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The reference 15 *Halsbury's Laws* (4th edn reissue) para 355 refers to paragraph 355 on page 283 of reissue volume 15 of the fourth edition of *Halsbury's Laws of England*.

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Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd .. .. .. **HL** **743**

MEDICAL TREATMENT – Withdrawal of treatment – Whether withdrawal of artificial nutrition and hydration from patients in permanent vegetative state infringing right to life – Whether withdrawal or continuance of such nutrition constituting inhuman or degrading treatment

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MENTAL HEALTH – Patient – Whether local authorities having duty or right to charge discharged patients for accommodation provided as after-care services

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PARTNERSHIP – Persons working together to commence business – Whether parties to joint venture not becoming partners until actual trading commenced

Khan v Miah .. .. **HL** **20**

PATENT – Judge upholding claim for patent infringement but granting injunction only restraining defendants from infringing in manner proved at trial – Whether judge should have granted injunction restraining defendants from infringing patent in suit

Coflexip SA v Stolt Comex Seaway MS Ltd (Note) .. .. **CA** **952**

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SALE OF GOODS – Delivery – Constructive delivery – Sale and leaseback transaction – Whether making of agreement for sale and entering into the lease constituting 'delivery'

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SENTENCE – Restraint order for purpose of aiding enforcement of external confiscation order – Whether relevant legislation applying retrospectively to United States confiscation orders – Whether confiscation order to which interest subsequently added an external confiscation order

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——Young offenders sentenced to be detained during Her Majesty's pleasure – Recommendations as to tariff

Thompson (tariff recommendations), Re .. .. **Lord Woolf CJ** **737**

SHIPPING – Employment clause – Whether instructions as to route orders as to employment or navigation of vessel

Whistler International Ltd v Kawasaki Kisen Kaisha Ltd .. .. .. **HL** **403**

STATUTE – Hansard – Whether reference to Hansard permissible in determining scope of statutory power

R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd .. .. **HL** **195**

UNFAIR DISMISSAL – Dismissal for misconduct – Correct approach to determining fairness of dismissal

Post Office v Foley, HSBC Bank plc (formerly Midland Bank plc) v Madden .. .. **CA** **550**

WARD OF COURT – Freedom of publication – Whether media requiring court's leave before interviewing or broadcasting interview with child known to be a ward

Kelly v BBC .. .. **Munby J** **323**

House of Lords petitions

This list, which covers the period 23 November 2000 to 14 March 2001, sets out all cases which have formed the subject of a report in the All England Law Reports in which an Appeal Committee of the House of Lords has, subsequent to the publication of that report, refused leave to appeal. Where the result of a petition for leave to appeal was known prior to the publication of the relevant report a note of that result appears at the end of the report.

Pemberton v Southwark London Borough Council [2000] 3 All ER 924. Leave to appeal refused 7 February 2001 (Lord Steyn, Lord Hoffmann and Lord Millett).

Re Proulx [2001] 1 All ER 57. Leave to appeal refused 14 March 2001 (Lord Slynn, Lord Hope, Lord Scott).

White v White

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD COOKE OF THORNDON, LORD HOPE OF CRAIGHEAD AND LORD HUTTON

3–5 JULY, 26 OCTOBER 2000

Divorce – Financial provision – Lump sum order – Factors to be regarded – Wife seeking financial relief in divorce proceedings – Assets of parties exceeding their financial needs – Principles governing exercise of court's discretion in such cases – Matrimonial Causes Act 1973, s 25.

The parties were married in 1961. Throughout the course of their marriage, which broke down in 1994, they carried on a farming business in partnership, with the wife playing an active part in the farming business as well as having the primary role in bringing up their children. By 1996, when the wife's application for financial relief in the divorce proceedings came before the judge, the children were independent and the parties' assets totalled approximately £4·6m, a sum that substantially exceeded the amounts required for their financial needs in terms of a home and income for each of them. In exercising his discretionary statutory powers in the proceedings for financial relief, the judge was required by s 25[a] of the Matrimonial Causes Act 1973 to have regard to all the circumstances, but in particular to the matters set out in s 25(2), including the income, earning capacity and financial resources of the parties (para (a)); their financial needs, obligations and responsibilities (para (b)); and their contributions to their family's welfare (para (f)). The judge concluded that husband and wife had both fully contributed to their marital and business partnership, but that the sum of £980,000 would meet the wife's 'reasonable requirements' (a term not found in s 25 of the 1973 Act but which had been widely used by the courts for several years). Taking account of the assets held solely by the wife, the judge held that those requirements would be satisfied by the husband making a payment of £800,000. Accordingly, the effect of the judge's order was that the wife received slightly over 20% of the assets. On the wife's appeal, the Court of Appeal increased the amount of the payment to £1·5m. After deducting costs, that decision had the effect of increasing the wife's share to about 40%. The husband appealed to the House of Lords, contending that the Court of Appeal had wrongly departed from the 'reasonable requirements' approach applied by the judge. The wife cross-appealed, seeking an order giving her an equal share in the assets and contending, inter alia, that the principle of equality should be the 'starting point' in every case concerning the division of assets between husband and wife. Their Lordships were therefore required to consider the principles that trial judges should apply when hearing applications for financial relief in such cases.

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a Section 25(2) is set out at p 7 *j* to p 8 *c*, post

Held – (1) The purpose of the powers conferred on the court in proceedings for ancillary financial relief was to enable it to make fair financial arrangements on or after divorce in the absence of agreement between the former spouses. In seeking to achieve a fair outcome, there was no place for discrimination between husband and wife. Thus, whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness required that that should not prejudice or advantage either party when considering s 25(2)(f) of the 1973 Act. If, in their different spheres, each contributed equally to the family, then in principle it did not matter which of them earned the money and built up the assets. It followed that before making an order providing for an unequal division of the assets, a judge would be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there was good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination. That conclusion did not introduce a presumption of equal division, and indeed such a presumption would go beyond the permissible bounds of interpretation of s 25. Nor was there a principle that in every case equality would be the 'starting point' in relation to a division of assets. A 'starting point' principle of general application would carry a risk that, in practice, it would be treated as a presumption, with formal consequences regarding the burden of proof. In contrast, it should be possible to use equality as a form of check for the valuable purpose described above without that being treated as a legal presumption of equal division (see p 8 *g* to p 10 *c*, p 16 *b c*, p 18 *e* and p 19 *a* to *c*, post).

(2) A claimant's financial needs, even when interpreted generously and called 'reasonable requirements', were not to be treated as determinative. There was no support in the statutory provisions for a conclusion to the contrary. Nor was there anything in the statutory provisions, or the underlying objective of securing fair financial arrangements, which led to the supposition that the available assets of the respondent husband became immaterial once the claimant wife's financial needs were satisfied. Although on the facts of a particular case there might be a good reason why the wife should be confined to her needs and the husband left with the much larger balance, the mere absence of financial need could not, by itself, be a sufficient reason. If it were, discrimination would be creeping in by the back door, bearing in mind that the claimant was usually the wife. Hence the importance of the check against the yardstick of equal division. There was much to be said for returning to the words of the statute, and confusion might be avoided if courts stopped using the expression 'reasonable requirements' in such cases. That would not deprive the court of the necessary degree of flexibility. In assessing financial needs, the court would have regard to a person's age, health and accustomed standard of living. It might also have regard to the available pool of resources. There was clearly some overlap between the factors listed in s 25(2), and in a particular case there might be other matters to take into account as well. However, the end product of that assessment of financial needs should be seen, and treated by the court, for what it was: only one of the several factors to which the court was to have particular regard. Thus in deciding what would be a fair outcome, the court was also required to have regard to other factors such as the available resources and the parties' contributions (see p 11 *h* to p 12 *f*, p 16 *b c* and p 19 *a* to *c*, post); dictum of Thorpe LJ in *Dart v Dart* [1997] 1 FCR 21 at 32 criticised.

(3) In the instant case, the judge had misdirected himself by treating the parties' reasonable requirements as the determinative factor. Accordingly, the Court of Appeal had been entitled to exercise afresh the statutory discretionary

powers. The amount of that court's award was well within the ambit of the discretion which it was exercising afresh, and there were no grounds entitling the House to interfere with that discretion. Accordingly, both appeals would be dismissed (see p 14 *b* to *f*, p 16 *a* to *c* and p 19 *a* to *c*, post).

Decision of the Court of Appeal ([1998] 4 All ER 659) affirmed.

Notes

For matters to which the court must have regard in exercising its powers to make orders for financial provision and property adjustment, see 13 *Halsbury's Laws* (4th edn) para 1060.

For the Matrimonial Causes Act 1973, s 25, see 27 *Halsbury's Statutes* (4th edn) (2000 reissue) 972.

Cases referred to in opinions

Conran v Conran [1998] 1 FCR 144.
Dart v Dart [1997] 1 FCR 21, CA.
Duxbury v Duxbury (1985) [1990] 2 All ER 77, [1992] Fam 62, [1991] 3 WLR 639, CA.
Haldane v Haldane [1977] AC 673, [1976] 3 WLR 760, PC.
Mallet v Mallet (1984) 156 CLR 605, Aust HC.
Norbis v Norbis (1986) 161 CLR 513, Aust HC.
O'Donnell v O'Donnell [1975] 2 All ER 993, sub nom *O'D v O'D* [1976] Fam 83, [1975] 3 WLR 308, CA.
Page v Page [1981] 2 FLR 198, CA.
Piglowska v Piglowski [1999] 3 All ER 632, [1999] 1 WLR 1360, HL.
Porter v Porter [1969] 3 All ER 640, [1969] 1 WLR 1155, CA
Preston v Preston [1982] 1 All ER 41, [1982] Fam 17, [1981] 3 WLR 619, CA.

Appeal and cross-appeal

Martin Edward John White appealed with leave of the Appeal Committee of the House of Lords given on 18 February 1999 from the order of the Court of Appeal (Butler-Sloss, Thorpe and Mantell LJJ) on 19 June 1998 ([1998] 4 All ER 659, [1999] Fam 304) whereby it (i) allowed an appeal by his former wife, Pamela Rosemary White, from the decision of Holman J on 10 December 1996 ordering Mr White to pay her a lump sum of £800,000 as financial relief in their divorce proceedings, and (ii) ordered him instead to pay her a lump sum of £1.5m. Mrs White cross-appealed with leave of the Appeal Committee given on 18 February 1999, seeking an order increasing the size of the lump sum. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

Nicholas Mostyn QC and *Lewis Marks* (instructed by *Clarke Wilmott & Clarke*, Taunton) for Mr White.

James Turner QC and *Philip Marshall* (instructed by *Payne Hicks Beach*) for Mrs White.

Their Lordships took time for consideration.

26 October 2000. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD. My Lords, divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided and whether one of them should continue to support the other. Stated in the most general terms, the answer is obvious. Everyone would accept that the outcome on these matters, whether by agreement or court order, should be fair. More realistically, the outcome ought to be as fair

as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder.

So what is the best method of seeking to achieve a generally accepted standard of fairness? Different countries have adopted different solutions. Each solution has its own advantages and disadvantages. One approach is for the legislature to prescribe in detail how property shall be divided, with scope for the exercise of judicial discretion added on. A system along these lines has been preferred by the New Zealand legislature, in the Matrimonial Property Act 1976. Another approach is for the legislature to leave it all to the judges. The courts are given a wide discretion, largely unrestricted by statutory provisions. That is the route followed in this country. The Matrimonial Causes Act 1973 confers wide discretionary powers on the courts over all the property of the husband and the wife. This appeal raises questions about how the courts should exercise these powers in so-called 'big money' cases, where the assets available exceed the parties' financial needs for housing and income.

The powers conferred by the 1973 Act have been in operation now for 30 years. This is the first occasion when broad questions about the application of these powers have been considered by this House. The House considered the statutory provisions recently, in *Piglowska v Piglowski* [1999] 3 All ER 632, [1999] 1 WLR 1360. But there the main issue concerned how appellate courts should approach appeals from trial judges' decisions, rather than the principles trial judges should apply when hearing applications for financial relief in this type of case. It goes without saying that these principles should be identified and spelled out as clearly as possible. This is important, so as to promote consistency in court decisions and in order to assist parties and their advisers and mediators in resolving disputes by agreement as quickly and inexpensively as possible. The present case is an unhappy, if extreme, example of how the parties' resources can be eroded significantly by legal and other costs.

Mr and Mrs White

Martin and Pamela White were married in September 1961. She was 26 years old, he was almost 24. They had three children. Tragically, their eldest child, Katherine, was killed in the Kathmandu air crash in 1992. Philip is now 30, and Hilary is 29. The marriage broke down in 1994. A divorce decree nisi was granted in December 1995, and this was made absolute in May 1997. Mr and Mrs White both filed applications for ancillary financial relief. The appeals before your Lordships' House are appeals in the ancillary relief proceedings.

Throughout their marriage Mr and Mrs White carried on a dairy farming business in partnership. Farming was in their blood. They both came from farming families. The business was successful. At the outset each of them contributed, in cash or in kind, a more or less equal amount of capital, of about £2,000. A year after their marriage they bought a farm of their own, set in beautiful countryside in Somerset. Blagroves Farm comprised 160 acres of land. Blagroves Farm itself, in which they made their home together, was a fine Jacobean house. The price was £32,000. Of this, £21,000 was borrowed on mortgage. Mr White's father made them an interest-free loan of £11,000, together with a further £3,000 used as working capital. Over time, they bought further land, substantially increasing the size of the farm. Eventually the farm comprised 337 acres. Throughout, Blagroves Farm and all the land were held by the two of them jointly. The whole

was treated as property of the farming partnership. In 1974 Mr White's father released his loan. Initially this was reflected in an increase in Mr White's partnership capital account. Ten years later Mr and Mrs White's capital accounts were merged into a single joint capital account.

Blagroves Farm, with its live and dead stock and machinery, together with milk quota, were Mr and Mrs White's principal assets. At the end of 1996, when the applications came before Holman J, these items were worth, in round figures, £3·5m.

Mr and Mrs White also farmed Rexton Farm as part of their partnership business. This farm also comprised over 300 acres. Rexton Farm was ten miles from Blagroves Farm, but the two were run as a single unit. Rexton was part of the Willett estate. Mr White's father bought this estate in 1971 at an advantageous price, mainly with the assistance of borrowings. Later he transferred the estate into the joint names of himself and his three sons. The four of them held the estate in equal shares. Mr White's share of the cost of borrowing, in the form of interest and endowment premiums, was met, through a tenancy agreement, by the Whites' farming partnership. In 1993 Mr White acquired Rexton Farm, subject to a mortgage debt of £137,000, as his partitioned share of the Willett estate. Rexton Farm, as distinct from the farming business carried on at the farm, was held in Mr White's sole name. Unlike Blagroves Farm, it was not in joint names, nor was it treated as belonging to the Whites' partnership. Rexton Farm was worth £1·25m.

Mr and Mrs White had also made pension provision for themselves. A substantial mortgage was outstanding on both farms. After deduction of estimated liabilities for capital gains tax and costs of sale, the overall net worth of Mr and Mrs White's assets was, in round figures, £4·6m. This comprised, on the figures found and used by the judge: Mrs White's sole property: £193,300 (mostly pension provision); her share of property owned jointly, either directly or through the partnership: £1,334,000; Mr White's share of jointly-owned property: £1,334,000; and Mr White's sole property: £1,783,500 (mostly Rexton Farm).

The proceedings

The applications proceeded at all stages on a 'clean break' basis. Holman J decided that Mrs White reasonably required £980,000. This was to be satisfied by payment of £800,000 and by her keeping her sole assets. On being paid this amount, Mrs White was to transfer all the jointly owned assets to Mr White. Thus, under this order, Mrs White was to receive slightly over one-fifth of their total assets.

Holman J's reasoning can be summarised as follows. Neither party had any earning capacity outside farming. Mrs White's wish to have enough money to enable her to buy a farm of her own was not a reasonable requirement. It was unwise and unjustifiable to break up the existing, established farming enterprise so that she could embark, much more speculatively, on another. Her housing and financial needs were a farmhouse type of home, with stabling and 25 acres of land for her horses, costing £425,000. She needed a net annual spendable income of £40,000. Capitalised, having due regard to her age, a net income of this amount called for a '*Duxbury*' fund of £550,000. The *Duxbury* label is derived from the decision of the Court of Appeal, *Duxbury v Duxbury* (1985) [1990] 2 All ER 77, [1992] Fam 62, where this type of fund was first described. This provision for Mrs White would leave Mr White with an amount exceeding his reasonable requirements simply in terms of a home and income. But, additionally, he

reasonably required to be able to continue farming in a worthwhile way. The financial contributions from his family made this reasonable.

Mrs White appealed to the Court of Appeal. Her appeal was successful. The Court of Appeal ([1998] 4 All ER 659, [1999] Fam 304, Butler-Sloss, Thorpe and Mantell LJJ) increased the amount of her payment from £800,000 to £1·5m. On the judge's figures, and after deducting £310,000, representing the parties' costs in both courts, this meant that Mrs White's share of the total assets would be increased to about two-fifths. Thorpe LJ regarded the farming partnership as the dominant feature in the case. Mrs White was entitled to use her share as she thought fit. Only in so far as she sought additional capital from Mr White was the judge entitled to evaluate critically the use to which such additional capital was proposed to be put. There was no fairness in an outcome which involved a transfer of property order in favour of Mr White. The court did not have the material to assess how much Mrs White would have been entitled to receive on dissolution of the partnership. But, having regard to the parties' contributions and the goal of overall fairness, the provision for Mrs White should be increased by a further £700,000. Mantell LJ agreed. Butler-Sloss LJ considered that Mrs White was entitled to more than her partnership share, to recognise the contribution she made to the family as wife and mother over and above her partnership role in the farming business. Mr White would still be able to continue to farm, even if on a reduced scale.

Mr White appealed to your Lordships' House, seeking the restoration of Holman J's order. Mrs White cross-appealed. She seeks an order giving her an equal share in all the assets.

Features of the case

I have already noted that this was a clean break case, where the children were grown up and independent. The available assets substantially exceeded the amounts required by Mr and Mrs White for their financial needs, in terms of a home and income for each of them. The general observations I make later should be read with this in mind.

Two other features should be noted. First, and importantly, is the equality of contribution made by Mr and Mrs White over their 33 years of married life. The judge found that each party contributed a great deal of effort to the marriage and the welfare of the family. Within the home it was the wife who primarily brought up the children, and she also worked hard in all sorts of ways on the farm. Mr White was a hard-working and active farmer. Holman J said:

> 'In truth this was a marital and also a business partnership in which, by their efforts and commitment, each contributed to the full for 33 years, and any attempt to weigh the respective contributions of their effort is idle and unreal.'

Thus, and this is itself a notable aspect of the equality of contribution, in this case the business partnership was a reality.

A second feature, although of less importance, is that the assets of Mr and Mrs White did not derive wholly from their own efforts. Without the initial loan of £14,000 from Mr White's father, the young couple would not have been able to acquire their own farm when they did. The advantageous terms on which Mr White acquired Rexton Farm stemmed from his father's purchase of the Willett estate.

Against this background I turn to the statutory provisions.

The statutory provisions

The court's powers to make financial provision on divorce derive from statute. In 1970 the statutory provisions were outdated and inadequate. They were primarily concerned with income for the maintenance of spouses and children. The property adjustment provisions were limited. They were first enacted in the middle of the nineteenth century, and so they reflected the values of male-dominated Victorian society. Essentially, the property adjustment provisions comprised power to order property to be settled on the other spouse and the children, and power to vary ante-nuptial and post-nuptial settlements. The power to order a settlement dated back to the Matrimonial Causes Act 1857, the statute which supplanted the jurisdiction of the old ecclesiastical courts and set up the new court for divorce and matrimonial causes. The power was exercisable against a wife whose adultery, cruelty or desertion had founded the divorce. It was seldom used. There was no power to make a corresponding order against a husband. This power was augmented in 1963 by power to order payment of a lump sum by either spouse. This power also was not much used.

The power to vary settlements originated in the Matrimonial Causes Act 1859. The courts did their best to stretch this power to accommodate modern needs, but there is a limit to judicial creativity. The courts did not confine 'settlement' to formal trust deeds. The expression was taken to include any property acquired by the husband and wife except property acquired by one of them alone under an out-and-out disposition. This produced the striking anomaly that if the matrimonial home was bought in joint names there was a settlement which could be varied, but not if the house was owned by one of them alone.

These and other problems were considered in a report of the Law Commission prepared in 1969 under the chairmanship of Scarman J (see *Family Law: Report on Financial Provision in Matrimonial Proceedings* (Law Com No 25) (1967)). An overall rationalisation of the court's powers was needed urgently.

The Matrimonial Proceedings and Property Act 1970 made a fresh start. The powers of the court were greatly extended. The relevant provisions in the 1970 Act were re-enacted in substantially similar terms in Pt II of the 1973 Act. Sections 23 and 24 of the 1973 Act empower the court, on granting a decree of divorce and in certain other circumstances, to make financial provision orders and property adjustment orders. Financial provision orders, under s 23, include orders that one party to the marriage shall make payments to the other party. The payments may be periodical, either secured or unsecured, or lump sums. Property adjustment orders, under s 24, include orders that one party to the marriage shall transfer property to the other party. Section 24A of the 1973 Act empowers the court to make ancillary orders for the sale of property.

Section 25 of the 1973 Act, as substituted by s 3 of the Matrimonial and Family Proceedings Act 1984, sets out the familiar list of matters to which the court is to have regard in deciding how to exercise these powers. Section 25(1) of the 1973 Act provides that it is the duty of the court in deciding whether, and how, to exercise these powers to have regard to all the circumstances of the case. First consideration is to be given to the welfare of any child of the family under the age of 18. Section 25(2) provides that, as regards the exercise of these powers in relation to a party to the marriage, the court shall in particular have regard to—

> '(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in

that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) ... the value to each of the parties to the marriage of any benefit ... which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.'

Section 25A of the 1973 Act requires the court to consider the appropriateness of a 'clean break'. Sections 25B–D of that Act, inserted by the Pensions Act 1995, make provision regarding benefits under pension schemes. They are not material in the present case.

As originally enacted in 1970, in s 5(1) of the 1970 Act, the list of factors to be taken into account contained a tailpiece. The tailpiece declared what should be the objective of the court when exercising the statutory powers to make financial provision orders and property adjustment orders. The court was so to exercise these powers:

'... as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.'

This tailpiece was later deleted from the legislation, and nothing inserted in its place. In consequence, the legislation does not state explicitly what is to be the aim of the courts when exercising these wide powers. Implicitly, the objective must be to achieve a fair outcome. The purpose of these powers is to enable the court to make fair financial arrangements on or after divorce in the absence of agreement between the former spouses (see Thorpe LJ in *Dart v Dart* [1997] 1 FCR 21 at 29). The powers must always be exercised with this objective in view, giving first consideration to the welfare of the children.

Equality

Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely. As Butler-Sloss LJ (at 39) said in *Dart*'s case, the statutory jurisdiction provides for all applications for ancillary financial relief, from the poverty-stricken to the multi-millionaire. But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their

home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering para (f) of s 25(2) of the 1973 Act, relating to the parties' contributions. This is implicit in the very language of para (f): '... the contribution which *each* of the parties has made or is likely ... to make to the *welfare of the family*, including any contribution by looking after the home or caring for the family.' (My emphasis.) If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the homemaker and the child-carer. There are cases, of which the Court of Appeal decision in *Page v Page* [1981] 2 FLR 198 is perhaps an instance, where the court may have lost sight of this principle.

A practical consideration follows from this. Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.

This is not to introduce a presumption of equal division under another guise. Generally accepted standards of fairness in a field such as this change and develop, sometimes quite radically, over comparatively short periods of time. The discretionary powers, conferred by Parliament 30 years ago, enable the courts to recognise and respond to developments of this sort. These wide powers enable the courts to make financial provision orders in tune with current perceptions of fairness. Today there is greater awareness of the value of non-financial contributions to the welfare of the family. There is greater awareness of the extent to which one spouse's business success, achieved by much sustained hard work over many years, may have been made possible or enhanced by the family contribution of the other spouse, a contribution which also required much sustained hard work over many years. There is increased recognition that, by being at home and having and looking after young children, a wife may lose for ever the opportunity to acquire and develop her own money-earning qualifications and skills. In *Porter v Porter* [1969] 3 All ER 640 at 643–644, [1969] 1 WLR 1155 at 1159, Sachs LJ observed that discretionary powers enable the court to take into account 'the human outlook of the period in which they make their decisions'. In the exercise of these discretions 'the law is a living thing moving with the times and not a creature of dead or moribund ways of thought'.

Despite these changes, a presumption of equal division would go beyond the permissible bounds of interpretation of s 25 of the 1973 Act. In this regard s 25 differs from the applicable law in Scotland. Section 10 of the Family Law (Scotland) Act 1985 provides that the net value of matrimonial property shall be

taken to be shared fairly between the parties to the marriage when it is shared equally or in such other proportions as are justified by special circumstances. Unlike s 10 of the 1985 Act, s 25 of the 1973 Act makes no mention of an equal sharing of the parties' assets, even their marriage-related assets. A presumption of equal division would be an impermissible judicial gloss on the statutory provision. That would be so even though the presumption would be rebuttable. Whether there should be such a presumption in England and Wales, and in respect of what assets, is a matter for Parliament.

It is largely for this reason that I do not accept Mr Turner QC's invitation to enunciate a principle that in every case the 'starting point' in relation to a division of the assets of the husband and wife should be equality. He sought to draw a distinction between a presumption and a starting point. But a starting point principle of general application would carry a risk that in practice it would be treated as a legal presumption, with formal consequences regarding the burden of proof. In contrast, it should be possible to use equality as a form of check for the valuable purpose already described without this being treated as a legal presumption of equal division.

Financial resources and financial needs

I turn next to a point where the current state of the law is not altogether satisfactory. That this is so emerges clearly from the decision of the Court of Appeal in *Dart's* case. The point concerns the relationship of para (a) and para (b) of s 25(2) of the 1973 Act in big money cases. Paragraph (a) concerns the available financial resources of each of the parties. Paragraph (b) is concerned with the 'financial needs, obligations and responsibilities' of each of the parties. In practice, para (b) seems to have become largely subsumed into a wider, judicially developed concept of 'reasonable requirements'. This wider concept appears, in turn, to have displaced consideration of the parties' available resources as a factor in its own right.

This development had its origins in a decision of the Court of Appeal in *O'Donnell v O'Donnell* [1975] 2 All ER 993, sub nom *O'D v O'D* [1976] Fam 83 where the alluring phrase 'reasonable requirements' was coined. In that case Ormrod LJ considered the wife's position, 'not from the narrow point of "need", but to ascertain her reasonable requirements'. A similar approach was adopted a few years later, in *Page v Page* [1981] 2 FLR 198 at 201. This was a case where there was enough capital to provide adequately for both husband and wife. Not surprisingly, the court held that when considering the needs and obligations of the parties a broad view could be taken. Ormrod LJ, whose judgments are a valuable source of much of the jurisprudence in this area of the law, said: 'In a case such as this "needs" can be regarded as equivalent to "reasonable requirements", taking into account the other factors such as age, health, length of marriage and standard of living.'

The third case in this trilogy of cases where resources exceeded financial needs is *Preston v Preston* [1982] 1 All ER 41, [1982] Fam 17. Ormrod LJ set out a list of general propositions. His second proposition was as follows:

> '... the word "needs" in para (*b*) of s 25(1) in relation to the other provisions in the section is equivalent to "reasonable requirements", having regard to the other factors and the objective set by the concluding words of the section ...' (See [1982] 1 All ER 41 at 47, [1982] Fam 17 at 25.)

Rightly or wrongly, these passages have been understood as saying that reasonable requirements is a more extensive concept than financial needs. This seems then to have led to a practice whereby the court's appraisal of a claimant wife's reasonable requirements has been treated as a determinative, and limiting, factor on the amount of the award which should be made in her favour.

The soundness of this approach was considered by the Court of Appeal in *Dart v Dart* [1997] 1 FCR 21. Thorpe LJ, who has much experience in this field, gave the leading judgment. He (at 32) sought to reconcile the existing practice with the statutory provisions. Reasonable requirements are more extensive than needs. What a person requires is likely to be greater than what that person needs. The objective appraisal of what the applicant requires must have regard to the other criteria of the section, including what is available, the parties' accustomed standard of living, their age and state of health and 'perhaps less obviously' the duration of the marriage, contributions and pension rights. Thorpe LJ said:

> 'Used thus, the consideration of needs ceases to be paramount or determinative but an elastic consideration that does not exclude the influence of any of the others ... in a big money case where the wife has played an equal part in creating the family fortune it would not be unreasonable for her to *require* what might be even an equal share.' (My emphasis.)

This conclusion, I have to say, seems to me worlds away from any ordinary meaning of financial needs. Moreover, this conclusion gives an artificially strained meaning to reasonable requirements, the more especially as this phrase was adopted originally as a synonym for financial needs.

The other two members of the Court of Appeal were more doubtful. Peter Gibson LJ (at 37) questioned the correctness of an approach which determines the quantum of an award by reference only to the reasonable requirements of the applicant. Butler-Sloss LJ (at 40), with her immense experience of family work, shared Peter Gibson LJ's doubts. She wondered whether the courts may not have imposed too restrictive an interpretation upon the words of s 25 of the 1973 Act and given too great weight to reasonable requirements over other criteria set out in the section. She considered that if spouses are in business together, the traditional 'reasonable requirements' approach to a wife's application for ancillary relief is not the most appropriate method to arrive at the post-divorce adjustment of family finances.

Subsequently this question arose again, in *Conran v Conran* [1998] 1 FCR 144. Wilson J was of the view that, notwithstanding the observations of Thorpe LJ in *Dart*'s case, one could not sensibly fit an allowance for contribution into an analysis of a wife's needs. That would do violence to language and to s 25(2) of the 1973 Act, where contribution and needs are set out as different matters to which the court is required to have regard (at 153–154).

Thus, as matters stand, there is a degree of confusion. I venture to think this has arisen because the courts have departed from the statutory provisions. The statutory provisions lend no support to the idea that a claimant's financial needs, even interpreted generously and called reasonable requirements, are to be regarded as determinative. Another factor to which the court is bidden to have particular regard is the available resources of each party. As my noble and learned friend Lord Hoffmann observed in *Piglowska v Piglowski* [1999] 3 All ER 632 at 642, [1999] 1 WLR 1360 at 1370, s 25(2) of the 1973 Act does not rank the matters listed in that subsection in any kind of hierarchy. The weight, or importance, to be attached to these matters depends upon the facts of the particular case. But

I can see nothing, either in the statutory provisions or in the underlying objective of securing fair financial arrangements, to lead me to suppose that the available assets of the respondent become immaterial once the claimant wife's financial needs are satisfied. Why ever should they? If a husband and wife by their joint efforts over many years, his directly in his business and hers indirectly at home, have built up a valuable business from scratch, why should the claimant wife be confined to the court's assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently, in such a case, where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband? On the facts of a particular case there may be a good reason why the wife should be confined to her needs and the husband left with the much larger balance. But the mere absence of financial need cannot, by itself, be a sufficient reason. If it were, discrimination would be creeping in by the back door. In these cases, it should be remembered, the claimant is usually the wife. Hence the importance of the check against the yardstick of equal division.

There is much to be said for returning to the language of the statute. Confusion might be avoided if courts were to stop using the expression 'reasonable requirements' in these cases, burdened as it is now with the difficulties mentioned above. This would not deprive the court of the necessary degree of flexibility. Financial needs are relative. Standards of living vary. In assessing financial needs, a court will have regard to a person's age, health and accustomed standard of living. The court may also have regard to the available pool of resources. Clearly, and this is well recognised, there is some overlap between the factors listed in s 25(2) of the 1973 Act. In a particular case there may be other matters to be taken into account as well. But the end product of this assessment of financial needs should be seen, and treated by the court, for what it is: only one of the several factors to which the court is to have particular regard. This is so, whether the end product is labelled financial needs or reasonable requirements. In deciding what would be a fair outcome the court must also have regard to other factors such as the available resources and the parties' contributions. In following this approach the court will be doing no more than giving effect to the statutory scheme.

The Duxbury paradox

This approach also furnishes a solution to the so-called *Duxbury* paradox in this type of case. In the present case Holman J referred to 'the well-known paradox that the longer the marriage and hence the older the wife, the less the capital sum required for a *Duxbury*-type fund'. A *Duxbury* calculation is, no doubt, useful as a guide in assessing the amount of money required to provide for a person's financial needs. It is a means of capitalising an income requirement. But that is all. As I have been at pains to emphasise, financial needs are only one of the factors to be taken into account in arriving at the amount of an award. The amount of capital required to provide for an older wife's financial needs may well be less than the amount required to provide for a younger wife's financial needs. It by no means follows that, in a case where resources exceed the parties' financial needs, the older wife's award will be less than the younger wife's. Indeed, the older wife's award may be substantially larger.

The next generation

I must mention a further matter on which, through her counsel, Mrs White advanced submissions. It arises out of observations made in *Page v Page* [1981]

2 FLR 198. Ormrod LJ expressed (at 201) the view that when assessing the amount of a lump sum provision under s 25 of the 1973 Act it is not legitimate to take into account the wife's wish to be in a position to make provision by will for her adult children. Dunn LJ (at 203) made a similar statement. Ormrod LJ repeated this in his third general proposition in *Preston v Preston* [1982] 1 All ER 41 at 47, [1982] Fam 17 at 25. Brandon LJ ([1982] 1 All ER 41 at 56, [1982] Fam 17 at 36) was of the same view.

I agree with this proposition to a strictly limited extent. I agree that a parent's wish to be in a position to leave money to his or her children would not normally fall within para (b) of s 25(2) of the 1973 Act as a financial need, either of the husband or of the wife. But this does not mean that this natural parental wish is wholly irrelevant to the s 25 exercise in a case where resources exceed the parties' financial needs. In principle, a wife's wish to have money so that she can pass some on to her children at her discretion is every bit as weighty as a similar wish by a husband. A *Duxbury*-type fund is intended to provide money for living expenses but not more. The amount of the *Duxbury* fund is calculated on the basis that the capital as well as the income will be used. The calculation assumes that nothing will be left when the wife dies. This was put graphically by Peter Singer QC in a challenging paper presented to the Family Law Bar Association in May 1992. The *Duxbury* fund calculation involves using income and ultimately exhausting the capital at the theoretical point when the wife would down her last glass of champagne and expire as predicted by the life tables.

In my view, in a case where resources exceed needs, the correct approach is as follows. The judge has regard to all the facts of the case and to the overall requirements of fairness. When doing so, the judge is entitled to have in mind the wish of a claimant wife that her award should not be confined to living accommodation and a vanishing fund of capital earmarked for living expenses which would leave nothing for her to pass on. The judge will give to that factor whatever weight, be it much or little or none at all, he considers appropriate in the circumstances of the particular case.

Inherited money and property

I must also mention briefly another problem which has arisen in the present case. It concerns property acquired during the marriage by one spouse by gift or succession or as a beneficiary under a trust. For convenience I will refer to such property as inherited property. Typically, in countries where a detailed statutory code is in place, the legislation distinguishes between two classes of property: inherited property, and property owned before the marriage, on the one hand, and 'matrimonial property' on the other hand. A distinction along these lines exists, for example, in the 1985 Act and the New Zealand Matrimonial Property Act 1976.

This distinction is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.

Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property.

The decision of Holman J

I turn now to the decision of Holman J. In a careful and lucid judgment, he faithfully followed the approach of Thorpe LJ in *Dart*'s case. He assessed the parties' reasonable requirements and on that basis made his award. That was the determinative factor. For reasons already given, I consider that, through no fault on his part, he was mistaken in taking this course.

Indeed, the present case is a good illustration of the unsatisfactory results which can flow from the reasonable requirements approach. Even if Rexton Farm were excluded, Mr and Mrs White's financial resources exceeded their financial needs. But Mrs White's award was confined to her financial needs, while Mr White, whose financial needs were no greater, scooped the entirety of the rest of the pool of resources. Even if Rexton Farm were wholly left out of account, Mr White still received roughly two-thirds of their assets. The initial cash contribution made by Mr White's father in the early days cannot carry much weight 33 years later.

The decision of the Court of Appeal

In my view, therefore, the judge misdirected himself. Accordingly, the Court of Appeal ([1998] 4 All ER 659, [1999] Fam 304) was entitled to exercise afresh the statutory discretionary powers. Both parties criticised the manner in which the Court of Appeal did so. Mr White's primary complaint was that the Court of Appeal wrongly departed from the reasonable requirements approach prescribed in *Dart*'s case. For reasons already given, I do not accept this criticism.

His next criticism was that the members of the Court of Appeal placed undue emphasis on the financial worth of each party on the dissolution of the partnership. This was a wrong approach, as was the view that the court should not exercise its statutory powers unless there was a 'manifest case for intervention'. I agree that both Thorpe and Butler-Sloss LJJ did attach considerable importance to the wife's entitlement under the partnership. There are observations, particularly in the judgment of Thorpe LJ, which, read by themselves, might suggest that in this regard the clock was being turned back to the pre-1970 position. Then courts often had to attempt to unravel years of matrimonial finances and reach firm conclusions on who owned precisely what and in what shares. The need for this type of investigation was swept away in 1970 when the new legislation gave the court its panoply of wide discretionary powers. Since then, the courts have not countenanced parties incurring costs which would be disproportionate to the assistance the expenditure would give in carrying out the s 25 exercise.

All this is well established. So much so, that I cannot believe that either Thorpe or Butler-Sloss LJJ intended to gainsay this approach. Indeed, Butler-Sloss LJ stated expressly that what she had in mind, where parties were in business together, was a broad assessment of the financial position and not a detailed partnership account. She rightly noted that, even in such a case, the parties'

proprietorial interests should not be allowed to dominate the picture (see [1998] 4 All ER 659 at 672, [1999] Fam 304 at 320). If Thorpe LJ went further than this, he went too far.

The wisdom of this approach is confirmed by the substantial body of additional evidence produced for the first time in your Lordships' House. The new material included the Whites' partnership agreement. From this evidence it emerged that, if a strict valuation of the parties' shares on a dissolution of the partnership were needed, several disputes would have to be resolved: disputes about the assets and liabilities of the partnership, a dispute about the value of the milk quota, and a dispute over the proper interpretation of the somewhat obscure retirement provisions in the partnership agreement. I do not think any of these differences need be resolved. The House can, and should, proceed on the basis of the factual findings of Holman J.

A further contention advanced for Mr White was that there was no basis on which the court could increase Mrs White's award to an amount substantially in excess of her share of their joint assets. Here again, I am unable to agree. As one would expect, both Thorpe and Butler-Sloss LJJ had in mind all the available assets. They had in mind that the contribution made by Mr White's father was significant. Both of them referred to Mrs White's dual role as business partner and as wife and mother. They also had in mind the overall goal of fairness, a consideration specifically mentioned by Thorpe LJ. The amount of their award was well within the ambit of the discretion which the Court of Appeal was exercising afresh.

For the same reason, I cannot accept Mrs White's contrary contention that the assets should have been divided equally.

Mrs White advanced the further argument that if proprietorial interests were to be looked at, the court should have conducted a full and detailed investigation. I have already stated that such an investigation was not called for. Her next submission was that the Court of Appeal should not have adopted a selective revaluation of only one of the assets, the milk quota, and then without proper evidence. This criticism lacks substance. The Court of Appeal was understandably anxious to make any necessary major adjustments in the figures but without putting the parties to further expense. As matters have since turned out, the judge's figures have to be adjusted downwards, by a substantial amount, in any event. The parties' untaxed costs of their appeals to this House are estimated at the appalling sum of £530,000. This exceeds Thorpe LJ's estimate of the reduction in value of milk quota since the decision of Holman J. Whatever may be the rights and wrongs of the amount of the milk quota revaluation, the course taken by the Court of Appeal did not prejudice Mrs White.

Finally, Mrs White criticised the use of net values, arrived at after deducting estimates of the costs and capital gains tax likely to be incurred if the farms were sold. Mr White still owns and uses the farms. The farms have not been sold. Counsel submitted that the use of net values in this situation should be discontinued. I do not agree. As with so much else in this field, there can be no hard and fast rule, either way. When making a comparison it is important to compare like with like, so far as this may be possible in the particular case. In the present case a comparison based on net values is fairer than would be a comparison of Mrs White's cash award and the gross value of the farms. Under her award Mrs White will have money. She can invest or use it as she pleases. Mr White's equivalent, as a cash sum, is the net value of the farms. The farms have to be sold before he can have money to invest or use in other ways. What will be his

financial position if he is able to retain the farms or parts of them? Will he better off financially? Dairy farming is currently languishing in the doldrums. On the evidence there is no reason to suppose that the farms are likely to yield a better financial return at present than the investment return to be expected if Mr White sold up and invested the net proceeds.

My conclusion is that, applying the principles expounded in *Piglowska's* case, there is no ground entitling this House to interfere with the Court of Appeal's exercise of discretion. I would dismiss the appeals of both Mr and Mrs White.

LORD HOFFMANN. My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Nicholls of Birkenhead. I agree with it, and for the reasons which he has given I too would dismiss both appeals.

LORD COOKE OF THORNDON. My Lords, having had the advantage of reading in draft the speech of my noble and learned friend Lord Nicholls of Birkenhead, I am in full accord with its tenor and believe that it will do much to enable English matrimonial property law to meet the requirements of contemporary society. What little I have to add is mainly by way of emphasis and supplement.

Lord Nicholls mentions the detailed statutory regime prescribed in New Zealand by the Matrimonial Property Act 1976 as a contrast with the more broadly-textured discretionary jurisdiction conferred in England and Wales by ss 23, 24 and 25 of the Matrimonial Causes Act 1973 as amended. One of the reasons that I think led the New Zealand Parliament into so much detail was disappointment with the performance of the courts in exercising jurisdiction under previous more generally expressed legislation. In particular it was thought that too often the non-monetary contributions of a wife and mother were undervalued. If the spirit of my noble and learned friend's speech is followed by the English courts, there should not be solid ground for such criticism here. This may be shown by a comparison.

In outline the scheme of the New Zealand Matrimonial Property Act 1976 is that after a marriage of more than three years, the values of the matrimonial home (whenever acquired) and the family chattels are shared equally unless there are extraordinary circumstances rendering equality repugnant to justice. Other matrimonial property is shared equally unless one party's contribution to the marriage partnership has clearly been greater; the bringing into the matrimonial partnership of separate property acquired by one spouse by inheritance or gift may rank as a contribution. If the New Zealand regime had applied to the facts of the present case, I would expect an award to the wife of certainly no less than 40% of the total available property, which is approximately what the Court of Appeal have ordered.

While a fairly broad discretionary jurisdiction does have the merit of flexibility, it will not be satisfactory unless exercised with a reasonable degree of consistency. On this aspect attention was focussed in argument on *Mallet v Mallet* (1984) 156 CLR 605, since the Australian statutory regime is similar in pattern to the English one. But not long after that decision a somewhat differently constituted High Court of Australia took a somewhat different approach in *Norbis v Norbis* (1986) 161 CLR 513. The story is told by Dr Richard Ingleby of the Victorian Bar, 'The de-Bromleyfication of Australian Family Law', in a contribution to Caroline Bridge (ed) *Family Law Towards the Millennium: Essays for P M Bromley* (1997), ch 12, p 393. In reproducing an extensive passage, I omit the footnotes (pp 404–405).

'During the first 20 years of its existence, the Family Court of Australia has been engaged in a struggle between the Full Court and first instance trial judges. The appellate court has sought to establish techniques to control the exercise of discretion by first instance judges. The first of these techniques was the creation of presumptions or guidelines for the exercise of judicial discretion. The main battleground in the 1980s was s 79 of the Family Law Act 1975, which establishes a regime for the exercise of judicial discretion in relation to the division of property in the names of parties to a marriage equivalent to that in s 25 of the English Matrimonial Causes Act 1973. Initially the High Court of Australia (being the highest court in the land and the court to which appeals lie from the Full Court of the Family Court) set itself against the Full Court. In *Mallett* (*Mallet v Mallet* (1984) 156 CLR 605) Bell J at first instance awarded Mrs Mallett 50% of the equity in the former matrimonial home, and 20% of the value of Mr Mallett's business assets. On appeal by the wife the Full Court essentially held that Bell J had paid insufficient attention to the method by which the business assets had been accumulated, and substituted an order for all assets to be divided evenly. The High Court rejected the Full Court's approach because, according to the majority, it was based on "an erroneous understanding of the operation of s 79(4) of the [Family Law] Act expressed in the [Full C]ourt's proposition that 'equality ... is a convenient starting point where the matter at issue involves a long marriage' ((1984) 156 CLR 605 at 622–623). The High Court held that a presumption of equality as between the contributions of a homemaker and an income earner was an unacceptable fetter "on the discretionary power which Parliament has left largely unfettered". Deane J (as he then was) gave the sole dissenting judgment in the *Mallett* High Court, and the importance of the dissent was that it became the majority view when the High Court had the opportunity to reconsider the question two years later. First, Deane J (at 640) took care to point out that the Full Court had not sought to fetter the exercise of discretion by trial judges and had indeed confined the application of the standard to a particular category of marriage: "there is no 'principle' in family law that equality is equity ... where the court is given a discretion it cannot lay down principles for to do so would be to fetter its own discretion ... the cases which refer to equality do not lay it down as a principle but merely as a convenient starting point where the matter at issue involves a long marriage". Deane J saw the "standard" as, "the enunciation not of a legal principle or presumption but of a general counsel of experience on the subject of what constitutes, in some types of case, an appropriate starting point for the determination of the particular order which should be made in the particular circumstances of the individual case." Two years later, in *Norbis* (*Norbis v Norbis* (1986) 161 CLR 513), the question of guidelines arose again, this time in the context of whether the courts should assess contributions to property on a global or asset-by-asset basis. In *Norbis*, Deane J's repetition of his suggestion of a norm which provided a guide to first instance judges without the same binding nature of a precedent received support from Mason J (who had been in the majority in *Mallett*), and Brennan J (as he then was), who was not a member of the *Mallett* High Court. This meant that Wilson and Dawson JJ were now in the minority. The High Court was now supportive of the Full Court's attempts to uphold "consistency in judicial adjudication ... the antithesis of arbitrary and capricious decision-making ... an important countervailing consideration

supporting the giving of guidance by appellate courts." ((1986) 161 CLR 513 at 529) As Brennan J (at 538) put it, "The only compromise between idiosyncrasy in the exercise of discretion and an impermissible limitation of the scope of the discretion is to be found in the development of guidelines from which a judge may depart when it is just and equitable to do so—guidelines which are not rules of universal application, but which are generally productive of just and equitable orders." Since the High Court's decision in *Norbis*, an increasingly assertive Full Court has arguably increased the status of guidelines. This has been done, not by holding that it is an appellable error to depart from a guideline, but by holding that a trial judge has a duty to give adequate reasons for such a departure.'

I agree with the majority in *Norbis v Norbis* (1986) 161 CLR 513. In this and other fields it is part of the function of a court of final appeal to lay down from time to time, after considering the experience and opinions of more specialised courts, guidelines assisting judges, legal advisers and parties to resolve disputes. There may be and is in the 1973 Act no statutory presumption or prima facie rule, but there is no reason to suppose that in prescribing relevant considerations the legislature had any intention of excluding the development of general judicial practice. I doubt whether the labels 'yardstick' or 'check' will produce any result different from 'guidelines' or 'starting point'.

An incidental advantage of such an approach is that it may save costs. The magnitude of the costs reported in this case (evidently counsel's fees were not the major items) is a very bad advertisement for the legal system.

The most important point, in my opinion, in the speech of my noble and learned friend Lord Nicholls is his proposition that, as a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. I would gratefully adopt and underline it. Widespread opinion within the Commonwealth would appear to accept that this approach is almost inevitable, whether the regime be broad or detailed in its statutory provisions.

In the present case, bearing in mind that it was a marriage of more than 30 years, that there were three children and that the wife was an active partner in the farming business as well as meeting the responsibilities of wife and mother, the only plausible reason for departing from equality can be the financial help given by the husband's father. I agree, however, that the significance of this is diminished because over a long marriage the parties jointly made the most of that help and because it was apparently intended at least partly for the benefit of both. As Lord Simon of Glaisdale said, in delivering the judgment of the Privy Council in a case under the former New Zealand legislation:

'Initially a gift or bequest to one spouse only is likely to fall outside the Act, because the other spouse will have made no contribution to it. But as time goes on, and depending on the nature of the property in question, the other spouse may well have made a direct or indirect contribution to its retention.' (See *Haldane v Haldane* [1977] AC 673 at 697, [1976] 3 WLR 760 at 774.)

My only doubt is whether the help from the husband's father should be seen as justifying a difference of the order of 20% in the overall shares of the parties. I think that £1·5m was probably about the minimum that could have been awarded to Mrs White without exposing the award to further increase on further appeal. But I am prepared to accept that the figure was one open to the Court of

Appeal in the exercise of their discretion, and that your Lordships should not interfere with it. So I would join in dismissing both appeals.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Nicholls of Birkenhead. I agree with it, and for the reasons which he has given I too would dismiss both appeals.

LORD HUTTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Nicholls of Birkenhead. I am in full agreement with it and, in particular, I agree with his opinion that it is the duty of the court at first instance to arrive at a fair result by taking into account not only the financial needs of the wife under s 25(2)(b) of the Matrimonial Causes Act 1973 as amended, but also to take into account the financial resources of each of the parties under s 25(2)(a) of that Act and the contributions of each of the parties to the welfare of the family under s 25(2)(f) together with the other factors set out in the subsection. Accordingly, I would also dismiss both appeals.

Appeals dismissed.

Celia Fox Barrister.

Khan and another v Miah and others

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD HOFFMANN, LORD CLYDE AND LORD MILLETT

19 OCTOBER, 2 NOVEMBER 2000

Partnership – Existence of partnership disputed – Persons working together to commence business – Parties incurring liabilities and acquiring assets in connection with prospective restaurant business – Relationship between parties breaking down before opening of restaurant – Whether parties to joint venture not becoming partners until actual trading commenced.

In May 1993 the first and second respondents wished to open a restaurant, but lacked sufficient capital. They therefore approached the appellant, K, with a view to interesting him in the venture. It was agreed that they would be partners in the business, that K would provide most of the initial capital, that the first respondent would manage the business and that the second respondent would be the chef. The third respondent was later brought in to provide the business experience and financial standing required by a prospective landlord. By 1 December 1993 the parties had found suitable premises, obtained planning permission for its conversion to a restaurant, taken a lease on the premises and agreed to buy the freehold reversion, opened a partnership bank account in the names of K and the third respondent, arranged to borrow money from the bank towards the purchase of the freehold, entered into a contract with a firm of builders for the conversion and fitting out of the premises and contracted for the purchase of equipment and table linen. Nearly all the moneys in the partnership account were provided by K. Subsequently, K's relationship with the respondents broke down, and any partnership between them determined on 25 January 1994. By that time, the parties had acquired the freehold, bought and taken delivery of furniture, entered into a credit agreement for the purchase of carpets and a contract for the laundry of table linen, and advertised the restaurant in the local press. However, the restaurant did not open for business until 14 February 1994. The respondents thereafter carried on the business on their own account, without any settling of accounts with K. In subsequent proceedings, the judge concluded that there had been a partnership between the parties and that K was entitled to a 50% share in it. On the respondents' appeal, the Court of Appeal held, by a majority, that parties to a joint venture did not become partners until actual trading commenced, that it was therefore necessary to identify the business which it had been agreed would be conducted by the partnership and that the court then had to decide whether the partners were carrying on the business at the material time. The majority identified the business of the partnership as the carrying on of the restaurant business from the premises, and concluded that the parties were not carrying on that business before 25 January 1994. Accordingly, the respondents' appeal was allowed, and K appealed to the House of Lords.

Held – There was no rule of law that the parties to a joint venture did not become partners until actual trading commenced. Rather, the rule was that persons who

agreed to carry on a business activity as a joint venture did not become partners until they actually embarked on the activity in question. It was therefore necessary to identify the venture in order to decide whether the parties had actually embarked upon it, but it was not necessary to attach any particular name to it. In the instant case, the majority of the Court of Appeal had been guilty of such nominalism, and had taken an impossibly narrow view of the enterprise on which the parties had agreed to embark. They had not intended to become partners in an existing business, and had not agreed merely to take over and run a restaurant. Instead, they had agreed to find suitable premises, fit them out as a restaurant and run the restaurant once they had set it up. The acquisition, conversion and fitting out of the premises and the purchase of furniture and equipment had all been part of the joint venture, had been undertaken with a view of ultimate profit and had formed part of the business which the parties had agreed to carry on in partnership together. Thus the question was not whether the restaurant had commenced trading, but whether the parties had done enough to be found to have commenced the joint enterprise in which they had agreed to engage. They had done so, and accordingly the appeal would be allowed (see p 22 *a* to *c*, p 24 *b* to *e*, p 25 *c* to *e* and p 26 *b*, post).

Notes

For the essentials of partnership, see 35 *Halsbury's Laws* (4th edn reissue) para 2.

Cases referred to in opinions

Birmingham & District Cattle By-Products Co Ltd v IRC (1919) 12 TC 92.

Kirk and Randall Ltd v Dunn (Inspector of Taxes) (1924) 8 TC 663.

Slater v Commissioner of Inland Revenue [1996] 1 NZLR 759, NZ HC.

Appeal

The plaintiff appellant, Muhit Khan, appealed with leave of the Appeal Committee of the House of Lords given on 15 April 1999 from the decision of the Court of Appeal (Roch and Thorpe LJJ, Buxton LJ dissenting) on 3 December 1997 ([1998] 1 WLR 477) allowing an appeal by the defendant respondents, Lucky Miah, Abdul Ahad and Khasru Miah, from the order of Judge Rich QC at the Central London County Court on 25 July 1996 whereby he declared that there was a partnership between the appellant and the respondents to own a restaurant known as 'The Nawab', 18 Cheap Street, Newbury, Berkshire, that the appellant was entitled to a 50% share in the profits and capital thereof and that the partnership had terminated on 25 January 1994. Surab Khan, the first plaintiff in the proceedings before Judge Rich QC, took no part in the proceedings before the Court of Appeal and the House of Lords. The facts are set out in the opinion of Lord Millett.

Nicholas Yell (instructed by *Trevor Jenkin & Co*, Reading) for the appellant.

Edward Davidson QC and *Robert Arnold* (instructed by *Saf Awan*, Luton) for the first respondent.

The second and third respondents appeared in person.

Their Lordships took time for consideration. *a*

2 November 2000. The following opinions were delivered.

LORD BINGHAM OF CORNHILL. My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Millett. I am in full agreement with it, and would make the order which he proposes. *b*

LORD STEYN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Millett. For the reasons he gives I, too, would allow the appeal.

LORD HOFFMANN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Millett. For the reasons he gives I, too, would allow the appeal. *c*

LORD CLYDE. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Millett. For the reasons he gives I, too, would allow the appeal. *d*

LORD MILLETT. My Lords, the question in this appeal is whether the parties ever carried on business in partnership together. On the trial of a preliminary issue in the action the judge (Judge Rich QC) found that they did. By a majority (Roch and Thorpe LJJ, Buxton LJ dissenting) the Court of Appeal ([1998] 1 WLR 477) held that while the parties agreed to become partners in the business of an Indian restaurant they never actually did so. The question turns on whether they actually started to carry on the business prior to 26 January 1994. *e*

The facts are set out in the judgment of Roch LJ ([1998] 1 WLR 477 at 480–481). I need not repeat them at length. In May 1993 the first respondent was the head waiter and the second respondent was the chef at an Indian restaurant in Barton. They wanted to open a restaurant of their own in Newbury to be called 'The Nawab'. They were not in a position to put up any significant amount of money themselves, and accordingly they approached the appellant, who was known to have some capital, with a view to interesting him in the venture. It was agreed that they would be partners in the business, that the appellant would provide most of the initial capital, and that the first respondent would manage the restaurant, the second respondent would be the chef, and the appellant's brother Surab Khan, who was a chef at another Indian restaurant in Milton Keynes, would be the second chef. Surab Khan was not to be a partner but was to be an employee of the partnership. The third respondent, who was the proprietor of an Indian restaurant in Radlett, was brought in later in order to provide the business experience and financial standing which an intending landlord required. He was described by the parties as 'a sleeping partner'. The judge found that the appellant was to have a 50% share in the business with the other 50% being shared between the three respondents. *f g h j*

By 1 December 1993 the parties had found suitable premises (an unused gas showroom), obtained planning permission for its conversion to a restaurant, taken a lease of the premises and agreed to buy the freehold reversion, opened a partnership bank account in the names of the appellant and the third respondent, arranged to borrow up to £60,000 from the bank towards the purchase of the

freehold, commissioned a design, entered into a contract with a firm of builders for the conversion and fitting out of the premises as a restaurant, and contracted for the purchase of equipment and table linen. With the exception of some small sums paid in by his brother Surab Khan, all the moneys in the partnership bank account were provided by the appellant. The account was used solely to make payments to the builders or for other works and services obtained in preparation for the opening of the restaurant.

By this time the parties had already spent some £51,000 on the venture. It is common ground that the whole of this expenditure was incurred in the course of the venture and with the agreement and authority of all four parties. The judge found that they had held themselves out as partners, jointly entered into all these activities together, agreed upon the division of their tasks, and had—

> 'so far advanced towards the establishment of such [a] restaurant as, in my judgment, properly to be described as having entered upon the trade of running a restaurant, albeit that it was yet to open and in the event was not opened for a further two months or slightly more.'

It had been hoped to open the restaurant for business on 13 December 1993, but this proved optimistic. The appellant had difficulty in raising his share of the purchase price of the freehold, and there were difficulties with the builders who at one stage temporarily stopped work. These problems, together with the appellant's discovery that the freehold had been conveyed into the third respondent's sole name, led to a breakdown in the relationship. It is common ground that, if there was a partnership between the parties, it was a partnership at will and was determined on 25 January 1994. By this date the restaurant was still not open for trade, though further progress had been made. The parties had acquired the freehold, bought and taken delivery of furniture and equipment for the restaurant, entered into a credit agreement for the purchase of carpets and a contract for the laundry of table linen, and advertised the restaurant in the local press.

The restaurant opened for business on 14 February 1994. The respondents have since carried on the business on their own account and without any settling of accounts with the appellant. Hence the present proceedings. The judge granted a declaration that there was a partnership in the business of the restaurant between the parties and that the appellant was entitled to a 50% share therein. He ordered the necessary partnership accounts and inquiries to be taken. These showed a substantial balance in favour of the appellant, who had borne some 70% of the expenditure which had been laid out in the course of the venture. The judge granted a declaration that the freehold and leasehold interests in the premises were property of the partnership and gave directions for the sale of the premises and the distribution of the proceeds.

Whether parties who propose entering into a business venture in partnership together have actually done so is a question of fact into which your Lordships would not normally enter. But the majority of the Court of Appeal did not reverse the judge's findings of fact. They reversed his conclusion because they considered that there was a rule of law that the parties to a joint venture do not become partners until actual trading commences. They recognised the distinction between a contemplated partnership or an agreement to become partners and the partnership itself. They considered that it was necessary first to identify the business that it was intended or agreed should be conducted by the partnership, and then decide whether that business was being carried on by the partners at the

material time. They identified the business of the partnership as the carrying on of a restaurant business from the premises in Newbury, and (at 486) posed the question: '... were the four parties ... carrying on a restaurant business at [the premises] prior to 25 January 1994?' So expressed, the question could only be answered in one way. The restaurant was not open for business. There was nothing for the first respondent to manage, and no function for the two chefs to perform. No food had been bought or bookings taken. Everything that had been done was preparatory to the commencement of trading.

I think that the majority of the Court of Appeal were guilty of nominalism. They thought that it was necessary, not merely to identify the joint venture into which the parties had agreed to enter, but to give it a particular description, and then to decide whether the parties had commenced to carry on a business of that description. They described the business which the parties agreed to carry on together as the business of a restaurant, meaning the preparation and serving of meals to customers, and asked themselves whether the restaurant had commenced trading by the relevant date. But this was an impossibly narrow view of the enterprise on which the parties agreed to embark. They did not intend to become partners in an existing business. They did not agree merely to take over and run a restaurant. They agreed to find suitable premises, fit them out as a restaurant and run the restaurant once they had set it up. The acquisition, conversion and fitting out of the premises and the purchase of furniture and equipment were all part of the joint venture, were undertaken with a view of ultimate profit, and formed part of the business which the parties agreed to carry on in partnership together.

There is no rule of law that the parties to a joint venture do not become partners until actual trading commences. The rule is that persons who agree to carry on a business activity as a joint venture do not become partners until they actually embark on the activity in question. It is necessary to identify the venture in order to decide whether the parties have actually embarked upon it, but it is not necessary to attach any particular name to it. Any commercial activity which is capable of being carried on by an individual is capable of being carried on in partnership. Many businesses require a great deal of expenditure to be incurred before trading commences. Films, for example, are commonly (for tax reasons) produced by limited partnerships. The making of a film is a business activity, at least if it is genuinely conducted with a view of profit. But the film rights have to be bought, the script commissioned, locations found, the director, actors and cameramen engaged, and the studio hired, long before the cameras start to roll. The work of finding, acquiring and fitting out a shop or restaurant begins long before the premises are open for business and the first customers walk through the door. Such work is undertaken with a view of profit, and may be undertaken as well by partners as by a sole trader.

The respondents relied on a number of tax cases to support their arguments, chiefly *Birmingham & District Cattle By-Products Co Ltd v IRC* (1919) 12 TC 92 and *Slater v Commissioner of Inland Revenue* [1996] 1 NZLR 759. Such cases are of limited assistance. In the former case Rowlatt J found that a company had not completed a full trade year before the outbreak of the First World War as required to obtain tax relief. Even if Rowlatt J's decision was right on the facts (which is doubtful) it was in an entirely different statutory context. It is worthy of note that in a later case (*Kirk and Randall Ltd v Dunn (Inspector of Taxes)* (1924) 8 TC 663) Rowlatt J, acknowledging that the Court of Appeal had taken a different view, said (at 669)

that he was inclined to think that he might have taken too narrow a view of the word 'business'.

In *Slater*'s case the question under s 104(b) of the Income Tax Act 1976 was whether expenditure was 'necessarily incurred in carrying on a business for the purpose of gaining or producing the assessable income for any income year ...' The court held ([1996] 1 NZLR 759 at 764–765), that the taxpayer must embark on the actual course of conduct which it hoped would ultimately yield a profit, and that merely establishing a business structure and organising the decision-making, management and equity structures would not suffice. This would be equally true in the present context. However, the court also excluded the purchase of plant and drew a distinction between 'carrying on a business' and 'setting up a business'. In the context of that case this was entirely understandable, for the expenditure had to be incurred for the purpose of producing the assessable income in the tax year in which it was incurred. But the distinction makes no sense in the present context.

The question in the present case is not whether the parties 'had so far advanced towards the establishment of a restaurant as properly to be described as having entered upon the trade of running a restaurant', for it does not matter how the enterprise should properly be described. The question is whether they had actually embarked upon the venture on which they had agreed. The mutual rights and obligations of the parties do not depend on whether their relationship broke up the day before or the day after they opened the restaurant, but on whether it broke up before or after they actually transacted any business of the joint venture. The question is not whether the restaurant had commenced trading, but whether the parties had done enough to be found to have commenced the joint enterprise in which they had agreed to engage. Once the judge found that the assets had been acquired, the liabilities incurred and the expenditure laid out in the course of the joint venture and with the authority of all parties, the conclusion inevitably followed.

The judge found that the appellant was entitled to a 50% share in the partnership. The respondents appealed that finding to the Court of Appeal, but the conclusion of the majority made it unnecessary to decide it. Thorpe LJ expressed the view that there was insufficient evidence to displace the statutory presumption of equal shares in the Partnership Act 1890. Buxton LJ, whose judgment made the point a live one, would have dismissed the appeal on this ground also. Roch LJ expressed no view one way or another. In the light of the view which I take of the question which is the subject of the present appeal, there is thus an outstanding issue which remains unresolved.

At the conclusion of the argument before us, the respondents asked us to remit the case to the Court of Appeal for the issue to be decided. I would be very reluctant to do so when the issue was not raised by the respondents, either by way of cross-appeal or in their case, and no warning that the issue was still a live one was given to the House or to the appellant. I am especially reluctant because I consider that the respondents' chances of success are, with due respect to Thorpe LJ who thought otherwise, negligible. The various provisions of the 1890 Act which contain the terms to be implied into a partnership unless otherwise agreed are not statutory presumptions but default provisions. Very slight evidence is needed to exclude them.

The issue was supremely one of fact for the trial judge who saw and heard the witnesses, and who had to make the most of evidence which was often muddled

and confused and sometimes self-serving. He evidently formed the impression that there were effectively two sides, the appellant who put up the bulk of the money and his brother (who did not become a partner) on the one hand, and the first two respondents who originated the idea (and who later brought in the third respondent as a sleeping partner) on the other. That fitted the commercial realities and was a plausible conclusion in the circumstances, and it was one which the judge was entitled to reach.

I would allow the appeal and restore all the orders made by the trial judge.

Appeal allowed.

Celia Fox Barrister.

R v Secretary of State for Trade and Industry, ex parte Eastaway

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD HOFFMANN, LORD CLYDE AND LORD MILLETT

18 OCTOBER, 2 NOVEMBER 2000

House of Lords – Appeal from Court of Appeal, Civil Division – Jurisdiction – Judicial review – Judge refusing applicant permission to apply for judicial review – Applicant asking Court of Appeal to grant permission but not seeking permission to appeal from judge's decision – Court of Appeal refusing permission to apply for judicial review and applicant appealing to House of Lords – Whether House of Lords having jurisdiction to entertain applicant's appeal.

E sought permission to apply for judicial review of a decision by the Secretary of State to continue directors' disqualification proceedings against him. Permission was refused on paper by a High Court judge, but the application was renewed at an oral hearing before another judge. Once again, permission to apply was refused. E then applied to the Court of Appeal for permission to apply for judicial review, but did not expressly apply for permission to appeal against the decision of the second judge. The Court of Appeal refused permission to apply for judicial review, describing the application as misconceived. Subsequently, E sought permission to appeal to the House of Lords. An Appeal Committee granted E's petition for leave to appeal so that the House might have an opportunity to consider whether it had jurisdiction to entertain an appeal in those circumstances.

Held – The appeal fell foul of the rule that the House of Lords had no jurisdiction to hear an appeal from a refusal by the Court of Appeal to grant permission to appeal. The jurisdiction of the Court of Appeal was exclusively appellate, and accordingly recourse to it following a refusal of permission to apply for judicial review constituted an appeal, not a renewed application for permission to apply for judicial review. Such an appeal could itself only be brought with permission. It followed in the instant case that E had needed permission to appeal against the judge's refusal of permission to apply for judicial review. He had not asked for, or obtained, such permission from the judge. Nor had he expressly sought permission to appeal from the Court of Appeal. However, that court had to be taken to have refused such permission, as it certainly would have done if its attention had been directed to the need for permission to appeal. In his petition to the House, E was seeking to challenge not only the Court of Appeal's refusal of permission to apply for judicial review, but also its implicit refusal of permission to appeal. Accordingly, the House had no jurisdiction to hear the appeal (see p 31 *g*, p 32 *a* to *g* *j* to p 33 *a* and *d* to *g*, post).

Lane v Esdaile [1891] AC 210 applied.

Kemper Reinsurance Co v Minister of Finance [2000] 1 AC 1 distinguished.

Notes

For appeals from a refusal to grant permission to apply for judicial review, see 1(1) *Halsbury's Laws* (4th edn reissue) para 191.

Cases referred to in opinions

Housing of the Working Classes Act 1890, Re, ex p Stevenson [1892] 1 QB 609, CA; *affg* [1892] 1 QB 394, DC.

Kemper Reinsurance Co v Minister of Finance [2000] 1 AC 1, [1998] 3 WLR 630, PC.

Lane v Esdaile [1891] AC 210, HL.

Poh, Re [1983] 1 All ER 287, [1983] 1 WLR 2, HL.

Appeal

The applicant, Nigel Antony Eastaway, appealed with leave of the Appeal Committee of the House of Lords given on 11 July 2000 from the orders of the Court of Appeal (Buxton LJ) on 15 and 23 March 2000 whereby it (i) refused him permission to apply for judicial review of the decision of the respondent, the Secretary of State for Trade and Industry, communicated on 30 June 1999, to continue proceedings against him under the Company Directors Disqualification Act 1986, and (ii) dismissed on the merits the applicant's application for permission to present a petition of appeal to the House of Lords. Sullivan J had refused permission to apply for judicial review on 27 January 2000. The facts are set out in the judgment of Lord Bingham of Cornhill.

Matthew Collings and *Rabinder Singh* (instructed by *Burton Copeland*) for the applicant.

Jonathan Crow and *Richard Gillis* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Their Lordships took time for consideration.

2 November 2000. The following opinions were delivered.

LORD BINGHAM OF CORNHILL. My Lords, on 30 June 1999 the Secretary of State for Trade and Industry decided to continue proceedings against Mr Eastaway (the applicant) under s 6 of the Company Directors Disqualification Act 1986. On 18 August 1999 the applicant made application for permission to apply for judicial review of that decision and also a later decision of the Secretary of State. Permission to apply was refused on paper on grounds clearly but succinctly stated by Collins J. There followed an oral hearing before Sullivan J, with both sides represented, when permission was again refused on 27 January 2000. The applicant made application for permission to apply for judicial review to the Court of Appeal, and permission was refused by Buxton LJ on 15 March 2000 following an oral hearing with both sides again represented. In the course of a considered judgment Buxton LJ described the application as 'misconceived'. The applicant thereupon sought permission to present a petition of appeal to this House. On 11 July 2000 an appeal committee granted the applicant's petition for leave to appeal so that the House might have an opportunity to consider whether it has jurisdiction to entertain an appeal in these circumstances. That is the issue now before the House.

The legislative background

By s 31(3) of the Supreme Court Act 1981 and CPR 53.3(1) a party may not apply for judicial review unless the permission of the court has been obtained. It is unnecessary to recite the terms of these familiar provisions.

A refusal of permission by the judge may be challenged in the Court of Appeal. Section 15 of the 1981 Act defines the general jurisdiction of the court, and s 16(1) confers jurisdiction to hear and determine appeals from any judgment or order of

the High Court subject to exceptions irrelevant for present purposes. Section 18(1) provided that no appeal shall lie to the Court of Appeal in certain specified categories of case. Section 18(1A) (inserted by s 7 of the Courts and Legal Services Act 1990) provided:

> 'In any such class of case as may be prescribed by Rules of the Supreme Court, an appeal shall lie to the Court of Appeal only with the leave of the Court of Appeal or such court or tribunal as may be specified by the rules in relation to that class.'

Section 18(1A) reflected a tendency evident over many years to subject recourse to the Court of Appeal to a requirement of leave. Section 54(6) of the 1981 Act provided that applications to the Court of Appeal for leave to appeal to that court might be determined by a single judge of that court, from whose decision no appeal should lie. This requirement of leave was reflected in the relevant rules of court. With effect from 1 January 1999 Ord 59, r 1B provided:

> '(1) Every appeal shall be subject to leave except an appeal against—(a) the making of a committal order; (b) a refusal to grant habeas corpus; or (c) an order under section 25 of the Children Act 1989 (secure accommodation orders).
>
> (2) Leave to appeal to the Court of Appeal may be given by the court below or by the Court of Appeal.'

Rule 14 governed the procedure for applying to the Court of Appeal and in para (3) provided:

> 'Where an application without notice being served on any other party has been refused by the court below, an application for a similar purpose may be made to the Court of Appeal without notice being served on any other party within seven days after the date of the refusal.'

This was directed to the special position where permission had been refused without notice to the proposed respondent. In *Practice Direction (judicial review: appeals)* [1982] 3 All ER 800, [1982] 1 WLR 1375 Lord Lane CJ and Sir John Donaldson MR gave a practice direction on recourse to the Court of Appeal following refusal of leave to apply for judicial review by a Divisional Court or a single judge, describing such a refusal as 'appealable to the Court of Appeal'. The practice direction did not refer to any requirement of leave or permission to appeal, since at that time there was no such requirement.

On 19 April 1999, shortly before the new Civil Procedure Rules were to come into effect on 26 April 1999, Lord Woolf MR gave a practice direction consolidating with some amendments the principal practice directions governing proceedings in the Court of Appeal: see *Practice Direction (Court of Appeal: procedure)* [1999] 2 All ER 490, [1999] 1 WLR 1027. This practice direction contained the following paragraph:

> '2. PERMISSION TO APPEAL
>
> 2.1 *When is permission required?*
>
> 2.1.1 Most appeals require the permission of the court below (the court which made the decision which is challenged) or of the Court of Appeal to bring an appeal.
>
> 2.1.2 Since 1 January 1999, permission has been required for all appeals except appeals against: (a) committal orders; (b) refusals to grant habeas corpus; and (c) secure accommodation orders made pursuant to s 25 of the Children Act 1989 (see RSC Ord 59, r 1B(1)(a) to (c)).

2.1.3 The experience of the Court of Appeal is that many appeals and applications for permission to appeal are made which are quite hopeless. They demonstrate basic misconceptions as to the purpose of the civil appeal system and the different roles played by appellate courts and courts below. The court below has a crucial role in determining applications for permission to appeal. This guidance indicates how applicants, and courts, should approach the matter.' (See [1999] 2 All ER 490 at 494, [1999] 1 WLR 1027 at 1031.)

Paragraph 2.7 of the practice direction read as follows:

'*Renewed applications for permission to apply for judicial review*

2.7.1 The applicant's advocate (and where any respondent will be represented at the Court of Appeal hearing, that party's advocate) must file four copies of their skeleton arguments with the Civil Appeals Office with the application bundles.

2.7.2 This applies only to renewed applications for permission to apply for judicial review. Where permission to apply has been granted and the substantive application for judicial review has been dealt with in the High Court, any application to the Court of Appeal for permission to appeal against that decision will be governed by the general provisions for such applications.' (See [1999] 2 All ER 490 at 496, [1999] 1 WLR 1027 at 1033.)

Section 54 of the Access to Justice Act 1999, which was contained in Pt IV of the Act and came into force on 27 September 1999, provided so far as relevant to this appeal as follows:

'(1) Rules of court may provide that any right of appeal to ... (c) the Court of Appeal, may be exercised only with permission ...

(3) For the purposes of subsection (1) rules of court may make provision as to—(a) the classes of case in which a right of appeal may be exercised only with permission, (b) the court or courts which may give permission for the purposes of this section, (c) any considerations to be taken into account in deciding whether permission should be given, and (d) any requirements to be satisfied before permission may be given, and may make different provision for different circumstances.

(4) No appeal may be made against a decision of a court under this section to give or refuse permission (but this subsection does not affect any right under rules of court to make a further application for permission to the same or another court).'

The Civil Procedure (Amendment) Rules 2000, SI 2000/221, which so far as relevant came into effect on 2 May 2000, inserted a new Pt 52 into the rules. That Part was set out in Sch 5 to the statutory instrument, and provided in rr 52.3 and 52.15 that permission to appeal to the Court of Appeal against refusal of a judge to grant permission to apply for judicial review is required, whether from the lower court or the Court of Appeal. If those rules governed this case it would be clear, as counsel for the applicant accepts, that their effect is to preclude the House from entertaining this appeal. They did not, however, come into effect until after the decision of Buxton LJ, which was governed by the earlier provisions.

Reference should lastly be made to the Appellate Jurisdiction Act 1876, which in s 3 provided:

'Subject as in this Act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the courts following; that is to say,

(1) Of Her Majesty's Court of Appeal in England ...'

The authorities

The leading authority is *Lane v Esdaile* [1891] AC 210, the effect of which is helpfully expounded in *Kemper Reinsurance Co v Minister of Finance* [2000] 1 AC 1. The issue before the House was whether, under s 3 of the 1876 Act, it had jurisdiction to entertain an appeal from a refusal of the Court of Appeal to grant leave to appeal out of time. The House recognised that on a strict literal construction of s 3 the ruling of the Court of Appeal might be said to fall within the language of the section. But it adopted a purposive construction of s 3, pointing out that the requirement of leave was 'intended as a check to unnecessary or frivolous appeals' (see [1891] AC 210 at 212 per Lord Halsbury LC) and that the purpose of such a check would be defeated if the House could be invited to reconsider the merits of an application after its refusal by the Court of Appeal. It was recognised as obviously absurd to allow an appeal against a decision under a provision designed to limit the right of appeal. In the following year the decision of the House was applied by the Court of Appeal in *Re Housing of the Working Classes Act 1890, ex p Stevenson* [1892] 1 QB 609. In that case a party had applied to a judge for what in effect amounted to leave to appeal and had been refused. The Court of Appeal held, following *Lane*'s case, that no appeal lay against such a refusal.

There matters stood until the decision of this House in *Re Poh* [1983] 1 All ER 287, [1983] 1 WLR 2. In that case the petitioner to the House had been refused leave to apply for judicial review both by the single judge and by the Court of Appeal, and sought to appeal to the House against the refusal of leave by the Court of Appeal. The case did not concern a refusal of leave to appeal, but the House treated it as analogous to such cases and so covered by *Lane*'s case. It accordingly held that the House had no jurisdiction to grant leave in that case. Doubt was thrown on the strength of that analogy in the *Kemper* case, a case in which leave to appeal to the Court of Appeal of Bermuda had been given by a judge who had discharged leave to apply for judicial review previously given by another judge, and in which it was held that the Court of Appeal's reliance on *Re Poh* had been misplaced. The main importance of the *Kemper* case for present purposes is that it gave the quietus to the belief, hitherto prevalent, that recourse to the Court of Appeal following refusal of leave to apply for judicial review by the judge was a renewed application rather than an appeal. It was held, as both parties to this appeal accept, that the jurisdiction of the English Court of Appeal is exclusively appellate in character, conferred by statute, and that any reference to renewed applications is accordingly a misnomer (see [2000] 1 AC 1 at 16–18, [1998] 3 WLR 630 at 640–642).

Conclusion

Counsel for the applicant submitted that the present appeal did not fall foul of the rule laid down in *Lane*'s case. He pointed out that Ord 59, r 14(3) provided a special procedure for ex parte proceedings, that such hearings were de novo in character, that an application for permission to appeal is different from an application for permission to apply for judicial review (as recognised in the *Kemper* case), that Lord Woolf MR in *Practice Direction (Court of Appeal: procedure)* [1999] 2 All ER 490, [1999] 1 WLR 1027 had recognised the need for legislation if rights of appeal were to be further restricted and that s 54 of the 1999 Act met the need which he

had recognised. But the rules made to give effect to Lord Woolf's proposals had not taken effect in time to govern this case. The applicant's application to the Court of Appeal had not been a true appeal, nor had the Court of Appeal recognised or treated it as such. Stress was laid on the public interest which underlies applications for judicial review.

Skilfully though this argument was developed, I cannot for my part accept it. The applicant was seeking judicial review of the Secretary of State's decisions. To pursue that remedy he needed permission to apply for judicial review: s 31(3) of the 1981 Act; r 53.3. He applied for permission to Collins J on paper and then to Sullivan J at an oral hearing, but was refused on both occasions. He was entitled to seek to challenge that refusal in the Court of Appeal: ss 16 and 18 of the 1981 Act; Ord 59, r 14(3); *Practice Direction (judicial review: appeals)* [1982] 3 All ER 800, [1982] 1 WLR 1375. But the jurisdiction of the Court of Appeal is appellate only, and there is no basis for a distinction between true appeals and other appeals, whatever may at various times have been thought. The applicant accordingly needed permission to challenge the refusal of leave to apply for judicial review in the Court of Appeal: s 18(1A) of the 1981 Act; s 54 of the 1999 Act; r 59.1B; *Practice Direction (Court of Appeal: procedure)* [1999] 2 All ER 490 at 494, [1999] 1 WLR 1027 at 1031 (para 2.1). The requirement of permission to appeal was confirmed by the new rules which came into force in May 2000. The applicant did not ask Sullivan J for, or obtain, permission to appeal against his decision. Had he done so, it seems most improbable that the judge would have granted permission to appeal. But the applicant was entitled to seek such permission (that is, permission to appeal against the judge's refusal of permission to apply for judicial review) from the Court of Appeal: s 54(4) of the 1999 Act; Ord 59, r 1B(2). He did not expressly seek permission to appeal from the Court of Appeal. But since the Court of Appeal only had jurisdiction to entertain an appeal against the refusal of Sullivan J to give permission to apply for judicial review if permission were given to the applicant to appeal, and Sullivan J had not given such permission, the Court of Appeal must be taken to have refused permission to appeal, as it certainly would have done had its attention been directed to the need for permission since the application was described as 'misconceived'. In his petition to the House, the applicant is seeking to challenge not only the Court of Appeal's refusal of permission to apply for judicial review but also the Court of Appeal's implicit refusal of permission to appeal. In doing so he falls foul of the rule in *Lane*'s case, which construed s 3 of the 1876 Act as precluding appeal to this House against a refusal of leave to appeal by the Court of Appeal.

The requirement of permission to apply for judicial review is imposed primarily to protect public bodies against weak and vexatious claims. The requirement of permission to appeal is imposed primarily to protect the courts against the burden of hearing and adjudicating on appeals with no realistic chance of success. The purpose of these filters is different, even though there is an incidental benefit to the courts in the first case and the successful litigant (or both litigants) in the second. The *Kemper* case concerned the first of these filters only, since the judge gave leave to appeal against her decision. *Re Poh* also concerned the first of these filters only, since the applicant had not required the permission of the judge or the Court of Appeal to seek leave to apply for judicial review in the Court of Appeal. The present case involves both filters: the applicant needed permission to appeal and also permission to apply for judicial review. It is the fact that he needed, and was impliedly refused, permission to appeal by the Court of Appeal

which distinguishes the case from the *Kemper* case and brings it within the ratio of *Lane*'s case.

Despite the applicant's argument, I see no escape from this conclusion. Nor should the House, in my opinion, seek to escape from it. In its role as a supreme court the House must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist. In this case it is not suggested that the decision of Buxton LJ raises any legal question of general public importance. The House has not, because of its decision on jurisdiction, heard argument on the merits of the applicant's complaint, but these have now been considered in detail by two judges of the High Court and one Lord Justice of Appeal, and it would both stultify the requirement of permission to appeal to the Court of Appeal and subvert the true function of the House if it were now open to the applicant to invite the House to review the merits of his complaint for a fourth time. Whatever sympathy one may have for the applicant personally, the House must apply the law as it stands and adhere to its true constitutional role.

I accordingly hold that the House has no jurisdiction to entertain this appeal. Since the House has chosen this case to resolve an issue concerning its own jurisdiction, I would accede to the request of counsel for the applicant that there be no order for costs in this House.

LORD STEYN. My Lords, I have had the advantage of reading in draft the speech of Lord Bingham of Cornhill. For the reasons he gives I would make the ruling and order in respect of costs which he proposes.

LORD HOFFMANN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bingham of Cornhill. For the reasons he gives I too would rule that the House has no jurisdiction to entertain this appeal.

LORD CLYDE. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill. For the reasons he gives I agree that the House has no jurisdiction to entertain this appeal.

LORD MILLETT. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill. For the reasons he gives I agree that the House has no jurisdiction to entertain this appeal.

Appeal outside House's jurisdiction.

Dilys Tausz Barrister.

Lafarge Redland Aggregates Ltd (formerly Redland Aggregrates Ltd) v Shephard Hill Civil Engineering Ltd

HOUSE OF LORDS

LORD HOPE OF CRAIGHEAD, LORD COOKE OF THORNDON, LORD CLYDE, LORD HOBHOUSE OF WOODBOROUGH AND LORD MILLETT

8, 9 MAY, 27 JULY 2000

Arbitration – Agreement – Dispute resolution – Main contract and sub-contract – Disputes arising under both contracts – Provision in sub-contract for resolution of disputes jointly with disputes arising under main contract – Contractor serving notice on sub-contractor of intention to have disputes resolved jointly – Whether contractor initiating dispute resolution procedure under main contract within reasonable time – Whether main contract providing for tripartite arbitration.

A contract for the construction of a bypass ('the main contract') was entered into by a local authority, E, as employer and the defendant, S Ltd, as contractor. The contract incorporated an amended form of the ICE Conditions of Contract (5th edn). S Ltd entered into a sub-contract with the claimant, L Ltd, for the supply and laying of asphalt surfacing. The sub-contract incorporated, with amendments, the FCEC Form of Sub-contract (1984 edn). Clause 66 of the ICE contract provided a system for the settlement of disputes between the contractor and the employer by which decisions of the engineer were to be final and binding on the parties unless either of them required the matter to be referred to arbitration, in which case the award of the arbitrator was to be final and binding. Clause 18(1) of the sub-contract provided that any dispute between the contractor and the sub-contractor in connection with or arising out of the sub-contract was to be referred to arbitration. By cl 18(2), the contractor might by notice in writing to the sub-contractor require disputes in connection with the main contract which touched on or concerned the sub-contract works to be dealt with jointly with the dispute under the main contract in accordance with cl 66 of the main contract, provided that an arbitrator had not already been agreed upon or appointed under cl 18(1). Clause 18(2) further provided that the sub-contractor was to be bound in like manner as the contractor by any decision of the engineer or any award of the arbitrator made in connection with a joint dispute. Disputes arose between the local authority and S Ltd and between S Ltd and L Ltd, in the course of which S Ltd gave notices to L Ltd that it required their disputes to be dealt with jointly with disputes under the main contract under cl 18(2). The notices were given in February, March and September 1995. L Ltd commenced proceedings against S Ltd, challenging the validity of the cl 18(2) notices, and arguing in the alternative, inter alia, that S Ltd was in breach of the obligations imposed on it by cl 18(2) because it had not initiated the arbitration procedure under cl 66 of the main contract within a reasonable time. The judge held that the notices were valid, and further that S Ltd had not been unreasonable in failing to initiate the cl 66 procedure because it had been involved in continuing negotiations with the local authority. L Ltd appealed. The Court of Appeal allowed the appeal, holding that L Ltd was no longer obliged to take part in a tripartite arbitration under

cl 18(2) and that it was entitled to seek the appointment of an arbitrator on its disputes with S Ltd under cl 18(1). S Ltd appealed to the House of Lords. The following issues fell to be determined: (i) it being accepted that the issue of a notice under cl 18(2) obliged the contractor to initiate the procedure under cl 66 of the main contract within a reasonable time, how that period was to be determined; and (ii) whether cl 18(2) envisaged a tripartite operation of the arbitration procedure provided for by cl 66 of the main contract.

Held – Where a contractor required, under cl 18, a sub-contract dispute to be dealt with jointly with a main contract dispute with the employer under cl 66, it was under an obligation to take the necessary steps to ensure that both disputes were dealt with under cl 66. It followed that cl 18(2) of the sub-contract did not give the contractor the right to deprive the sub-contractor of its right under cl 18(1) to appoint an arbitrator in respect of the sub-contract dispute while it attempted to negotiate a settlement of the main contract dispute with the employer. Any delay attributable to the negotiation process had to be left out of account when the question of whether the contractor had fulfilled its implied obligation to the sub-contractor to have the dispute under the sub-contract resolved within a reasonable time was determined. It would be no answer for the contractor, if challenged on the grounds of its failure to invoke the procedure under cl 66 within a reasonable time, to attempt to explain the delay by referring to time which had elapsed because of negotiations entered into with the employer with a view to rendering the cl 66 procedure unnecessary. On the facts, more than a reasonable time had elapsed and the contractor was not entitled to rely upon cl 18(2) to resist the sub-contractor's demand for a reference of its dispute to arbitration under art 18(1). Accordingly, the appeal would be dismissed (see p 43 *e* to *g*, p 49 *f* to *j*, p 52 *a*, p 55 *c d* and p 56 *d e*, post).

Per Lord Cooke, Lord Hobhouse and Lord Millett. On its true construction, cl 18(2) envisages a tripartite operation of the arbitration procedure under cl 66 and that the disputes under the main contract and the sub-contract will be dealt with jointly. If that could not be or is not done, the contractor will no longer be able to use cl 18(2) and the sub-contractor will be free to pursue a separate arbitration under cl 18(1). The power to order concurrent hearings conferred by rule 7 of the Institution of Civil Engineers' Arbitration Procedure (1983) or its equivalent may be apt for such a case (see p 51 *j*, p 55 *e* to p 56 *a* and *d e*, post).

Per Lord Hope and Lord Clyde. Clause 18(2) did not envisage a tripartite operation of the arbitration procedure under cl 66 in the sense of an arbitration in which the employer, the contractor and the sub-contractor are all parties to the proceedings. Rule 7 of the Institution of Civil Engineers' Arbitration Procedure (1983) could not have any application and the joint mechanism for the resolution of the dispute which cl 18(2) assumes is one which requires the contractor to represent the interests of the sub-contractor in the proceedings before the engineer and the arbitrator under the main contract (see p 45 *d* to *j*, p 46 *f* to p 47 *c f*, p 48 *h j*, p 50 *c* to *h* and p 52 *a b*, post).

Notes

For multi-party arbitration in construction contracts, see 4(2) *Halsbury's Laws* (4th edn reissue) para 497.

Cases referred to in opinions

Erith Contractors Ltd v Costain Civil Engineering Ltd [1994] ADR LJ 123.

Gleeson (M J) Group plc v Wyatt of Snetterton Ltd (1994) 42 Con LR 14, CA.

Appeal

The defendant contractor, Shephard Hill Civil Engineering Ltd, appealed with the permission of the Appeal Committee of the House of Lords given on 21 April 1999 from the decision of the Court of Appeal on 11 December 1998 ((1998) 71 Con LR 86) allowing the appeal of the claimant sub-contractor, Lafarge Redlands Aggregates Ltd, from the order of Mr Recorder Brian Knight QC sitting as a deputy Official Referee on 22 May 1997 ((1998) 71 Con LR 86) whereby he ordered that the claimant's application for declaratory relief be dismissed. The facts are set out in the opinion of Lord Hope of Craighead.

David Friedman QC and *Stephen Dennison* (instructed by *Eversheds*) for the contractor.

Vivian Ramsay QC and *Louise Randall* (instructed by *Winward Fearon & Co*) for the sub-contractor.

Their Lordships took time for consideration.

27 July 2000. The following opinions were delivered.

LORD HOPE OF CRAIGHEAD. My Lords, the framework within which work is carried out by participants in the construction industry is provided by the law of contract. They are assisted in their negotiations within this framework by the various standard forms of contract which are in current use. Among the matters provided for in these standard forms is a mechanism for the resolution of disputes between the parties to the contract. This invariably includes an arbitration clause which includes provision for the appointment of an arbitrator.

Arbitration is a means of dispute resolution which is widely practised within the construction industry. But it too depends on the law of contract. The arbitrator provides his services to the parties under the contract which he enters into with them when he is appointed to act as their arbitrator, and it is the agreement between the parties to the arbitration clause that renders the arbitrator's award enforceable. This contractual framework causes no difficulty where the dispute is of concern only to the parties to the contract which contains the arbitration clause. But it is not well adapted to the position which is commonplace throughout the construction industry where work which the contractor has undertaken to carry out for the employer under the main contract is executed on the contractor's behalf by a sub-contractor. The only contract which binds the employer is his contract with the contractor under the main contract. The only contract which binds the sub-contractor is his contract with the contractor under the sub-contract. The doctrine of privity of contract inhibits the formation of any kind of implied contractual relationship between the employer and the sub-contractor. This arrangement usually works well enough while the works are in progress, as the main contract and any sub-contracts entered into by the contractor are designed to operate independently as regards the execution, completion and maintenance of the contract or sub-contract works and the payments due to the contractor and to the sub-contractor respectively. Its

limitations are thrown into sharp focus where a dispute arises which is of concern to all three parties and arbitration is the preferred means of resolving it.

Background

The disputes which have arisen in the present case relate to the construction of the A133 Little Clacton and Weeley Heath Bypass. The main contract was entered into on 24 February 1993 between Essex County Council as employer and the appellant, Shephard Hill Civil Engineering Ltd, as contractor. The works which were to be carried out under it consisted of the construction of approximately seven kilometres of carriageway together with associated side roads, bridges and culverts, drainage and accommodation works. It incorporated an amended form of the Institution of Civil Engineers Standard Form of Contract for Civil Engineering Works (5th edn, June 1973; revised January 1979; reprinted January 1986) (the ICE Conditions). The contract price was £7·7m, to be measured and paid against a schedule of rates. By a contract dated 31 August 1993 the appellant entered into a sub-contract with the respondent, Lafarge Redland Aggregates Ltd, for the work of supplying and laying the asphalt surfacing for the new carriageway. The sub-contract incorporated, with amendments, the Federation of Civil Engineering Contractors' (FCEC) Standard Form of Sub-contract (September 1984 edn), generally known as the Blue Form.

The commencement date of the main contract was 22 March 1993 and its completion date was 18 December 1994. This was a period of 91 weeks. The sub-contract works were to be carried out in accordance with the appellant's programmes and schedule of durations, the effect of which was that they were to be completed in 135 days. The main contract works commenced on 22 March 1993. The sub-contract works were scheduled to start in June 1993, but due to earlier delays the start was delayed until 1 October 1993. They were substantially completed on 17 January 1995. The engineer under the main contract certified that the main contract works were substantially completed on 19 February 1995. The effect of his decision was that there was a delay in the completion of the main contract works of nine weeks as compared with the contractual completion date of 18 December 1994. Two interim extensions of time were granted to the appellant by the engineer under the main contract which amounted in total to seven and a half weeks. The effect of these decisions was that there was a period of one and a half weeks for which no extension of time had been granted.

Disputes arose between Essex County Council and the appellant and between the appellant and the respondent during and following completion of the main contract and the sub-contract works. These disputes related primarily to the causes of delay to the main contract and the sub-contract works. They raised questions as to entitlement to extensions of time, entitlement to additional remuneration as a result of delays to completion, the appellant's right to withhold from sums otherwise due to the respondent moneys in respect of the loss which the appellant claimed to have incurred by reason of the respondent's alleged delay in completion of the sub-contract works, whether or not additional work was instructed and, to the extent that it was instructed, the value of the additional work. The respondent's claims against the appellant amounted in total to about £450,000 exclusive of VAT and interest. The appellant's claims against Essex County Council amounted to about £1·7m.

The provisions for the settlement of disputes arising under the main contract are set out in an amended cl 66 to the ICE Conditions. The relevant parts of this clause provide: *a*

> '(1) If a dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works including any dispute as to any decision opinion instruction direction certificate or valuation of the Engineer (whether during the progress of the Works or after their completion and whether before or after the determination abandonment or breach of the Contract) it shall be referred to and settled by the Engineer who shall state his decision in writing and give notice of the same to the Employer and the Contractor. Unless the Contract shall have been already determined or abandoned the Contractor shall in every case continue to proceed with the Works with all due diligence and he shall give effect forthwith to every such decision of the Engineer unless and until the same be revised by an arbitrator as hereinafter provided. Such decisions shall be final and binding upon the Contractor and the Employer unless either of them shall require that the matter be referred to arbitration as hereinafter provided. If the Engineer shall fail to give such decision for a period of 3 calendar months after being requested to do so or if either the Employer or the Contractor be dissatisfied with any such decision of the Engineer then and in any such case either the Employer or the Contractor may within 3 calendar months after receiving notice of such decision or within 3 calendar months after expiration of the said period of 3 months (as the case may be) require that the matter shall be referred to the arbitration of a person to be agreed upon between the parties or (if the parties fail to appoint an arbitrator within one calendar month of either party serving on the other party a written notice to concur in the appointment of an arbitrator) a person to be appointed on the application of either party by the President for the time being of the Institution of Civil Engineers ... Any such reference to arbitration may be conducted in accordance with the Institution of Civil Engineers Arbitration Procedure (1983) or any amendment or modification thereof being in force at the time of the appointment of the arbitrator and in cases where the President of the Institution of Civil Engineer's is requested to appoint the arbitrator he may direct that the arbitration is conducted in accordance with the aforementioned Procedure or any amendment or modification thereof. Such arbitrator shall have full power to open up review and revise any decision opinion instruction direction certificate or valuation of the Engineer and neither party shall be limited in the proceedings before such arbitrator to the evidence or arguments put before the Engineer for the purpose of obtaining his decision above referred to. The award of the arbitrator shall be final and binding on the parties.'

b *c* *d* *e* *f* *g* *h*

The provisions of this clause provide a system for the settlement of disputes between the contractor and the employer which derives its binding force from the contract which they have entered into. The decisions of the engineer are to be 'final and binding' on the contractor and the employer unless either of them requires that the matter be referred to arbitration. If the matter is referred to arbitration the award of the arbitrator is to be 'final and binding' on the parties to the contract between the contractor and the employer. No mention is made in the clause of any *j*

third party with whom either the employer or the contractor may be in dispute. Neither the engineer nor any arbitrator appointed under cl 66 has power to issue a decision or to make an award which is binding on any third party by virtue of the provisions of the main contract.

The sub-contract between the appellant and the respondent contains a preamble in which the following references are made to the main contract:

> 'WHEREAS the Contractor has entered into a Contract (hereinafter called "the Main Contract") particulars of which are set out in the First Schedule hereto: AND WHEREAS the Sub-Contractor having been afforded the opportunity to read and note the provisions of the Main Contract (other than details of the Contractor's prices thereunder), has agreed to execute upon the terms hereinafter appearing the works which are described in the documents specified in the Second Schedule hereto and which form part of the works to be executed by the Contractor under the Main Contract.'

These provisions have an important bearing on the contractual relationship between the contractor and the sub-contractor. But it is not, and could not be, suggested that by entering into the sub-contract with the contractor the sub-contractor was entering into a contractual relationship of any kind with the employer. The system which the amended cl 66 of the ICE Conditions provides for the resolution of disputes between the employer and the contractor under the main contract is not available for the resolution of disputes between the contractor and the sub-contractor. So the sub-contract contains its own system for the resolution of these disputes.

This system is set out in cl 18 of the standard form of sub-contract, which—as amended by the parties to the sub-contract by the substitution of the word 'shall' for 'may' where indicated—is in these terms:

> '(1) If any dispute arises between the Contractor and the Sub-Contractor in connection with or arising out of this Sub-Contract or the carrying out of the Sub-Contract Works including any dispute as to any decision, opinion, instruction or direction of the Contractor and/or Engineer or any dispute as to payment under Clause 15 it shall, subject to the provisions of this clause, be referred to the arbitration and final decision of a person agreed between the parties, or failing such agreement, appointed upon the application of either of the parties by the President for the time being of the Institution of Civil Engineers and any such reference to arbitration [shall] be conducted in accordance with the Institution of Civil Engineers' Arbitration Procedure 1983 or any amendment or modification thereof in force at the time of the appointment of the arbitrator.
>
> (2) If any dispute arises in connection with the Main Contract and the Contractor is of the opinion that such dispute touches or concerns the Sub-Contract Works, then provided that an arbitrator has not already been agreed or appointed in pursuance of the preceding sub-clause, the Contractor may by notice in writing to the Sub-Contractor require that any such dispute under this Sub-Contract shall be dealt with jointly with the dispute under the Main Contract in accordance with the provisions of Clause 66 thereof. In connection with such joint dispute the Sub-Contractor shall be bound in like manner as the Contractor by any decision of the Engineer or any award by an arbitrator.

(3) If at any time before an arbitrator has been agreed or appointed in pursuance of sub-clause (1) of this clause any dispute arising in connection with the Main Contract is made the subject of proceedings in any court between the Employer and the Contractor and the Contractor is of opinion that such dispute touches or concerns the Sub-Contract Works, he may by notice in writing to the Sub-Contractor abrogate the provisions of sub-clause (1) of this clause and thereafter no dispute under this Sub-Contract shall be referable to arbitration without further submission by the Contractor and Sub-Contractor.

(4) Notice of any dispute under this Agreement shall be given by the Sub-Contractor to the Contractor in writing as soon as practicable after the event giving rise to the dispute. The Sub-Contractor shall be bound by the time limits imposed on the contractor by Clause 66 of the Main Contract in respect of any decision given by the Engineer thereunder insofar as such decision affects the Sub-Contract Works.'

The questions which are before your Lordships in this appeal relate to the meaning and effect of cl 18(2) of the sub-contract. They arise in the context of the following events, all of which occurred after the completion of the sub-contract works.

By letter dated 15 February 1995 the respondent gave notice to the appellant of its intention to refer disputes between them to arbitration under cl 18(1). This notice was followed by further notices to the same effect dated 21 March and 11 September 1995. On 20 February 1995 the respondent gave notice to the appellant to concur in the appointment of Mr D T Simmonds, FCIA, as sole arbitrator. In response to these initiatives the appellant replied that it considered the appointment of an arbitrator to be premature, that in its view the normal negotiating channels had not yet been exhausted and that it did not wish to escalate the disputes under the main contract at that stage. It then gave notice to the respondent by letter dated 6 March 1995 that it required the disputes to be dealt with jointly with disputes under the main contract under cl 18(2). Further notices to the same effect were given by the appellant to the respondent on 9 June, 17 July and 26 September 1995. On 20 March 1995 the respondent applied to the president of the Institution of Civil Engineers (ICE) for the appointment of an arbitrator. On 3 April 1995 the appellant notified the respondent that it considered the application to the president premature and that it would challenge the jurisdiction of any arbitrator who was appointed in response to the respondent's request. On 6 April 1995 the appellant invited the president of the ICE to reject the respondent's request for the appointment of an arbitrator. On 13 April 1995 the respondent asked the president of the ICE to postpone the making of the appointment for the time being. On 12 September 1995, having on 11 September listed 16 disputes which it required to be referred to arbitration, the respondent gave a further notice to the appellant to concur in the appointment of Mr Simmonds as sole arbitrator. But on 26 September 1995 the appellant required that nearly all of the disputes be dealt with jointly with the disputes under the main contract and again notified the respondent that it considered the application to be premature and that it would challenge the appointment of any arbitrator appointed under cl 18(1).

Two of the disputes which had arisen under the main contract were then referred by the appellant to the engineer for his decision under cl 66 of the main

contract. The engineer gave his decision on these disputes, and the appellant referred them to arbitration under that clause. By agreement between the appellant and the employer the arbitration proceedings in regard to these disputes were deferred. None of the other disputes between the appellant and the employer, and in particular none of the disputes which had arisen between the appellant and the respondent and were the subject of the cl 18(2) notices given to the respondent by the appellant under the sub-contract, were the subject of a request for a formal decision by the engineer under cl 66 of the main contract. The respondent then raised these proceedings against the appellant to challenge the validity of the cl 18(2) notices and for a declaration that the appellant was not entitled to rely upon them.

On 22 May 1997 the recorder, Mr B J Knight QC, held ((1998) 71 Con LR 86) that the notices which were given under cl 18(2) were valid notices, and he rejected the respondent's alternative arguments that the appellant was in breach of obligations imposed on it by cl 18(2), that it was estopped from relying upon that clause, that it had by its conduct frustrated the purpose of cl 18(2) and that it had repudiated the agreement for arbitration in cl 18(1). On 11 December 1998 the Court of Appeal, (Auld and Chadwick LJJ and Sir Christopher Staughton) allowed the respondent's appeal ((1998) 71 Con LR 86). It declared that the respondent was no longer obliged to take part in a tripartite arbitration under cl 18(2) and that it was entitled to call upon the president of the ICE to appoint an arbitrator on its disputes with the appellant under cl 18(1).

The following issues arise for decision in this appeal. Mr Friedman QC for the appellant conceded that the effect of the serving of a notice on the sub-contractor under cl 18(2) was to oblige the contractor to initiate the procedure under cl 66 of the main contract within a reasonable time. The first issue relates to the question how that period is to be determined. In particular, is the effect of cl 18(2) that the contractor must have a present intention of invoking the cl 66 procedure at the time when it serves the notice under cl 18(2) and, if so, does it lack that intention if its intention is to invoke cl 66 only if and when negotiations between it and the employer fail? The second issue relates to the nature of the procedure that is envisaged by cl 18(2). Does it require a tripartite operation of the arbitration procedure provided for by cl 66 of the main contract? If, not, what form of procedure is required to achieve a decision which is binding as between the contractor and the sub-contractor in terms of cl 18(2)?

The reasonable period of time issue

The question as to what amounts to a reasonable time for the performance of an obligation is in almost every case a pure question of fact. But in this case an issue of law is involved. It arises because the reason which the appellant has given for not initiating arbitration proceedings under the main contract is its wish to negotiate a settlement of its disputes with the employer rather than obtain a formal decision from the engineer under cl 66 with a view to referring the matter to arbitration under that clause.

The recorder dealt with the matter as a pure question of fact. He said that he did not think that it was unreasonable for the appellant to have embarked on negotiations with the employer. He accepted that they might not have proceeded at a pace acceptable to the respondent, but he did not consider that they had been unreasonably protracted. In the Court of Appeal Sir Christopher Staughton also dealt with the question as one of fact. He said that the obligation on the contractor

was to set up and conduct the procedure contemplated by cl 18(2) of the sub-contract with all deliberate speed. He summed the matter up in this way: *a*

> '... how should a reasonable time be viewed? Seeing that the sub-contractors have requested arbitration to enforce their claims, and that the contractors have placed an obstacle in the way of that request, and in the light of the very short periods, relatively speaking, which feature elsewhere in the clause, it seems to me that a reasonable time would be quite a short period, and certainly not two years or 18 months or anything like it.' (See (1998) 71 Con LR 86 at 112.) *b*

But Chadwick LJ said that it seemed to him that the requirement to which the exercise of the power under cl 18(2) gave rise, that the sub-contract dispute be dealt with 'jointly with the dispute under the main contract', gave rise to two further conditions on the exercise of the power, which he described in these terms: *c*

> 'They are: (i) that at the time when the power is exercised the contractor has a present intention of invoking the provisions of cl 66 of the main contract in order to resolve, as between itself and the employer, the main contract dispute which it has identified; and (ii) that, following the exercise of the power, the contractor does take steps timeously to invoke the provisions of cl 66 in relation to the main contract dispute.' (See (1998) 71 Con LR 86 at 114.) *d*

e

I agree with Chadwick LJ that there is more to this matter than an implied obligation on the contractor to initiate the procedure within a reasonable time. The assumption on which cl 18(2) proceeds is that a dispute has arisen in connection with or arising out of the sub-contract or the carrying out of the sub-contract works which would otherwise fall to be resolved by arbitration under cl 18(1) of the sub-contract. In the typical case a dispute of that kind involves a request by the *f* sub-contractor for payment of money which the contractor has declined to pay under the terms of the sub-contract, and it will normally be in the best interests of the sub-contractor that the dispute between them be resolved as quickly as possible. The effect of the exercise of the power under cl 18(2) is to remove from the sub-contractor the power to take the initiative by referring the dispute to arbitration under cl 18(1). A different dispute resolution procedure is to be *g* substituted, over the timing of which the sub-contractor has no control as it is not a party to the main contract. But the procedure which cl 66 of the main contract describes is a procedure for the resolution of disputes by means of a decision of the engineer which failing that of an arbitrator. A process of negotiation whose purpose is to avoid the necessity of referring the matter for the decision of the *h* engineer whom failing of an arbitrator is a quite different procedure. It is an informal procedure which is conducted without regard to the mechanism for the resolution of disputes set out in the contract. It is not mentioned anywhere in cl 66 of the main contract, nor is it mentioned in cl 18(2) of the sub-contract.

Clause 18(2) of the sub-contract provides that the sub-contractor is to be bound *j* in like manner as the contractor by any decision of the engineer or any award by an arbitrator. But there is nothing in the clause which makes an agreement which results from negotiations between the contractor and the employer binding on the sub-contractor. The result of these negotiations, in which the sub-contractor has no right under its contract with the contractor to participate, may be

unacceptable to the sub-contractor. In that event its dispute with the contractor, which would otherwise have gone to arbitration under cl 18(1), will remain unresolved. That plainly is not a situation which sub-cl 18(2) contemplates. The purpose of cl 18(2) is to avoid the risk of inconsistent findings on matters which arise in connection with the main contract and touch on or concern the works under the sub-contract. The risk of negotiations with the employer resulting in an agreement between the contractor and the employer which is unacceptable to the sub-contractor is not within the mischief that cl 18(2) seeks to avoid. Negotiation is the antithesis of submitting the dispute for the decision of the engineer or an award by an arbitrator.

I would readily accept that it may well be in the best interests of the parties to a dispute to attempt to settle their dispute by negotiation and agreement rather than embarking upon a process of litigation with a view to its resolution by means of an award by an arbitrator. The expense and delay which is inevitable in litigation has the effect of putting up costs and increasing overheads. The hardening of attitudes which results is not good for continuing business relationships. Everyone would agree that it is sensible to avoid those consequences by negotiation wherever possible. But a contractor who seeks to take advantage of the power under cl 18(2) is not entitled to have regard only to its own interests in selecting a means of resolving its dispute with the employer. It must have regard also to the interests of the sub-contractor, which is being deprived of its power to make use of the procedure set out in cl 18(1).

The meaning and effect of cl 18(2) was considered in *Erith Contractors Ltd v Costain Civil Engineering Ltd* [1994] ADR LJ 123. In that case Judge John Loyd QC, sitting as an official referee, said that it was axiomatic that if the contractor requires the sub-contract dispute to be dealt with jointly with the main contract dispute with the employer in accordance with the provisions of cl 66 of the main contract, he is under an obligation to take the necessary steps to have the two disputes dealt with in accordance with cl 66. I agree. Clause 18(2) of the sub-contract does not give the contractor the right to deprive the sub-contractor of the benefit of the procedure in cl 18(1) while he attempts to settle the main contract dispute by negotiation with the employer. There is nothing in either cl 66 or in cl 18(2) to prevent the contractor from attempting to settle the dispute under the main contract by negotiation once it has initiated the procedure that cl 18(2) contemplates. But any delay which is attributable to the negotiation process must be left out of account when consideration is being given to the question whether the contractor has fulfilled its obligation to the sub-contractor to have the dispute which has arisen under the sub-contract resolved within a reasonable time under cl 66.

I would therefore hold that it is an implied condition of the exercise of the power under cl 18(2) that the contractor intends to invoke the procedure under cl 66 of the main contract. This means that it is no answer for the contractor, if challenged on the ground of its failure to invoke that procedure within a reasonable time, to attempt to explain the delay by referring to time which has elapsed due to negotiations entered into with the employer with a view to rendering that procedure unnecessary. My noble and learned friends Lord Cooke of Thorndon and Lord Hobhouse of Woodborough have indicated that they would prefer an objective approach to this matter rather than one which has regard to the subjective intent of the contractor. But I do not believe that the disagreement between us is on a point of any real substance. As my noble and

learned friend Lord Hobhouse has observed, the subjective intent of the contractor may provide evidence of repudiation or anticipatory breach which will deprive it of the right to enforce cl 18(2) against the sub-contractor.

I do not think that the recorder was in error when he held that the notices which the contractor gave to the sub-contractor under cl 18(2) were valid notices. In *M J Gleeson Group plc v Wyatt of Snetterton Ltd* (1994) 42 Con LR 14, the Court of Appeal rejected the sub-contractor's argument that a dispute between the contractor and the employer within the meaning of cl 18(2) can only arise when cl 66 is invoked. The court held that the word 'dispute' in cl 18(2) must be given its ordinary meaning which, in the words of Steyn LJ (at 19) as he then was, prima facie comprehends the case where a claim has been put forward and rejected. It seems to me that this approach is entirely consistent with the opening words of cl 18(2), and I did not understand Mr Ramsay QC for the respondent to contend otherwise.

Where the recorder went wrong, in my opinion, was when he asked himself the question whether it was reasonable for the appellant to embark on negotiations with the employer once it had exercised its power under cl 18(2). That was a question which had no bearing on the question whether the contractor had performed its obligation to invoke the procedure within a reasonable time after service of the relevant notices. Once that question was left out of account, the appellant had no answer to the respondent's case that the contractor had failed to invoke the cl 66 procedure within a reasonable time and that for this reason it was no longer entitled to rely on the cl 18(2) notices.

The procedure required by cl 18(2)

Although it is sufficient for a decision in this appeal to hold that the appellant was in breach of the obligation to invoke the cl 18(2) procedure within a reasonable time, I think it would be appropriate for your Lordships also to say something about the nature of the procedure that is envisaged by this clause. This is because of the views that were expressed in the Court of Appeal on this matter, and because the true meaning of the clause is of general interest and importance to the construction industry.

Sir Christopher Staughton ((1998) 71 Con LR 86 at 111) said in the Court of Appeal that in his judgment the plain wording of cl 18(2) contemplates a tripartite arbitration. He rejected the appellant's argument that what the clause contemplated was: (1) an arbitration in which the contractor put forward the sub-contractor's claims; (2) two separate arbitrations by one arbitrator, who would be bound in the sub-contract arbitration by his findings in the main arbitration; or (3) two separate arbitrations by different arbitrators, the sub-contract arbitrator being bound by the findings of the main contract arbitrator. He said that these alternatives were so unfair to sub-contractors that they could not be supposed to have agreed to it unless they had expressly said so. Nevertheless he recognised that it might well be that the employer could not be compelled to participate in a tripartite arbitration, and he was willing to accept that on his construction of cl 18(2) the appellant had agreed to a procedure which it might not be able to deliver. Chadwick LJ (at 115) also recognised that neither cl 66 nor any other provision in the main contract provided that the employer would be obliged to participate in a joint arbitration. He referred to various circumstances in which a joint arbitration might take place, but he accepted that it would not necessarily do so. However, he too rejected the appellant's suggestions as to

other possible constructions of cl 18(2) on the ground that they were so oppressive and unfair to sub-contractors as to be untenable.

I would be unwilling to place a construction on cl 18(2) which had the result of committing the contractor to a procedure which it plainly could not deliver if the employer declined to agree to modify the procedure laid down in cl 66 of the main contract in order to accommodate it. It is clear that the context in which the words are used in cl 18(2) is one in which the contractor is party to two entirely separate contracts—one with the employer and the other with the sub-contractor. The purpose of cl 18(2) is to enable the contractor to avoid the risk of inconsistent findings as a result of the use of the independent dispute resolution machinery provided for in each contract. The draftsman must have had in the forefront of his mind the fact that the dispute resolution machinery provided for in each contract was binding only on the parties to that contract. And both parties to the sub-contract must be taken to have known perfectly well when they entered into it that nothing that was said in cl 18(2) about the provisions of cl 66 of the main contract would bind the employer. Yet there is nothing in cl 18(2) to indicate that its operation is conditional on the contractor being able to secure the agreement of the employer to implement it. These considerations suggest strongly that the clause should be read in such a way that it is capable of being operated without the employer's agreement.

A further consideration supports this view. That is the position of the arbitrator appointed under cl 66. He derives his authority to pronounce decisions which bind the parties to the arbitration purely and solely from the agreement by virtue of which he has been appointed. This is so whether his appointment was by agreement between the parties to the contract which contains the arbitration clause or was by the use of the agreed appointment machinery. He has no jurisdiction of any kind over any other party, as the entire procedure on which he is engaged depends upon contract. For example, the only parties who are liable for the payment of his fees and expenses are the parties to the contract by which he was appointed (see s 28 of the Arbitration Act 1996). Accordingly when cl 18(2) refers to the dispute under the sub-contract being dealt with 'jointly with the dispute under the main contract in accordance with the provisions of clause 66', it must be taken to have in view the fact that what cl 66 envisages, once the dispute has left the engineer, is an arbitration in which the arbitrator derives his authority to issue a binding award solely from the contract which the contractor and the employer have entered into. No provision is made in cl 18(2) for securing the appointment of an arbitrator in which all three parties have participated either by agreeing to his appointment as their arbitrator or by agreeing to the machinery by which he has been appointed. Indeed the person who is to act as arbitrator under cl 66 may already have been agreed or appointed before the contractor gives notice to the sub-contractor under cl 18(2).

I do not think that there can be such a thing as a tripartite arbitration that does not have as its starting point a tripartite method of conferring jurisdiction on the arbitrator. Clause 18(2) does not address this difficulty. I would conclude that, whatever else it has in mind, it is not a tripartite arbitration in the sense of an arbitration in which the employer, the contractor and the sub-contractor are all engaged as parties to the proceedings before the cl 66 arbitrator. In this situation some other meaning must be found for the expression 'to be dealt with jointly with the dispute under the main contract' in cl 18(2).

One possibility lies in the fact that both cl 66 of the main contract and cl 18(1) of the sub-contract refer to the Institution of Civil Engineers' Arbitration Procedure (1983) (the 1983 procedure). This, as I understand it, is the argument which has found favour with my noble and learned friends Lord Cooke and Lord Hobhouse. Clause 66(5)(a) of the ICE Conditions provides that any reference to arbitration under that clause 'shall' be conducted in accordance with the procedure. In the amended form of cl 66 which was adopted for the purposes of the main contract the word 'shall' has been replaced by the word 'may'. Conversely, while cl 18(1) of the FCEC Standard Form provides that any reference to arbitration under that clause 'may' be conducted in accordance with the 1983 procedure, the clause as amended for the purposes of the sub-contract has replaced the word 'may' with the word 'shall'. Rule 7 of the 1983 procedure provides:

> '**Rule 7. Power to order concurrent Hearings**
>
> 7.1 Where disputes or differences have arisen under two or more contracts each concerned wholly or mainly with the same subject matter and the resulting arbitrations have been referred to the same arbitrator he may with the agreement of all the parties concerned or upon the application of one of the parties being a party to all the contracts involved order that the whole or any part of the matters at issue shall be heard together upon such terms or conditions as the arbitrator thinks fit.
>
> 7.2 Where an order for concurrent hearings has been made under Rule 7.1 the arbitrator shall nevertheless make and publish separate awards unless the parties otherwise agree but the arbitrator may if he thinks fit prepare one combined set of reasons to cover all the awards.'

A revised version of the procedure was issued in 1997 in which this rule appears in almost identical terms as rule 9. As the reference in the contracts with which your Lordships are concerned in this case was to the 1983 procedure, I propose to base my observations on the terms of rule 7 of that version of the procedure.

It is plain that one of the preconditions for the operation of rule 7 is the fact that disputes have arisen under two or more contracts which have resulted in a reference of these disputes to the same arbitrator. It is conceivable that this precondition will have been satisfied in a case where a reference of a dispute to arbitration under cl 66 of the main contract has been accompanied by a reference of a dispute to arbitration under cl 18(1) of the sub-contract. But in the situation to which cl 18(2) applies no arbitrator will have been agreed or appointed under cl 18(1). Nor does cl 18(2) provide for the appointment of an arbitrator for the purposes of resolving the dispute between the contractor and the sub-contractor which is the subject of the notice given under that clause. The reference at the end of cl 18(2) to 'any decision of the engineer or any award by an arbitrator' is to a decision of the engineer or an award by the arbitrator agreed or appointed under cl 66 of the main contract. The absence of any machinery in cl 18(2) for the reference of the dispute between the contractor and the sub-contractor to an arbitrator agreed or appointed under the sub-contract means that cl 18(2) has been drafted on the assumption that there will be only one arbitration and only one arbitrator—that is to say, the arbitrator agreed or appointed under cl 66 of the main contract. The assumption is not that the arbitrator will make an *award* against the sub-contractor—he could not do that unless the sub-contractor was a party to his appointment as arbitrator—but that the arbitrator's award against the

contractor will be binding on the sub-contractor under the contractual arrangement between the contractor and the sub-contractor which is set out in cl 18(2) of the sub-contract. In this situation I do not see how rule 7 of the 1983 procedure as to concurrent hearings can have any application.

My noble and learned friend Lord Hobhouse states that the contractor must 'procure' that the arbitrator for the purposes of cl 18(2) is the same as that for the purposes of cl 66. If he can achieve this result then, of course, everything will fall into place and the system which he and Lord Cooke have described will be able to operate. But neither the main contract nor the sub-contract nor the 1983 procedure provide any mechanism by which the contractor may procure such an appointment if the employer or the cl 66 arbitrator are unwilling to agree to it. Unless they will co-operate with him in setting up this procedure—which neither is obliged to do and which may have an effect on the smooth running of an arbitration under cl 66 which they may find objectionable—there is nothing the contractor can do about it.

A further difficulty about the 1983 procedure in the present case is the fact that under the amended cl 66 the arbitrator is not obliged to conduct the arbitration under that clause under that procedure. Even if he decides to do so, he is not bound by rule 7.1 to order that there shall be a concurrent hearing. He may be expected to do so if all the parties concerned agree that he should do so, but if the contractor's application is opposed by the employer the prospect of a concurrent hearing is much less certain. At best therefore the 1983 procedure provides a facility which may or may not be available according to the circumstances and the position which the other parties wish to adopt when one of them wishes to make use of it. But my main reason for discounting this procedure as a solution to the problem raised by cl 18(2) is that that clause envisages that there will be only one arbitration and only one arbitrator.

Of the three possible solutions which were advanced in the Court of Appeal only one deserves further scrutiny. This is that the joint mechanism for the resolution of the dispute that cl 18(2) assumes is one which requires the contractor to represent the interests of the sub-contractor in the proceedings before the engineer and the arbitrator under the main contract.

The use of the words 'shall be dealt with jointly with the dispute under the main contract' clearly admit of this construction. No particular procedure is laid down, but the fact that the provisions of cl 66 of the main contract are to be used indicates that the mechanism for the resolution of the dispute is one in which the sub-contractor cannot participate directly as it is not a party to the main contract. At first sight it might appear that there must inevitably be a conflict of interest between the contractor and the sub-contractor which would make it impossible for the contractor to present the sub-contractor's argument jointly with its own argument. But the likelihood that such a conflict of interest will arise in practice is much reduced once one appreciates the consequences of the fact that the sub-contract works will always fall, in a question with the employer, to be regarded as the sole responsibility of the contractor under the main contract. Payment for works undertaken by the sub-contractor can only be obtained from the employer under the provisions of the main contract. And the financial consequences of any delay in the sub-contract works must also be worked out through the provisions of the main contract. The contractor's interest in disputes arising under the sub-contract will in many cases be confined to obtaining money from the employer which will enable it to settle such disputes and to retain for

itself the appropriate percentage uplift on the rates and prices quoted by the sub-contractor for the carrying out of the sub-contract works. *a*

The question whether this procedure is unfair and oppressive to the sub-contractor is, according to ordinary principles, a matter of judgment for the parties to take when they are entering into their contract. It is not for us to attempt to rewrite the contract for the parties according to our own conception of what is fair and unfair. In *M J Gleeson Group plc v Wyatt of Snetterton Ltd* (1994) 42 Con LR 14 at 20 *b* Steyn LJ accepted that cl 18(2) was capable of causing serious financial difficulties for sub-contractors. But he insisted that it was not for the court to rewrite the sub-contract in order to substitute its judgment of what was commercially fair between the parties.

That is not to say that the contractor is free to do what it likes when making use of the procedure under cl 18(2). The fact that the sub-contractor is unable to *c* participate directly in the procedures laid down by cl 66 carries with it obligations which the law will imply in the interests of fairness. The contractor must observe these obligations if it wishes to enforce any decision of the engineer or any award of the arbitrator against the sub-contractor in terms of that clause. The sub-contractor must be kept informed about the progress of the procedure and must be given a *d* reasonable opportunity to provide the contractor with the information which is needed to present the arguments that it wishes to present to the engineer and in his turn to the arbitrator.

At the stage when the matter is before the engineer for his decision, the practice is for the engineer to communicate only with the contractor. It is not the *e* practice of the engineer to engage in tripartite discussions with the employer, the contractor and the various sub-contractors. In these circumstances the obligation on the contractor will normally involve placing before the engineer for his consideration all the relevant statements and documents on which the sub-contractor wishes to rely for the purposes of his dispute with the contractor. It will also involve providing copies to the sub-contractor of the submissions *f* made on its behalf and of the decision of the engineer when it is known. The time limits imposed by cl 66 for requiring that the decision of the engineer be referred to arbitration is binding on the sub-contractor for the purposes of his dispute with the contractor in terms of cl 18(4) of the sub-contract. If the contractor is content with the engineer's decision and the sub-contractor does not request that the matter be referred to arbitration within those time limits, the engineer's decision *g* is final and binding upon the sub-contractor in terms of cl 18(2). If the sub-contractor intimates to the contractor that it wishes the matter to be referred to the arbitrator it is the duty of the contractor to initiate that procedure without delay under the provisions of cl 66 of the main contract.

Clause 18(2) assumes that once an arbitrator has been appointed the contractor *h* will deal with all the issues which the sub-contractor wishes to raise in the course of the presentation of its case to the arbitrator. The sub-contractor has no right to appear as a party to the arbitration between the employer and the contractor. So here again the contractor must keep the sub-contractor informed about progress and must take all reasonable steps to present the sub-contractor's case to *j* the arbitrator. This will involve providing the sub-contractor with a reasonable opportunity to supply the contractor with the necessary evidence so that the contractor may then place that evidence before the arbitrator.

I do not think that it can be suggested that the procedure which seems to me to have been envisaged by cl 18(2) is ideal for the resolution of these disputes.

But, in the absence of prior agreement between the employer and the contractor that they will submit such disputes to a tripartite arbitration procedure, there is no way in which either the employer or the cl 66 arbitrator can be forced to submit to such procedure by an agreement entered into between the contractor and the sub-contractor. If the cl 18(2) procedure were to be operated in the way that I have described it would provide a reasonable solution to the problems caused by the contractual context which surrounds such disputes. In the end of the day the parties would require to exercise their own judgment before entering into a contract in these terms as to whether they wished to commit themselves to this procedure. However that may be, as my noble and learned friend Lord Clyde has said, the difference of view which has arisen between us as to the interpretation of the clause indicates that further thought should now be given to providing the machinery that is needed to ensure that a joint arbitration can be achieved by the contractor when he wishes to invoke cl 18(2) against the sub-contractor.

Conclusion

I consider that the appellant was in breach of the implied obligation to initiate the procedure under cl 66 of the main contract within a reasonable time. What amounts to a reasonable time is a question of fact in each case, as to which no hard and fast rules can be laid down. But in this case time was allowed to elapse due to the appellant's wish to negotiate a settlement rather than to make use of the procedure which cl 66 provides for the resolution of disputes. This was an irrelevant consideration, as it had nothing to do with the procedure contemplated by cl 18(2). In these circumstances the appellant had no answer to the respondent's contention that, as more than a reasonable time had elapsed, it was no longer in a position to resist its demand for a reference of its dispute to arbitration under cl 18(1). I would dismiss the appeal.

LORD COOKE OF THORNDON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hope of Craighead. For the reasons which he gives I would dismiss the appeal. But I have difficulties on two of the other matters with which my noble and learned friend deals; and, although it is unnecessary to do so for the purpose of disposing of the appeal, I think it right, like him, to say something about them as they are of general importance in the construction industry.

First, I entirely agree that a contractor who wishes to invoke against a sub-contractor the procedure under cl 18(2) of the sub-contract is bound to initiate and progress the procedure under cl 66 of the main contract within reasonable times. In particular the contractor is not entitled to defer the main contract procedure while he negotiates with the employer. Of course there is nothing to prevent his negotiating, but he cannot delay for that purpose. It is common experience indeed that effective negotiation can be promoted by the pendency of hearings. This very case happens to provide an illustration. Your Lordships have been informed by the solicitors that when, soon after the hearing before your Lordships' Committee, the arbitration between the sub-contractor and the contractor commenced at long last on 11 May 2000, their dispute was settled at the end of the first day.

I agree, too, that what is a reasonable time is a question of fact. The contractor's duty under cl 18(2) with regard to the cl 66 procedure was therefore encapsulated

happily by Sir Christopher Staughton ((1998) 71 Con LR 86 at 112) as being to proceed with all deliberate speed. Balthazar's all convenient speed would not do. In this case the contractor manifestly did not fulfil that condition and so forfeited the benefit of cl 18(2), leaving cl 18(1) available to the sub-contractor.

A connected point on which I have some hesitation in agreeing with Lord Hope and Chadwick LJ is whether it is necessary to identify as a further and separate condition that at the time when the power to invoke cl 18(2) is exercised the contractor must have a present intention of invoking cl 66. That would seem to entail a subjective inquiry of a kind not common in contract law. If the contractor does proceed within a reasonable time, that will normally be enough. On the other hand an unreasonable delay will normally be fatal. A proclaimed intention to delay, as here, will normally disqualify the contractor from relying on cl 18(2), but this is because a reasonable party in the shoes of the sub-contractor will be justified in taking the contractor as having repudiated the obligation of reasonable speed. The test would seem to be objective. I acknowledge, however, that this point may seem something of a cavil.

The second matter may be of more moment. I share the view of the Court of Appeal ((1998) 71 Con LR 86) that cl 18(2) of the sub-contract contemplates a tripartite arbitration in which the sub-contractor can take part. Where cl 18(2) applies there will be at least two disputes. They will be linked because in the opinion of the contractor they both touch or concern the sub-contract works. Clause 18(2) contemplates that they will be dealt with jointly under the procedure specified in cl 66 of the main contract. If this cannot be or is not done, the contractor will no longer be able to utilise cl 18(2) and the sub-contractor will be free to pursue a separate arbitration with the contractor under cl 18(1), as eventually happened in this case.

The question becomes what is a joint dealing with the disputes within the meaning of cl 18(2). As to the employer's engineer, in the ordinary course he is not bound to communicate directly with the sub-contractor nor to give anything in the nature of a formal hearing. Provided that he acts even-handedly, it will no doubt usually satisfy cl 18(2) if he receives the sub-contractor's claims and any supporting representations relayed through the contractor, and, after considering the contractor's representations also, determines the dispute between the contractor and the sub-contractor as well as the dispute between the contractor and the employer.

If there is an arbitration, cl 18(2) likewise contemplates a dealing with the disputes jointly. It is plain from the wording of the subclause that they remain different disputes between different parties, though linked in their subject matter as they touch or concern the sub-contract works. The power to order concurrent hearings conferred by rule 7 of the Civil Engineers' Arbitration Procedure (1983) or an equivalent present-day rule may be apt for such a case. I think it must be that kind of procedure which cl 18(2) contemplates.

The foregoing approach requires no rewriting of the sub-contract. It does no more than give realistic effect to the provisions of cl 18(2) by recognising that the parties to the sub-contract have agreed that their dispute will be determined by the engineer acting under the main contract or an arbitrator appointed under the main contract, as the case may be. The last sentence of cl 18(2) is explicit that the sub-contractor is to become bound thereby. It may well have been thought desirable to emphasise this, as only the contractor can take advantage of the subclause. The approach also gives full effect to the purpose of cl 18(2) in providing

a machinery whereby the contractor may avoid inconsistent findings. The contrary view recognises that under cl 18(2) there may be an award of the arbitrator against the sub-contractor. It is difficult to see how that can be so unless the sub-contractor is a party to an arbitration before the arbitrator.

The procedure contemplated by cl 18(2) might fail for various reasons. For instance, the employer is not bound by the sub-contract and may not be willing to concur in a joint dealing with the disputes. Similarly the engineer might not be willing to determine the dispute between the contractor and the sub-contractor. The contractor might negotiate a settlement with the employer only or might be content not to take an engineer's decision to arbitration. Again, the arbitrator under the main contract might be unwilling to determine a sub-contract dispute or the power to order concurrent hearings might not be exercised. These illustrations are not exhaustive. If, for whatever reason, the joint procedure fails without default on the part of the sub-contractor, the latter will be able to fall back on arbitration under cl 18(1).

The last sentence of cl 18(4) of the sub-contract is a puzzling provision which in argument counsel could do little to elucidate. I am inclined to think that its intention was to impose on the sub-contractor the same time limits regarding the reference of an engineer's decision to arbitration as apply to the contractor. This would be relevant, for instance, if the contractor were to accept the engineer's decision and only the sub-contractor sought an arbitration. Be that as it may, the import of the last sentence of cl 18(4) is not clear enough, in my view, to affect the natural and ordinary meaning of cl 18(2).

In the Court of Appeal counsel for the contractor disclaimed the interpretation of cl 18(2) that it envisages an arbitration in which the contractor puts forward the sub-contractor's claims. He described it as untenable. In this House he was nevertheless permitted to advance it; but I prefer his earlier position. As Lord Hope points out, although the work under the main contract may be described as executed on the contractor's behalf by a sub-contractor, the main contract and any sub-contracts are designed to operate independently as regards the execution, completion and maintenance of the contract or sub-contract works and the payments due to the contractor and to the sub-contractor respectively. As my noble and learned friend also says, the likelihood of a conflict of interest is reduced (perhaps much reduced) by the fact that in a question with the employer the sub-contract works will be regarded as the sole responsibility of the contractor. Even so, in an arbitration between the sub-contractor and the contractor it would be incongruous (perhaps it is not too much to say grotesque) that the contractor should be responsible for presenting the arguments against himself. And the incongruity is not diminished by the circumstance that the same arbitrator is dealing jointly with a dispute between the contractor and the employer. It may be added that, according to a standard work, 'it is only rarely that a sub-contractor's entitlement or liability will correspond exactly with the main contractor's corresponding rights or liabilities in the main contract' (*Hudson's Building and Engineering Contracts* (11th edn, 1995) vol 2, p 1638 (para 18–116)).

Accordingly I agree with the unanimous opinion of the Court of Appeal that cl 18(2) envisages that disputes under the different contracts will be dealt with jointly; and that it would be neither consistent with the terms of cl 18(2) nor fair to the sub-contractor to treat the sub-contractor's claims against the contractor as merely subsumed within the contractor's claims against the employer.

LORD CLYDE. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hope of Craighead. I agree with it, and for the reasons he gives I too would dismiss the appeal.

I should add, in light of the evident divergence of views about the operation of cl 18(2), that I agree with the view expressed by my noble and learned friend Lord Hope. The last words of the clause seem to me to point to the conclusion that what is envisaged is an arbitration to which the employer and the contractor are the only formal parties. But, since the clause is clearly open to differences in interpretation, it would certainly seem desirable that consideration should be given to a revision of its terms, and, if a joint arbitration is thought to be the fair and proper course, then the clause should provide the machinery for that to be achieved.

LORD HOBHOUSE OF WOODBOROUGH. My Lords, this appeal concerns the marriage of the arbitration provisions of respectively a sub-contract on the Federation of Civil Engineering Contractors' (FCEC) Standard Form of Sub-contract (September 1984 edn) (the Blue Form) and a main contract on the Institution of Civil Engineers Standard Form of Contract for Civil Engineering Works (5th edn; revised January 1979; reprinted January 1986) (the ICE Conditions). The parties to the appeal are the contractor and one of the sub-contractors. The sub-contractor is only a party to the sub-contract and it is with the construction and correct understanding of this contract that the appeal is primarily concerned. The employer is not a party to the sub-contract and is not a party to the present proceedings.

The sub-contract has, however, to be construed having regard to the surrounding circumstances in which it was made and the references to the commercial and contractual structure of which it forms a part. The sub-contract, as one would expect, makes numerous references to the main contract and many of its provisions are expressed in terms of the main contract and its provisions. The sub-contract recites that the contractor has entered into the main contract and that the sub-contractor has 'been afforded the opportunity to read and note the provisions of the main contract' except for the prices. The arbitration provision in the sub-contract (cl 18), as does that in the main contract (cl 66), refers to the 'Institution of Civil Engineers' Arbitration Procedure (1983)' (the 1983 procedure) (and any amendment or modification of it in force at the time of the appointment of the arbitrator). This procedure is something to which all the relevant persons have agreed and to which I will have to refer again later in this speech.

The circumstances surrounding the making of the sub-contract were normal for those involved in the construction industry. No special surrounding circumstances are relied on. Thus it is contemplated that the performance and completion of the main contract works will involve a number of other sub-contractors besides the parties to this particular sub-contract. It must also be contemplated that both external factors and the performance of other sub-contractors may affect the performance of the sub-contract by the sub-contractor, as indeed may the performance of the contractor of any part of the works which he has reserved for himself. Variations may be ordered. Any of these things may affect the cost to the sub-contractor of doing the sub-contract work, the time it takes and its extent. Likewise these things may affect the remuneration to which the sub-contractor is entitled from the contractor and any liability of the sub-contractor to the contractor (and vice versa).

a The financial consequences may involve any of a number of conflicts of interest and various combinations of them. A delay may be attributed to one sub-contractor or another; the contractor may or may not be neutral. One sub-contractor may be blaming the contractor who may be blaming the employer who may be blaming (factually) another sub-contractor who may be blaming, say, soil conditions. A disputed method of measuring or pricing the work may be b advantageous to one sub-contractor but not to another, or to a sub-contractor and the employer but not to the contractor. Major construction works are complex operations. It is easy to approach contracts as if the parties to them were the only persons involved whereas the sub-contract is merely one of a number of interlocking contracts and the parties are merely two of a considerable number of participants in a project performing their tasks in relation to one another.

c In such a situation, any dispute is capable of affecting a number of participants and affecting them in a different way. Making provision for dispute resolution becomes correspondingly complex. Where the resolution is left to the court, the procedures of the court can and do accommodate this complexity. But where the resolution is to be by hostile arbitration the problems are greater. Commercial d arbitration is a contractual concept originating from the law of agency. The arbitrator derives his jurisdiction to decide a dispute from the authority given to him by the parties to that dispute. Unless he has been appointed ad hoc, he will derive his authority from an appointment made under an antecedent contractual provision which will bind only those bound by that contract. Accordingly an appointment under the main contract will only confer jurisdiction on the e arbitrator as between the employer and the contractor and an appointment under the sub-contract will only do so as between the contractor and the sub-contractor. All this is elementary.

But practical and legal problems arise. Some additional agreement is required where it is wished to authorise an arbitrator to decide a dispute as between the f parties to more than one contract. This is not a problem which is peculiar to the construction industry. It is to be found in other fields as well, for example, shipping and charters and sub-charters. The problem exists at two levels. There is the capacity of the arbitrator to make an award binding upon a given person. There is also the capacity of an arbitrator, otherwise than by the express consent of all those involved, to hold a joint hearing at which all the interested parties g have a right to adduce evidence and be heard in relation to any issue relevant to the issue of an award binding upon them. In the absence of specific agreement, each arbitration must be kept distinct; only the parties to the dispute to be decided by the award and who have given the arbitrator the authority to make that award may be present at and take part in the arbitration hearing. Thus, other h things being equal, each sub-contract dispute must be arbitrated and decided independently of the arbitration and decision of a dispute under the main contract or another sub-contract. Again, this is elementary and the Arbitration Act 1996, unlike the rules of court, does not provide the answer.

It is for the commercial parties to provide the answer, if they wish to do so, by j making the appropriate contracts. The Institution of Civil Engineers (ICE) has laid the ground for them to do so in its 'Arbitration Procedure'. As previously observed, the version relevant to this appeal is that of 1983. We understand that there are later versions which may or may not resolve some of the matters presently under discussion. Rule 26 provides that the 1983 procedure shall apply where the parties have at any time so agreed or the president of the ICE so directs

when making an appointment or the arbitrator so stipulates at the time of his appointment. (If the arbitrator does so stipulate, both parties can within 14 days agree otherwise and terminate his appointment.) The 1983 procedure does not apply to arbitrations under the law of Scotland.

Rule 7 of the 1983 procedure has already been quoted by my noble and learned friend Lord Hope and I will not set it out again. It applies where there are disputes which arise under more than one contract and which are concerned wholly or mainly with the same subject matter and the same arbitrator has been appointed. That arbitrator may, either with the agreement of all the parties concerned or on the application of one of those parties being a party who is a party to all of the contracts under which the dispute has arisen and the arbitrator has been appointed, order that the whole or part of the matters in issue shall be heard together. The arbitrator is given a wide discretion as to the terms on which he does this. The arbitrator still has (unless otherwise agreed) to make separate awards in respect of each dispute but can give a single set of reasons.

Rule 7 provides a sensible scheme for hearing related arbitration disputes. The only substantial precondition is that the parties must procure that the same arbitrator is appointed in all the arbitrations. Thereafter the arbitrator is given adequate powers to make arrangements for the hearing which are appropriate to arrive at a just outcome for all concerned without causing any undue expense, delay or inconvenience to any particular party. The arbitrator's awards will (or should) provide consistency in the decision of related issues. It is therefore not surprising that both the main contract and the sub-contract make express use of the 1983 procedure. The use if any that is made of rule 7 is in the discretion of the arbitrator. If he decides to exercise his discretion no party has the right to gainsay him.

Clause 66 of the main contract was reworded by the parties. It is a suitably detailed arbitration provision of a type which is fully familiar to those involved with construction contracts. It has already been quoted by my noble and learned friend; it did not fully follow the wording of the 1979 form. The use of the 1983 procedure by the arbitrator is not mandatory but he is authorised to use it; therefore, for present purposes the alteration makes no difference. The clause provides for any dispute or difference to proceed through various stages in accordance with a timetable and imposes certain limits (irrelevant in the present case) upon the ability to refer disputes to arbitration before completion. The involvement of the engineer in the earlier stages of the dispute could in theory affect the involvement of a sub-contractor in the earlier stages but, if it be relevant, not in practice.

My Lords, with this somewhat lengthy but necessary introduction, I come to cl 18 of the sub-contract. Again, I will not re-quote it. Paragraph (2) gives the contractor an option. I agree that the contractor was here entitled to serve a para (2) notice. There was a dispute of the requisite character and no arbitrator had been appointed under para (1). It is the contractor's choice whether or not he chooses to exercise the option. In making up his mind he need not consult any commercial interest but his own. Where a contractual option is given to a party it is his to exercise in his own interest unless the contract (expressly, impliedly or by inference) provides otherwise. But having chosen to exercise it he must perform the obligations attached to that choice as well as take the benefit. The effect of the exercise of the option is to displace the arbitration procedure provided for in para (1) and replace it with that in para (2) (or (3)). In my judgment there are

certain implied obligations arising from the exercise of the option under para (2) and it is a condition of the contractor's right to proceed under para (2) and not para (1) that the contractor perform those obligations. If the contractor fails to perform the obligations or evinces an intention not to or demonstrates an unwillingness or inability to do so, he can no longer rely on and enforce para (2) and must accept a para (1) arbitration. The principles which apply are those governing the performance of an obligation and the loss of the right to enforce a contractual obligation (cf repudiation and anticipatory breach). The subjective intent of the contractor is not relevant except in so far as it may provide evidence to support one of the above conclusions. On this point I must, like my noble and learned friend Lord Cooke of Thorndon, respectfully disagree with my noble and learned friend Lord Hope.

In the present case it is not in dispute that the contractors came under an obligation to proceed with the arbitration under para (2) and failed to do so. The contractors argue that their time for doing so was open-ended, as they were engaged in negotiations with the employers and it was reasonable for them to do so. This argument was mistaken. The obligation is not to act reasonably but to carry out the obligation within a reasonable time. What is a reasonable time is the time reasonably required to carry out that obligation. (The time limits reiterated in para (4) are not irrelevant.) I agree with my noble and learned friends that the Court of Appeal ((1998) 71 Con LR 86) were right to reject the argument.

This conclusion suffices for the dismissal of the appeal. But, like your Lordships, I agree that it is useful that we should provide assistance by answering the other questions argued on this appeal concerning the meaning and effect of the second paragraph. On this I agree with my noble and learned friend Lord Cooke and must respectfully disagree with my noble and learned friend Lord Hope.

The second paragraph must be construed in conjunction with the remainder of the clause and the sub-contract and with cl 66 of the main contract as amended and the procedure, in particular rule 7. When this is done I consider that the paragraph is tolerably clear. The contractor must procure that the arbitrator for the purpose of para (2) is the same as that for the purpose of cl 66. This is borne out by the condition precedent that an arbitrator shall not already have been appointed under para (1), the absence of any separate procedure for appointment under para (2) and the terms of rule 7—'have been referred to the same arbitrator'.

Next, the contractor must procure that the arbitrator is willing to apply, and make an order under, rule 7. This is so that there can be an arbitration which deals 'jointly' with the disputes under both the contracts. In the context of cll 18 and 66 of the main contract and the 1983 procedure to which they both refer, 'jointly' is a reference to the procedure authorised by rule 7. The resultant award will be one which will bind both the contractor and the sub-contractor. Anything less than the rule 7 procedure will not ensure natural justice to the sub-contractor. I agree with those who have expressed the view that it would be both uncommercial and unprincipled to construe para (2) as requiring the sub-contractor to be bound by an arbitration from which he was excluded and to which the only parties were persons who might well both have a conflict of interest with him. Further, as will be apparent from what I have said earlier about the surrounding circumstances, in no way unusual, in which this contract was made, it does not remove these objections to suggest that the contractor could be

relied upon to present the arguments and evidence of the sub-contractor or sub-contractors to the main contract arbitrator. It is also hard to visualise how the arbitrator would deal with this situation given that arbitration, like litigation, is essentially adversarial. One might just be driven to accept that the parties had agreed to some of these unlikely consequences if they had not also agreed, as they have (and as has the employer), to the 1983 procedure and rule 7.

One minor point remains. Paragraph (2) also refers to the engineer and the sub-contractor being bound by his decisions. In the pre-arbitration stage all decisions are provisional in the sense that they can be challenged and reviewed provided the stipulated procedure is followed. This requirement is also to be found in para (4). It is not one which need cause significant difficulties for the sub-contractor who probably can procure that his view is put before the engineer. The only addition that this makes is therefore that it gives rise to a further implied obligation of the contractor to give any requisite notices to protect the rights of the sub-contractor and keep open his right to challenge the engineer's decision in the arbitration. If the contractor fails to do this, he will have failed to preserve the position of the sub-contractor in the para (2) arbitration and will have created a disparity which makes it no longer appropriate that the sub-contractor should be bound under para (2).

I agree that the appeal should be dismissed.

LORD MILLETT. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Cooke of Thorndon and Lord Hope of Craighead. On the procedure contemplated by cl 18(2) of the contract I prefer Lord Cooke's reasoning, which appears to me to give full effect to the fact that the contract requires two separate arbitrations to be dealt with jointly. Subject to this point, I agree with the speech of Lord Hope, and for the reasons he gives I too would dismiss the appeal.

Appeal dismissed.

Kate O'Hanlon Barrister.

Re Proulx

R v Bow Street Magistrates' Court and another, ex parte Proulx

QUEEN'S BENCH DIVISION, DIVISIONAL COURT

MANCE LJ AND NEWMAN J

19–23 JUNE, 28 JULY 2000

Extradition – Committal – Evidence – Exclusion of evidence – Circumstances in which evidence obtained – Confession – Applicant being suspected of murder committed in Canada – Applicant making confessions during undercover operation by Canadian police in England – Confessions forming evidential basis of extradition proceedings – Magistrate not excluding confessions – Whether evidence ought to have been excluded – Approach to be adopted by Divisional Court when reviewing magistrate's decision on admissibility in extradition proceedings – Police and Criminal Evidence Act 1984, ss 76, 78 – Extradition Act 1989, s 9(8).

Criminal evidence – Admissions and confessions – Confession obtained in circumstances likely to render unreliable 'any confession' made by accused – Meaning of 'any confession' – Police and Criminal Evidence Act 1984, s 76(2)(b).

The Canadian police suspected P, who was living in England, of having committed a murder in Canada. In order to obtain evidence, they launched an undercover operation in England with the co-operation of the local police. During the course of that operation, P made statements to a Canadian police officer, confessing to the killing. In subsequent proceedings for P's extradition, the stipendiary magistrate concluded that those confessions satisfied the evidential requirements of s 9(8)[a] of the Extradition Act 1989, and made an order for P's committal to custody pending the Secretary of State's decision on his return to Canada. P applied for habeas corpus and judicial review, contending that the confessions ought to have been excluded under s 76(2)(b)[b] of the Police and Criminal Evidence Act 1984. That provision required the court to exclude from evidence a confession which was or might have been obtained in consequence of anything said or done which was likely, in the circumstances, to render unreliable 'any confession' which the accused might make 'in consequence thereof'. Alternatively, he contended that the confessions ought to have been excluded under s 78[c] of the 1984 Act which gave the court a discretion to exclude evidence if, having regard to all the circumstances, including the circumstances in which the evidence was obtained, its admission 'would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'. In determining those issues, the Divisional Court considered the approach to be adopted on a review of a magistrate's decision on the admissibility of evidence in extradition proceedings. It also considered, inter alia, the meaning of the term 'any confession' in s 76(2)(b) of the 1984 Act.

a Section 9, so far as material, is set out at p 62 *b* to *d*, post

b Section 76 is set out at p 71 *a* to *c*, post

c Section 78, so far as material, is set out at p 71 *f g*, post

Held – (1) Provided that a magistrate had correctly directed himself on the law, the Divisional Court would only interfere with his findings of fact and assessment of their significance when ruling on the admissibility of evidence in the extradition context if they were outside the range of conclusions open to a reasonable magistrate. Thus a magistrate's decision on the admissibility of evidence under s 76 of the 1984 Act, in such a context, would only be reviewed on those grounds. Such an approach was justified by the context of extradition, when any issue of admissibility would be revisited at trial, and by the fact that the statute made the magistrate the primary decision maker (see p 73 *c* to *e*, p 74 *d e* and p 90 *c*, post); *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701 applied.

(2) The reference to 'any confession' in s 76(2)(b) of the 1984 Act was to be understood as indicating 'any such' or 'such a' confession as the accused had made. Thus in the instant case, the relevant confessions were those made by P, and the test in s 76 could not be satisfied by postulating some entirely different confession. Moreover, the magistrate had been entitled to conclude that P's confessions were not obtained as a result of things said or done which were likely in the circumstances to render them unreliable within the meaning of s 76 (see p 76 *j* to p 77 *c*, p 79 *h* to p 80 *a*, p 81 *g* and p 90 *c*, post); *R v Barry* (1992) Cr App R 384 considered.

(3) Where a magistrate was concerned, in extradition proceedings, with the fairness of admitting evidence, he was entitled and bound to have regard to the extradition context in which the issue arose. His decision whether or not to admit the evidence was solely in and for the purpose of his determination on the issue of extradition. The trial judge in the proposed country of trial remained the person who should and would determine the critical issue of the admission of such evidence at trial. Thus, in the instant case, the question for the magistrate had not been whether the confessions would fall to be excluded in a purely English context. Rather, it was whether, bearing in mind that the ultimate issue was whether P should be extradited to stand trial in Canada, the magistrate should under s 78 of the 1984 Act exclude the confessions from consideration as part of the evidence. A magistrate ought only to exclude evidence where to admit it would outrage civilised values. The circumstances of the instant case did not fall within that exceptional class, and the magistrate had been right to refuse to exclude the confessions under s 78. Accordingly, the applications would be dismissed (see p 75 *f* to *j*, p 86 *g*, p 88 *g h*, p 89 *g* and p 90 *b c*, post); dicta of Lord Hoffmann in *R v Governor of Brixton Prison, ex p Levin* [1997] 3 All ER 289 at 295 applied.

Notes

For extradition and for the admissibility of confessions, see respectively 11(1) *Halsbury's Laws* (4th edn reissue) paras 787–800 and 11(2) *Halsbury's Laws* (4th edn reissue) para 1124.

For the Police and Criminal Evidence Act 1984, ss 76, 78, see 17 *Halsbury's Statutes* (4th edn) (1999 reissue) 234, 236.

For the Extradition Act 1989, s 9, see 17 *Halsbury's Statutes* (4th edn) (1999 reissue) 698.

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Applications for habeas corpus and judicial review

By applications lodged on 16 September 1999, Armand Michael Proulx applied (i) for a writ of habeas corpus to be issued against the governor of Brixton Prison, and (ii) for judicial review of the decision of the Bow Street Stipendiary Magistrate (Nicholas Evans) on 2 September 1999 ordering his committal to custody under s 9(8) of the Extradition Act 1989 pending the outcome of the decision of the Secretary of State for the Home Department on the request of the government of Canada for his extradition. The facts are set out in the judgment of Mance LJ.

Michel Massih QC and *Mark Summers* (instructed by *Lound Mulrenan*) for the applicant.
John Hardy (instructed by the *Crown Prosecution Service*) for the respondents.

Cur adv vult

28 July 2000. The following judgments were delivered.

MANCE LJ.

INTRODUCTION

1. During the night of 25/26 March 1995 Stacey Koehler was killed by blows struck to the head with a heavy implement in her flat in Burnaby, British Columbia, Canada. She had worked in a Kentucky Fried Chicken restaurant in New Westminster, and had been promoted to become its manager about two months before her death. The applicant worked in the same restaurant, as did Patricia Gulliford, who was his girlfriend until April 1995. The applicant and Patricia Gulliford were interviewed after Stacey Koehler's death. He told the police and Patricia Gulliford confirmed that he had been with Patricia Gulliford on the evening of 25 March 1995. According to an affidavit sworn 16 October 1998 by Patricia Gulliford, that was in fact incorrect. It is common ground that its incorrectness could give rise to no more than suspicion in relation to the applicant. He was not arrested, and he left Canada for Mexico using his own passport in or about August 1995.

2. The applicant later moved to England, where he worked at the Queen Alexandra Nursing Home, Folkestone. On 28 August 1998 he was arrested on a warrant for his arrest issued by the Bow Street Magistrates Court under s 8(1)(b) of the Extradition Act 1989. On 16 October 1998 nine affidavits were sworn setting out the basis and evidence upon which the respondent government of Canada sought his extradition to Canada to stand trial for murder of Stacey Koehler. As will appear, the evidence relied upon is evidence of confessions made

on 21 and 22 August 1998 to Scott Doran, an officer of the Royal Canadian Mounted Police (RCMP) working as an undercover agent in collaboration with the Kent Police Force and London Metropolitan Police in an operation code-named 'Implore'. *a*

3. The Secretary of State gave authority to proceed under s 7(4) of the 1989 Act on 9 November 1998. The matter came before Mr Nicholas Evans, the stipendiary magistrate, under s 9(8) of the 1989 Act. That subsection (as amended by the Criminal Justice and Public Order Act 1994) reads: *b*

> 'Where an authority to proceed has been issued in respect of the person arrested and the court of committal is satisfied, after hearing any representations made in support of the extradition request or on behalf of that person, that the offence to which the authority relates is an extradition crime, and is further satisfied—(a) where that person is accused of the offence ... that the evidence would be sufficient to make a case requiring an answer by that person if the proceedings were the summary trial of an information against him; (b) where that person is alleged to be unlawfully at large after conviction of the offence, that he has been so convicted and appears to be so at large, the court ... shall commit him to custody or on bail—(i) to await the Secretary of State's decision as to his return; and (ii) if the Secretary of State decides that he shall be returned, to await his return.' *c* *d*

4. The offence in relation to which extradition is sought is an extradition crime within the meaning of s 9(8) of the 1989 Act. The issue argued before the stipendiary magistrate was whether the evidence before him 'would be sufficient to make a case requiring an answer by [the applicant] if the proceedings against him were the summary trial of an information against him'. By a ruling handed down on 2 September 1999, the stipendiary magistrate answered that issue affirmatively, and in consequence made an order for committal under s 9(8) of the 1989 Act. *e* *f*

5. Applications for habeas corpus under s 11(1) and/or (3)(b) and/or (c) of the 1989 Act and/or for judicial review were lodged on 16 September 1999. Permission to seek judicial review was granted on 11 April 2000, and the applications for habeas corpus and judicial review were consolidated. The primary ground upon which habeas corpus is sought is that the magistrate erred in his conclusion that there was any sufficient evidence under s 9(8) of the 1989 Act. This in turn depends upon submissions that the magistrate ought (under ss 76 and/or 78 of the Police and Criminal Evidence Act 1984 (PACE) and/or under common law principles) to have excluded the evidence of the confessions made by the applicant to the RCMP officer working undercover in the course of 'Operation Implore'. The government of Canada accepts that there was and is no other evidence capable of justifying extradition. And, as the magistrate said, if the confession is admitted, then, in the absence of any further evidence, a 'case to answer' has been made out. *g* *h*

6. The application for judicial review represents an alternative, though Mr Massih QC for the applicant submits potentially wider way of putting the applicant's objection to the use of the undercover evidence relied upon against him. It is submitted that the magistrate erred in law in admitting the evidence and/or acted in a way in which no reasonable magistrate properly directing himself could fairly have acted. *j*

7. I shall have to consider further below the Divisional Court's role in relation to the applications for habeas corpus and judicial review with respect to the stipendiary magistrates' rulings and conclusion.

8. Secondary grounds upon which relief is sought are that it would having regard to all the circumstances be unjust or oppressive to return the applicant to Canada, under s 11(3)(b) of the 1989 Act by reason of the passage of time since he is alleged to have committed the murder and/or under s 11(3)(c) of the 1989 Act because the accusation against him is not made in good faith in the interests of justice. Similar submissions of injustice or oppression are relied upon as factors in support of the application for judicial review.

THE EVIDENCE

9. I start with the evidence upon which the respondent government relies and the circumstances in which it was obtained. 'Operation Implore' was carefully and professionally planned and executed, with attention being given expressly to English authority (particularly *R v Smurthwaite, R v Gill* [1994] 1 All ER 898) and the *Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers* (Code C) to PACE. In addition to the nine affidavits on which the government relies, the government made available, on a voluntary basis, to those representing the applicant extensive material relating to the operation, including a policy file showing the strategy and tactics adopted and its inception and course, a video and sound recording of the critical three hour meeting and conversation on 21 August 1998, a sound recording of a subsequent meeting on 22 August 1998 and numerous recordings of other taped conversations in June, July and August 1998, together, it appears, with a number of witness statements. On the basis of this further material, a large number of admissions were drafted and made by the government. The policy file, the video and sound recording of 21 August and the transcript of the recording of 22 August 1998 were, together with the admissions, before the magistrate.

10. At one point Mr Massih representing the applicant suggested that the government had owed a positive duty to make (more extensive) disclosure. He later conceded that the issue of disclosure was argued and determined against the applicant by the magistrate, and that there is no challenge to the magistrate's ruling upon it. It is true, as Mr Massih points out, first that not all of the conversations which took place involving the applicant were recorded or successfully recorded, and secondly that further documentation relating to some aspects of 'Operation Implore' must exist in the government's possession. But the government owed no duty to produce such material at this stage. In fact it has produced very substantial material, and there seems to me no doubt that a very full and fair picture of 'Operation Implore' was put before the magistrate, and indeed before us.

11. Whilst it will be material later in this judgment to consider precisely what the role of this court is upon applications such as the present, we were ourselves asked to and have watched and listened to the video and sound recording of 21 August 1998. We have read the transcript of the recording of 22 August 1998. The course of events is otherwise to be derived from the policy file, and from the contents of the admissions agreed with the applicant and made by the respondents which extract or summarise matters derived from the other recordings or relating to the course of events generally.

12. The avowed purpose of 'Operation Implore' was throughout to 'infiltrate' the applicant and to obtain evidence of his commission of Stacey Koehler's murder in 1995. The operation was under the control of Det Chief Insp Townshend and Det Insp Bungay of the Kent Police Force. Actual contact with the applicant was mainly by Scott Doran (calling himself 'Woody'), but also by undercover

policewomen from the Kent Police Force (particularly 'Maxine' and from 19 August 1998, 'Alex') and some other undercover officers of no present materiality. Neither 'Woody' nor any of those in direct contact with the applicant knew anything more about the circumstances of or surrounding Stacey Koehler's death than that she had been killed in circumstances of suspected murder in Burnaby, Canada. With the assistance of those running the Queen Alexandra Nursing Home, 'Woody' and 'Maxine' presented themselves on 12 June 1998 as a Canadian who had just inherited a nursing home in Canada and his girlfriend, who were friends of the operators of the home and were working there for a period to learn the business. They developed social contact with the applicant and on 17 June met him at a public house to play darts. The applicant then agreed to assist 'Woody' 'with a bit of work that [he] had to do' in London. On and from 19 June 1998 apparently suspect activities were conducted in the applicant's presence on a basis recorded as follows in the policy file:

> 'This course is utilised to further develop a bond and trust between Woody and subject. He will not be told of crimes/activities unless as [a response to] a direct question. He will be paid for his part as a "lookout come support to Woody". This action is designed to further the infiltrating. He has been assessed as susceptible to financial gain and willing to enter into criminal enterprise. The low level criminality perception will consist of sale of "credit cards" in London/Essex.'

13. Thus on 19 June, the applicant watched 'Woody' drop off a package to and receive £3,000 from a male, in fact another undercover agent, and was paid £60 for watching the other male during this operation; on 20 June 1998 'Woody' arranged with the applicant for him to obtain a post office box, to receive packages delivered to it, and to page a third party and pass them on to him while 'Woody' was away in Canada, and gave him £100, of which £60 was to cover the rental of the box. When the applicant questioned the legitimacy of the business, 'Woody' responded by asking him whether that concerned him. When 'Woody' asked if the applicant had been involved in anything else 'dodgy', the applicant said 'stealing cars when young'. 'Woody' left England on 23 June. On 7 July 1998 the applicant made contact with an agreed number indicating that he had rented a post office box. A package was sent to the box from Canada, the applicant informed an undercover agent, 'Jan', that it had arrived, it was collected and £40 was paid to the applicant on 14 July. A similar exercise was repeated on 24 July 1998.

14. On 11 August 1998 'Woody' returned to England, and on 12 August 1998 met the applicant and gave him a further £40 for delivering another package. The undercover officers hired accommodation in the Grand Hotel, Folkestone. On 18 August 1998 the applicant was asked to accompany 'Woody' to Dover to assist in the collection of monies from a female who was, allegedly, delinquent in paying 'Woody'. While in Dover he was asked to watch this female's ostensible boyfriend (in fact another undercover agent) and to 'grab him if he moves' while 'Woody' was ostensibly meeting the female. Thereafter, in conversation (of which no recording exists) 'Woody' indicated that he had sorted out the girl who owed 'Mac', and, in answer to a question 'What do you do if someone doesn't pay?' gave the answer 'Knee cap them'. The applicant was paid £60. He was led to believe that 'Mac' was a Canadian criminal for whom 'Woody' was working, and that 'Woody' would like to get the applicant a job with 'Mac'.

15. On 19 August 1998 the applicant was brought to the Grand Hotel, to meet a (fictitious) male. In the hotel a pager call was ostensibly received cancelling the meeting. The plan was that the applicant should meet 'Alex', who was introduced into the scene 'to befriend subject, flirt and generally show an interest in him'. This she did to considerable effect. She suggested that he stay the night 'with us'. He told her that he found her 'absolutely gorgeous' and spoke of getting together. When 'Alex' left and 'Woody' returned, 'Woody's' first words were:

> 'I wouldn't expect to be having sex with Alex today if I were you, it could happen if you [inaudible] you can try I suppose ... surely attractive eh ... There's room in the inn. It's a popular hotel [inaudible] much luck.'

16. The applicant told 'Woody' 'I love Alex'. He also told 'Woody' of assaulting his former girlfriend's new boyfriend, saying he had 'smashed his head on screen' and told the police it was self-defence. 'Woody' spoke of the importance of honesty.

17. On 20 August 1998 the applicant was brought to the Folkestone hotel accommodation, there was increased reference to 'Mac' as boss and to the question of honesty and respect. 'Woody' was involved in retrieval of a bag from a parked vehicle, for which he was paid £60. 'Woody', 'Maxine', 'Alex' and the applicant spent the evening dining and viewing a film in London, before returning for the night to Ashford, where the applicant was put up in hotel accommodation.

18. On 21 August 1998 those conducting the undercover operation felt that 'the time is right to start introducing aspects of the offence under investigation, in the presence of the subject'. During the morning, the applicant was left in a hotel room in Maidstone to receive a briefcase, and page 'Woody' when he had done so. He was paid £75 for this. 'Woody' and the applicant then returned to the accommodation in the Grand hotel, Folkestone at about 2.00 p m, where they remained until about 5.00 p m, during which period the applicant drank three cans of beer. This three hour period started with a lengthy period of relaxed conversation and verbal games involving 'Woody', 'Maxine' and 'Alex'. The telephone then rang. A person calling himself 'Mac' asked the applicant to speak to 'Woody', and the applicant can be seen on the video looking to his side listening intently to what he could hear 'Woody' saying. This suggested firstly that 'Mac' had been checking out the applicant and secondly that he had discovered something relevant in connection with some female in Burnaby which the applicant had not mentioned:

> '*W:* Okay, yep. So what else is happening?
> *W:* Well yeah he's the uh, he's the guy that answered the phone. Yep.
> *W:* Yep.
> *W:* Yeah, yeah, why did you uh, oh you did eh, you checked him out already?
> *W:* Uh yeah.
> *W:* He what?
> *W:* From Burnaby?
> *W:* No, I, no way, I don't think so, no. Huh, I don't know. How long ago? Oh, yeah.
> *W:* How did it happen?
> *W:* She wa, she what? Is that right? [Laughter] Oh, that's something eh? No he never, no he never did, no.
> *W:* What what was her name?

W: Well that's something, isn't it? No he never did. Uh, it's not something you say I guess on the first date, eh. Yeah. No, no he never. Or I would have fuckin' told you wouldn't I?

W: I would have told you if it was that. No, no, no, he never. Right.

W: Yeah, okay ... go over it. Okay. Go over that again. I just wanna, yeah. I'll I'll talk to him. Go over it again.

W: Yeah, okay.

W: But he's, he's from there. He's from Burnaby.

W: Yeah he's from there.'

'Woody' sent 'Maxine' and 'Alex' away, and then told the applicant that he had not been completely frank:

'*W:* You haven't been completely forthright with me. *P:* How?

W: Well Mac did uh some checking. *P:* Yeah.

W: And uh is there something else you wanna tell me about? *P:* Like what.

W: He's gonna fax something to me here but I'm not gonna get it for a day or so. *P:* Yeah.

W: I don't know. You know what about, you tell me. We're the ones that are being honest here and stuff right. Uh being open with us and we're working together and you doing lots of stuff for people I work with and for me. *P:* Mmm.

W: You know so, pretty serious stuff and uh and we, we had a good conversation the other day and that was good. I don't have a problem with that. I've no problem with er with what I've just heard about but I don't [inaudible] myself. The only thing I do have a problem with is someone that's not being completely, completely, completely open with me that's my only concern. I'll close this. So why don't you tell me, what is it I just heard. Now I think you've got an idea. You're just not wanting to tell me right now. There's something that you haven't told me. Something Mac found out that uh that you haven't told us about. *P:* Is it something to do with murder?

W: Could be.'

19. The applicant then said that the finger of suspicion had been pointed at him, but that he did not do it. During the next 15 or so minutes, he denied being involved in the murder some seven or eight times. 'Woody' in turn emphasised that it was irrelevant what had happened, that all that mattered was honesty, that he 'sensed' that the applicant was not giving him the full picture or thought he was 'bull-shitting' him, that 'Mac' was going to check out whatever was said and that he ('Woody') was going to be 'in major shit' if 'Mac' 'finds out stuff' that 'Woody' did not know. When 'Woody' asked whether anyone had been charged with the murder, and the applicant said he did not know, 'Woody' said 'Well, I can probably answer that one for you. I'm not going to, but I probably could'. 'Woody' also made clear that 'what's said in this room, stays in this room' and was 'between you, me and Mac'. The critical breakthrough from the respondent's viewpoint occurred as follows:

'*P:* And I told everything you want to hear because that's it.

W: Ah no that's not it, you know it's not it. You're not, you're not telling me the whole thing but, and I know you're not, right there's something he said to me and he's concerned now there's some things he told me that you haven't told me that there's obviously more that you know about this whole

thing than he would. Certainly should be anyway, so … *P:* I don't, I don't know. That's what I'm trying to say is, is that …

W: I mean the other thing is I mean not to, not to, I don't want, yeah. It's okay, hypothetically, again, if you're the man responsible for whatever, as long, as long as there was good reason and ah you probably be on a pedestal, you know what I mean? *P:* Mmm.

W: Well in Mac's in Mac's eyes you know. Like, how can I put this, like ah, sort of a [rite] of passage you know, do you understand what I mean. Like a, there would be, there would be no reason to check you out any further would there. As long as, if something happened, and if it was for the right reason. If it was for the wrong reason then it might be you know a different story, but, everything happens for a reason, they say. *P:* Mmm.

W: Why was I brought here, why have I met you, I don't know. So what else. *P:* Her boyfriend owed me money.

W: Is that right? *P:* Mmm.

W: A substantial amount, or … *P:* A lot.

W: Yeah, how much? *P:* $3,000.

W: Would've been a lot for you wouldn't it? *P:* A lot for me, yes.

W: Would've been. *P:* I'm sorry.

W: What you sorry about? *P:* Just for being dishonest, I was scared.

W: What were you scared of? *P:* I don't know. I'm just …

W: What you scared of? Tell me and I'll try relax your fears. *P:* Just like, I was trying to get him.

W: Yea. *P:* And then she was there and I did it. I went fucking …

W: Wild? *P:* Yeah.

W: What, what did you do exactly, like just not exactly but was he there too? *P:* He was supposed to be there.

W: Oh I see, right. Mike this doesn't bug me at all.'

20. In further conversation the applicant stated that he was scared, shaking or shattered. Mr Massih suggested that this meant and showed that he was frightened of 'Woody' or 'Mac'. But it seems clear from the video and transcript that what he meant was that he was frightened about telling another person of involvement in the killing of Stacey Koehler. Hence his comment that one telephone call (ie by 'Mac') to whoever 'Mac' got his information from (by inference, probably the police) could lead to the applicant being taken away (by inference, by the police). Hence also his comment about his own stupidity at talking in the way he had to 'Woody', after so short an acquaintance. Hence his explanation, when 'Woody' indicated that he did not understand, that 'I'm thinking oh gee, he might be RCMP or something, do you know what I mean. I know it's stupid.' The magistrate put the matter in terms which I can see no reason to fault, when he said: 'Mr Proulx was understandably reluctant to, and no doubt suffered a degree of mental turmoil before finally, admitting to Mr Doran that which he had kept quiet about so long.'

21. When the applicant referred to the RCMP, 'Woody', whose acting abilities were clearly very considerable, remained true to his role, and the applicant went quickly on to make further admissions. He disclosed that, relying on knowledge obtained from the youthful involvement in car theft which he had earlier disclosed, he had wiped down the door handle on leaving Stacey Koehler's house to avoid fingerprints. He also volunteered that he had killed her by hitting her on the head with plastic dumbbells or single weights from inside her house. A little

later, he added that he had taken the dumb-bells with him and hidden them in a garbage bag about two miles away; in answer to a question from 'Woody' he estimated that one was about 25 lbs, the other about 5 lbs. These statements, as it happens, match observed facts at the scene of the killing. Stacey Koehler was killed by blows to the head. A sand/gravel like material was found in the small of her back, similar to that found inside plastic weights. A number of plastic dumb-bells were found in her home, but none of those was broken, split or leaking.

22. During this part of the conversation, 'Woody' also referred to the applicant's account that Stacey Koehler's boyfriend had owed him money, and said: 'Well he better of owed you money you know what I'm saying and er, er cos he [ie 'Mac'], he'll find that out and just little things like that.' This elicited a response from the applicant that: 'The thing is that no one knew that he owed me money, I didn't tell anyone.' The possible significance of this relates to a later change in the applicant's account (see below). A further question by 'Woody' elicited that 'Woody' was the first person whom the applicant had told of his involvement. During this period, 'Woody' reiterated that it did not matter what was the applicant's story, so long as it was the truth, and there was this exchange:

> 'W: Yeah. Now you wouldn't be telling me this story to make yourself look better would you? P: Yeah, yeah gee, yeah I wanna join, I wanna join your family just so I can in it, so I'm gonna tell you this story.
>
> W: I just wanna make sure, people do that sometimes you know. P: Well I'm definitely not.
>
> W: Okay.
>
> SILENCE'

Not long afterwards there followed this exchange:

> 'P: Some way, some way, I, I'm glad that I've told you. Well, I am glad. W: I, I am too, but ...
>
> P: Do you, listen ... W: Yes.
>
> P: It was, it was on my chest. W: Probably has been for some time.
>
> P: Really.
>
> P: No I just. I forgot about it, completely. I just though fuck, might as well fuck off. If they're gonna find me, they're gonna find me. W: They're not going to find you ...'

23. In the next passage the applicant indicated a wish to have someone who had 'beaten the shit' out of his mother in Burnaby killed, 'when I'm in with you lot'. He went on to say that he wanted to meet 'Mac' and tell him that the things he had probably looked into were 'true'. There was a further supposed telephone call from 'Mac', during which 'Woody' assured 'Mac' that he had straightened most of the things out in a 'little conflab' with the applicant, assured 'Mac' that the applicant was 100% and asked him when he was coming over. The applicant responded by saying that 'Mac' 'must be like the Grand Master', and:

> 'P: I just wanna meet him and say look, look, I'll lay it all on the table and I'll just say look. If I'm not worth for it then, [I'm not] ... W: I think you will be ...
>
> P: Because I've told you fucking shit that I would never tell my fucking dog. W: Yeah but we do know each other ...'

24. Later, the applicant came out with his wish to get away from his current girlfriend and join 'Woody' and his boredom with his current life style, saying

that when 'Woody' came along he was just like 'Jesus'. Conversation continued for some time on a basis of intimacy, including at one point a friendly embrace, shaking clenched forearms. 'Woody' gave the applicant a further £70 or £75. Towards its end, the applicant indicated that the previous occasions on which he had assisted 'Woody' had led him to realise that there was lots of money in this business and 'this could be a major opportunity'. He went on:

> 'P: And I thought to myself I said well, then when you came back and all this fucking shit. Well today ran smooth, right. It'd be different if I told you what I told you maybe, but don't think so. If I told you this last night and things didn't run smooth then I'd be gone obviously. You understand? W: Well I have the feeling that you would have told me eventually anyway you know.
>
> P: Good. W: I do.
>
> P: Good. W: I have a feeling you would have told me on you own.
>
> P: Then good. Cos I honestly would have, cos it was playing my mind last night. W: Yeah.
>
> P: And that's why I was so quiet, cos I was quiet. W: You were yeah.'

Next day 'Woody' and the applicant had a further one and half hour conversation. In it 'Woody' said:

> 'W: ... I just want you to be comfortable with telling me stuff, ahh, even if, even if, ahh, you told me stuff yesterday that's not you know 100% ... Now is probably the time to square that up, cuz he is going to, he is going to find out stuff right. So, it's up to you, it's no big deal. If you've told me everything great, if you haven't then ahh, you might want to consider that.'

25. The applicant's initial response was: 'That was it, yes' and 'Otherwise I wouldn't have poured, poured out my ...' After further conversation about the scope of activities of 'Mac' and 'Woody's' organisation and about the possibility of obtaining a false passport for the applicant, the applicant came out with the statement that all the stuff that he had told 'Woody' the night before was 'straight up' and:

> 'P: Down the line. That was it. Cuz I thought I have nothing hide now, there is no point. W: As long as there is no, as long as there is nothing that [Mac] is going to find out that, that you know, that doesn't match up to your story, you know what I'm saying ...'

26. Contrary to a submission made by Mr Massih, the statement 'I thought I have nothing to hide now, there is no point' was clearly a reference back by the applicant to his state of mind in the previous day's conversation, rather than a description of his state of mind during the meeting on 22 August 1998. A little later, 'Woody' emphasised that:

> '[Mac] is going to want to make sure that he knows every piece of dust that's in the cracks and ahh, he'll go find this guy and he'll go talk to him himself or he'll send someone to go talk to him if he needs to. And ... he has ways of making people talk that ahh, heat can't use. You know what I'm saying ... Because I understand you know if someone ahh, you are telling somebody for the first time well, maybe you are a little nervous about telling him and you tell me things that maybe you know, you think you ought to say, like you know, I know you know that I think the truth is important ... And

ahh, I wouldn't expect you to tell me everything in you know in one single day ...' *a*

27. After further discussion about the applicant's future with 'Woody' and 'Mac' and the family nature of that involvement, this conversation took place:

'*P:* I'm just so scared. *W:* Yeah, well you can always back out too, it's no big deal. *b*

P: No, I don't want to, though. *W:* No, you don't want to. No you don't, I am telling you, you won't. What you do, you say listen Woody I would like to try it out with you guys for a while and if it doesn't work out.

P: [inaudible] saying, you don't want to look like a fool. He didn't owe me money.' *c*

28. The applicant then gave as his motive for the attack on Stacey Koehler that someone had told him that her boyfriend had been 'kissing and sort of tonguing' or necking Trish (Patricia Gulliford), the applicant's former girlfriend, at a party about a month before: 'So I went completely, like I said, enraged, like completely lost it. Because I was quite jealous when I was young.' Later in the conversation, *d* he said that he was just glad he had got that off his chest.

THE RESPECTIVE ROLES OF THE MAGISTRATE AND THE DIVISIONAL COURT

29. The magistrate's role and powers are specified in s 9(2) and (8) of the 1989 Act as amended by the 1994 Act. Prior to the 1994 Act, s 9(8) of the 1989 Act *e* required the magistrate to be satisfied 'that the evidence would be sufficient to warrant his trial if the extradition crime had taken place within the jurisdiction of the court'. Section 9(2) of the 1989 Act conferred on the magistrate the like jurisdiction and powers, as nearly as may be, 'as a magistrate's court acting as examining magistrates'. The 1994 Act amended s 9(8) of the 1989 Act to the form set out earlier in this judgment. The test now is thus whether 'the evidence *f* would be sufficient to make a case requiring an answer by that person if the proceedings against him were the summary trial of an information against him'. The 1994 Act also amended s 9(2) of the 1989 Act to confer on the magistrate 'the like powers, as nearly as may be ... as if the proceedings were the summary trial of an information against him'.

30. It had already been established prior to 1994 that, when magistrates *g* conducting a summary trial were faced with objections to the admissibility of evidence under ss 76 and/or 78 of PACE, they were obliged to determine the objections forthwith by holding a trial within a trial (see *R v Liverpool Juvenile Court, ex p R* [1987] 2 All ER 668, [1988] QB 1). It was common ground before us that this was therefore the procedure that the magistrate was bound to follow, as *h* he did. In *R v Governor of Brixton Prison, ex p Levin* [1997] 3 All ER 289 at 294, [1997] AC 741 at 747–748, the House of Lords was concerned with s 9 of the 1989 Act as it stood prior to amendment by the 1994 Act. But Lord Hoffmann referred, in parenthesis, to the exclusion (subsequent to the date of committal in *Ex p Levin*) of committal proceedings from the application of s 78 of PACE by para 26 of the *j* Criminal Procedure and Investigations Act 1996 and thought it likely that the effect of s 9(2) and para 6(1) of Sch 1 to the 1989 Act would in future be to exclude extradition proceedings from the application of s 78 of PACE altogether. Before us and having regard to the amendment by the 1994 Act of the language of s 9(2) and s 9(8) of the 1989 Act, it was common ground that s 78 of PACE continues, like s 76, to have potential relevance in extradition proceedings.

31. I set out at this point the wording of ss 76 and 78 of PACE:

> '**76.**—(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.
>
> (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained— (a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.'

32. When considering s 76 of PACE, a magistrate has thus to determine various points:

(a) what was said or done,

(b) the circumstances existing at the time of the confession,

(c) whether what was said or done was, in the light of such circumstances, 'likely to render unreliable any confession which might be made by him in consequence of thereof', and

(d) whether *the* confession was made in consequence of anything said or done likely to have the effect identified in (c).

Confession under s 82(1) of PACE 'includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise'.

Then by s 78 of PACE:

> '**78.**—(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'

33. The magistrate in the present case, having considered the evidence and very detailed submissions put before him on each side, gave a careful summary of the facts and clearly stated reasons for rejecting the applicant's submissions that the evidence of his confessions should be excluded under either of these sections or on any basis.

34. The role of the Divisional Court in this type of situation was considered under the pre-1994 Act wording in *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701, [1990] 1 WLR 277. The court put the matter as follows:

> 'THE TASK OF THE DIVISIONAL COURT
>
> The authorities are unanimous that the Divisional Court is not a court of appeal from the magistrate. It cannot retry or rehear the case. In *Armah v Government of Ghana* ([1966] 3 All ER 177 at 184; sub nom *R v Governor of Brixton Prison, ex p Armah* [1968] AC 192 at 230) Lord Reid said: "The court does not hear the case by way of appeal so as to reverse the magistrate's decision on fact

or alter a discretion properly exercised." See also per Lord Wilberforce in *Tarling v Government of the Republic of Singapore* ((1978) 70 Cr App R 77 at 108). So it is clear what our task is not. But what is not so clear is what our task is. Different language has been used in different cases. In *Tarling*'s case (at 108) Lord Wilberforce said that the powers of the Divisional Court are limited to deciding whether the magistrate was right or wrong in finding on the evidence before him that there was sufficient evidence to warrant committal, and to ascertaining whether he had erred in law. In *Government of the Federal Republic of Germany v Sotiriadis* ([1974] 1 All ER 692 at 705; sub nom *R v Governor of Pentonville Prison, ex p Sotiriadis* [1975] AC 1 at 29–30), Lord Diplock said that the Divisional Court is only concerned to interfere with the decision of the magistrate where there is no evidence to justify committal. If there was some evidence, then the Divisional Court could not substitute its own view. In *Armah*'s case ([1966] 3 All ER 177 at 187–188, [1968] AC 192 at 233–235) Lord Reid and Lord Pearce adopted a straightforward *Wednesbury* test (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223), that is to say whether there was evidence on which a reasonable magistrate, properly directing himself in law, could commit: see per Lord Reid, where he approved the judgment of Lord Parker CJ in *Re Mourat Mehmet* ([1962] 1 All ER 463, [1962] 2 QB 1), and Lord Pearce. Similarly, Viscount Dilhorne, in his dissenting speech in *Tarling*'s case (at 114), said that the task of the Divisional Court was to decide whether on the evidence the chief magistrate might reasonably conclude that it sufficed to constitute a case to answer. In the face of these apparently differing views, counsel for the respondent urges us to adopt what he submitted was the stricter test propounded by Lord Diplock in *Sotiriadis*'s case. Counsel for Osman urged us to adopt what he submitted was the less strict test propounded by Lord Wilberforce in *Tarling*'s case. As so often happens, the difference between the various approaches is, in our view, more apparent than real. Thus, if in a particular case there was no credible evidence to support committal on a charge, no reasonable magistrate would commit on that charge unless he had made some error of law, e g by misunderstanding the nature of the offence. In such a case one could say that the court was justified in interfering either because there was no evidence to support the committal or because no reasonable magistrate would commit on that evidence or because the magistrate must have been guilty of an error of law. It all comes to the same thing in the end. But since the point has been raised for our decision, we would say that the correct approach is best defined in *Wednesbury* terms. That at least has the advantage of being well understood, as well as keeping this branch of the law in line with the task of the Divisional Court in other aspects of its jurisdiction. Before leaving this point, we should perhaps refer, with diffidence, to the decision of *R v US Government, ex p Blair* ((1985) Times, 21 June). That was a case where the United States was seeking extradition on a charge of fraud. The question was whether there was any direct evidence of reliance on the alleged misrepresentation and, if not, whether reliance could be inferred. In upholding the decision of the magistrate to commit, I [Lloyd LJ] said ... "The question which we have to ask ourselves is ... whether the chief magistrate erred in law, not whether he reached the right conclusion on the facts or a conclusion with which we would necessarily have agreed ourselves. The question for us is not whether there was sufficient evidence to send Mr Blair for trial if these offences had

a been committed in England. That was a question for the chief magistrate, not for us. The question for us is whether there was any evidence on which the chief magistrate could so find. The discretion in the matter was his, not ours. For the same reason, it is not for us to say whether, in our view, the inference is irresistible that there was here reliance. The question for us is whether the chief magistrate could lawfully reach that view; whether, in b other words, it was within the range of views which a reasonable magistrate, directing himself properly and in accordance with the law, could reach." It will be noted that in that short passage the three tests which we had identified are all relied on without differentiation. This again suggests that, in the view of that court, there is in reality nothing between them. We would not, however, support the use of the word "discretion" used by the court in c that context.' (See [1989] 3 All ER 701 at 722–723, [1990] 1 WLR 277 at 300–302.)

35. The Divisional Court was in *Ex p Osman* concerned with a challenge to the adequacy of the evidence adduced before the magistrate. But a similar approach should, in my view, apply when the challenge is to the ruling of a magistrate on d the admissibility of evidence. Provided that he has correctly directed himself on law, his findings of fact and his assessment of their significance, when ruling on admissibility, should be considered, and only be interfered with, on *Wednesbury* grounds (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). The changes in the language of s 9(2) and (8) of the 1989 Act as a result of the 1994 Act do not suggest or make appropriate any alteration e of approach in this respect.

36. Justification for such an approach is to be found in the context of extradition, and the fact that by statute the primary decision maker is the magistrate's court. It is perhaps worth adding that, even in a purely domestic and appellate context, the ambit of review of judgmental decisions may be constrained, as the decision of the f House of Lords in *Brutus v Cozens* [1972] 2 All ER 1297, [1973] AC 854 illustrates. The case concerned s 5 of the Public Order Act 1936, whereby:

> 'Any person who in a public place ... uses ... insulting ... behaviour ... with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence'.

g The magistrates had acquitted the defendant who with others had disrupted a match at Wimbledon by some form of protest, but the Divisional Court had set aside the acquittal, treating the issue whether conduct was insulting within s 5 of the 1936 Act as effectively one of law. The House of Lords disagreed, holding, as h Lord Reid put it, that:

> 'It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the tribunal has reached j a wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision.' (See [1972] 2 All ER 1297 at 1299, [1973] AC 854 at 861.)

Lord Morris of Borth-y-Gest said:

'The words "insulting behaviour" are words that permit of ready comprehension. Having found the facts it was for the justices' applying rational judgment and common sense to reach a decision ... In my view, the justices' decision was really a decision of fact just as would be the decision of a jury if called on to decide whether someone had used insulting behaviour.' (See [1972] 2 All ER 1297 at 1300–1301, [1973] AC 854 at 863.)

37. The same approach must in logic apply to the other limb of s 5 of the 1936 Act, whether the behaviour was likely to occasion a breach of the peace. That was expressly stated by Viscount Dilhorne ([1972] 2 All ER 1297 at 1302, [1973] AC 854 at 865): 'The magistrates had two questions to decide; first, was the appellant's behaviour insulting and, secondly, if so, was it likely to occasion a breach of the peace. Both were questions of fact for them to decide.'

38. All the points which, as indicated above, fell for determination by the magistrate under s 76 of PACE involved matters of fact or, in the case of point (c), a matter of judgment for the magistrate. In *R v L* [1994] Crim LR 839 the Court of Appeal acknowledged in a domestic context that it becomes 'a matter of degree' as to whether the threshold is passed beyond which the behaviour of officers has made a so-called confession unreliable in all the circumstances.

39. In the present case, the Divisional Court when undertaking any review of the stipendiary magistrate's decision should bear firmly in mind at all stages both the extradition context and the consideration that by statute that all decisions of fact and judgment on the points arising were for the magistrate. Any challenge can thus only be based on *Wednesbury* principles. I recognise that, whatever test may be adopted, the constitutional nature of the interests protected by s 76 of PACE is likely, in a purely domestic context, to encourage a closer and more protective scrutiny of events. But, in the present context of extradition, when any issue of admissibility will be revisited at any trial, the more limited review for which *Ex p Osman* stands is appropriate.

40. I turn to s 78 of PACE. This section requires a judgment by the first instance court, here the magistrate, as to the overall fairness, in all the circumstances, of admitting the evidence. The section is commonly described as involving the exercise of a discretion. Whether described as a judgment or discretion, it is well-established in a domestic context that an appellate court will not interfere with a first instance court's conclusion under s 78 of PACE, unless the appellate court considers that it was unreasonable in a *Wednesbury* sense (see *R v Christou* [1992] 4 All ER 559, [1992] QB 979, *Thompson v The Queen* [1998] AC 811 at 838–839, [1998] 2 WLR 927 at 949–950).

41. Again, the extradition context of the present issue is material. In *Ex p Levin*, Lord Hoffmann, with whom the other members of the House agreed, accepted, with regard to the pre-1994 wording of s 9 of the 1989 Act, that, since extradition proceedings were criminal proceedings, s 78 of PACE applied to them, but went on:

'On the other hand, it must be borne in mind that when the section is being applied to committal or extradition proceedings, the question is whether the admission of the evidence would have such an adverse effect on the fairness of *those* proceedings that the court ought not to admit it. This is not at all the same thing as the question of whether the admission of the evidence at the trial would have an adverse effect on the fairness of the trial. On the contrary, the magistrates should ordinarily assume that the powers available to the judge at the trial will ensure that the proceedings are fair. The question is,

a therefore, whether the admission of the evidence would have an adverse effect on the fairness of the decision to commit or extradite the accused for trial, even if the trial is a fair one. I think that the circumstances would have to be very unusual before magistrates could properly come to such a decision and I am sure that Beldam LJ was right when he said in *R v King's Lynn Magistrates' Court, ex p Holland* ([1993] 2 All ER 377 at 380–381, [1993] 1 WLR b 324 at 328): "Examining justices could exclude the evidence from their consideration only if satisfied that its admission at the trial would be so obviously unfair to the proceedings that no judge properly directing himself could admit it. I have no doubt that even in such a case it would generally be far better to leave the decision to the trial judge who will, as I have said, be in a better position to assess the effect on the fairness of the proceedings and c have had greater experience of deciding such questions." In extradition proceedings there is even less scope for the exercise of the discretion because, as McCowan LJ pointed out in *R v Governor of Belmarsh Prison, ex p Francis* ([1995] 3 All ER 634, [1995] 1 WLR 1121) (quoting the Supreme Court of Canada in *Kindler v Canada (Minister of Justice)* ((1991) 84 DLR (4th) 438 at 488)), d extradition procedure is founded on concepts of comity and reciprocity. It would undermine the effectiveness of international treaty obligations if the courts were to superimpose discretions based on local notions of fairness upon the ordinary rules of admissibility. I do not wish to exclude the possibility that the discretion may be used in extradition proceedings founded upon evidence which, though technically admissible, has been obtained in a way e which outrages civilised values. But such cases are also likely to be very rare.' (See [1997] 3 All ER 289 at 295, [1997] AC 741 at 748; Lord Hoffmann's emphasis.)

42. Mr Massih accepts that the relevance of s 78 of PACE remains as described f in this passage by Lord Hoffmann. The same considerations based on comity and reciprocity continue to apply following the change of statutory wording. A magistrate considering the fairness of admitting evidence remains entitled and bound to have regard to the context of extradition proceedings in which the issue before him arises. His decision whether or not to admit evidence, in the exercise of the powers preserved by s 9(2) of the 1989 Act as amended, is solely in and g for the purpose of his determination on the issue of extradition. The trial judge in the proposed country of trial remains the person who should and will determine the critical issue of the admission of such evidence at trial. Thus the question which the magistrate had here to ask himself therefore was not whether the confession would fall to be excluded in a purely English context. It was whether, bearing in h mind that the ultimate issue was whether the applicant should be extradited to stand trial in Canada, he should under s 78 of PACE exclude the confessions from consideration as part of the evidence by reference to which he determined whether or not there was a case requiring an answer if the proceedings were a summary trial of an information before him. As Lord Hoffmann indicated, it is j to be expected that it would only be in very unusual circumstances that a magistrate could properly conclude that he should in this context exclude evidence under s 78 of PACE: 'It would undermine the effectiveness of international treaty obligations if the courts were to superimpose discretions based upon local notions of fairness upon the ordinary rules of admissibility.'

43. He went on to preserve the possibility that the discretion under s 78 of PACE might fall to be exercised 'in extradition proceedings founded upon

evidence which, though technically admissible, has been obtained in a way which outrages civilised values', but repeated that 'such cases are also likely to be very rare'. *a*

ANALYSIS OF SUBMISSIONS

(i) *Section 76(2)(b) of the Police and Criminal Evidence Act 1984*

44. Against this background, I turn to consider the parties' submissions. I start, as Mr Massih did, with s 76(2)(b) of PACE. Mr Massih submits that the applicant's confessions with respect to the killing in Burnaby of a female who can only have been Stacey Koehler were or may have been obtained in consequence of things said or done by 'Woody', and that the prosecution had failed to and could not prove the contrary. At times, he seemed to assume that that was all that mattered. But the subsection refers to 'anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made in consequence thereof'. The real issue is whether the magistrate was, bearing in mind the limited scope of the review which this court should undertake, entitled to conclude that the prosecution had proved beyond reasonable doubt that the applicant's confessions (notwithstanding that they might be true) were 'not obtained as aforesaid', in other words were not obtained in consequence of anything said or done likely in the circumstances existing at the time to render unreliable any confession so made. *b c d*

45. As I have already stated, the subsection requires the court to consider; (a) what was said or done, (b) the circumstances existing at the time of the confession, (c) whether what was said or done was, in the light of such circumstances, 'likely to render unreliable any confession which might be made by him in consequence of thereof', and (d) whether *the* confession was made in consequence of anything said or done likely to have the effect identified in (c). In *R v Barry* (1992) Cr App R 384, the Court of Appeal set out the steps to the application of the subsection in terms which referred to the onus of proof in respect of (d). But the subsection places the onus on the prosecution at each of stages (a), (b), (c) and (d). Again, Mr Massih sought to place heavy emphasis on this onus. But in the present case I consider it to have limited, if any, practical relevance. Points (a), (b) and (c) are essentially factual points. Here the basic facts are clear. The magistrate had the benefit of a video recording of the critical conversation in which the applicant made his principal confessions. He had a full transcript of the subsequent conversation on the next day, when the applicant made a modified confession regarding motive. He had very full admissions relating to the background circumstances and conversations leading up to these two main conversations. There was no real scope for doubt about the things said or done or about their causative effect in leading the applicant to make the confessions which he made. The circumstances existing at the time were also relatively clear, although there are points, which I will have to consider, where Mr Massih interprets them differently from Mr Hardy. The essential issue concerns point (c), which requires a judgment to be made on the facts as they existed at the time of the confession. The word 'unreliable' means 'cannot be relied upon as being the truth' (see *R v Crampton* (1991) 92 Cr App R 369 at 372). Whether, in the light of other material or subsequent investigation, the confession may be said or shown in fact to have been true is immaterial. *e f g h j*

46. In *R v Barry* the court described point (c) as involving a test which was 'in a sense hypothetical since it relates not to *the* confession but to *any* confession'

(my emphasis). This does not in my view mean that the subject matter or nature of the confession can be disregarded. A confession will commonly occur in the context of investigations or questioning, maybe under caution, relating to a specific offence. Even in the present case, although 'Woody' knew no details, he was directing the applicant's attention first to some unspecified event involving a female in Burnaby and then, after the applicant had himself raised the possibility, to a specific killing of a female in Burnaby. The relevant confession is thus to involvement in Stacey Koehler's killing, a killing about which the applicant had already volunteered knowledge. The test in s 76 of PACE cannot be satisfied by postulating some entirely different confession. There is also no likelihood that anything said or done would have induced any other confession. The word 'any' must thus, I think, be understood as indicating 'any such', or 'such a', confession as the applicant made. The abstract element involved also reflects the fact that the test is not whether the actual confession was untruthful or inaccurate. It is whether whatever was said or done was, in the circumstances existing as at the time of the confession, *likely* to have rendered such a confession unreliable, whether or not it may be seen subsequently (with hindsight and in the light of all the material available at trial) that it did or did not actually do so.

47. Section 78 of PACE calls for the exercise of overall judgment or discretion. Section 76 of PACE, although it includes some judgmental elements, involves an essentially fixed scheme. Once it is represented to the court that the confession was or may have been obtained as stated in s 76, then it is for the prosecution to prove if it can that it was not so stated; and, if the prosecution fails to prove this, then the confession must be excluded (see *R v Paris, R v Abdullahi, R v Miller* (1993) 97 Cr App R 99).

48. Mr Massih submits that there were a broad range of inducements which led or may have led to the making of the applicant's confessions. The principal potential inducements consisted, he submits, in the perceived attractions of the 'mafia' apparently run by 'Mac' and 'Woody' in terms of the money, the 'family' relationship of unconditional loyalty which acceptance as a member entailed, and the sexual attractions of membership personified by 'Alex'. Membership would also enable the applicant to use the family's services to solve personal problems (like the grievance which he had against his mother's assailant). Then, he suggests, 'Mac's' apparent omniscient knowledge, fear on the applicant's part and/or the holding out of violence as an acceptable and customary tool of the 'mafia' family played or may have played a part, and so too the alcohol which the applicant drank on 21 August 1998.

49. Mr Massih also seeks to introduce in this context consideration of Code C issued under s 66 of PACE, which under s 67(11) of PACE is admissible in evidence, and 'if [it] ... appears ... to be relevant to any question arising in the proceedings' is to be 'taken into account in determining that question'. Whilst there are situations in which the effect of breach of Code C must, almost automatically, throw doubt on the reliability of evidence obtained as a result of or following such a breach, the undercover operation created a situation in which the applicant believed and acted and spoke on the basis that he was among friends and discussing with them his future participation in joint criminal activity. He had no thought that he was speaking either to police officers or to persons charged with the duty of investigating any offence or charging offenders (see s 67(9) and (10) of PACE). There are, as will appear below, difficulties about regarding Code C as having any direct application to such a situation. But, even if it can have, its special nature means that the risk of unreliability cannot simply

be derived from the fact of breach of that code. Whether there was such risk can only be assessed by a careful consideration of the actual course of the undercover operation, including of course evaluation of the extent to which the operation was properly planned and reliably recorded. The direct relevance of Code C is in these circumstances in my judgment to the applicant's submission, in the context of s 78 of PACE, that the whole undercover operation constituted an illegitimate 'circumvention' of Code C. I shall come to that submission in due course.

50. In relation to s 78 of PACE, Mr Hardy for the respondent submits that the applicant was throughout the operation simply responding to repeated statements by 'Woody' that 'Mac' and 'Woody' and their organisation laid great stress on honesty and trust among members. Membership of 'Mac's' and 'Woody's' 'family' was less, not more, likely to be obtained (while the cause for any concern would be greater not lesser) if the applicant told lies. 'Mac's' omniscience would lead to discovery of any lies.

51. I have already stated my view, and agreement with the magistrate, on the subject of fear. As to alcohol, the drinking of three cans (as shown on the video) was moderate, and took place over some three hours. It had no apparent effect and was not in my judgment likely to have had. The applicant was only on his first can at the time of the confessions made on 21 August 1998. Again, I see no reason to fault the magistrate, who said: 'It misrepresents the position to say that Mr Proulx was plied with drink. There was modest social drinking which was of no consequence.' As to the sexual lure of 'Alex', the magistrate said: 'The so-called "honey-trap" is an irrelevance that had absolutely no bearing on the making of the confession.'

52. I do not myself doubt that 'Alex' was an attraction, likely to have heightened the applicant's interest in joining 'Mac' and 'Woody's' 'family'. But that does not of itself mean that any confession of involvement in killing made by the applicant with a view to joining the family is likely to have been unreliable, rather than truthful. At one point it appeared that the 'honey-trap' laid for the applicant might have had the particularly distasteful aspect of being designed to undermine the applicant's existing relationship in order to develop his relationship with 'Woody'. But fuller examination of the relevant evidence indicates that the applicant was as keen as anyone to bring his existing relationship to an end. His general attitude and recorded sentiments towards his current partner do not elicit sympathy for Mr Massih's submission that there occurred here a gross infringement of his human right to a private life and personal relationship. In any event, this submission does not appear to me to bear directly on the issue under s 76 of PACE. What is, however, important is that 'Mac' and 'Woody's' 'family' was presented in a manner which, for a variety of reasons, was extremely attractive to the applicant. Therefore, Mr Massih submits, he had every motive to satisfy 'Woody', and so 'Mac', of his credentials to be admitted as a member of the 'family'.

53. For present purposes attention can be focussed upon the applicant's original confession to involvement in the killing. If that should have been excluded, then its subsequent elaboration and, on the next day, amendment as to motive must likewise be excluded. The elaboration and amendment flowed clearly from the original confession. For present purposes, I am prepared to proceed on the basis that, when judging the admissibility of the initial confessions, it would be appropriate to stop the clock at the point when they were or were about to be made, rather than to consider the confessions and the circumstances in which they were made as a whole. Conversely, however, if the original confession was properly admitted, I see no real basis for excluding its

subsequent elaboration and amendment. My own view, having seen the material which the magistrate considered, is that the farther through the videoed and recorded conversations that one goes, the more difficulty Mr Massih's submissions face. I find the course and contents of the behaviour and conversation which followed the original confession particularly difficult to square with the idea that the confessions to killing then elaborated and amended should be viewed as unreliable. I have set out above specific passages in which the applicant expressed in apparently genuine terms his rejection of any idea that he had made up his account of his involvement in order to join the 'family' and his relief at having unburdened himself. I have taken into account his change in his account of his motivation, and also the fact that his account would not appear to account for all the forensic facts noted by the RCMP when investigating Stacey Koehler's killing (e g evidence of compression of her neck).

54. In the interchanges between the applicant and 'Woody' leading up to the initial confessions to involvement, the applicant himself (by his question: 'Is it something to do with murder?') volunteered the possibility that whatever 'Mac' had discovered about the applicant could have something to do with a murder of which he said he had been suspected. He continued on some seven or so occasions to deny any involvement. These are factors which point to reliability. However, 'Woody' did not accept the denials. 'Woody' thus necessarily continued to withhold acceptance of the applicant as a potential member of the family. Further, the immediate trigger for the applicant's confession of involvement was 'Woody's' statement that he would 'probably be on a pedestal' and that in 'Mac's' eyes it would be like a 'sort of rite of passage' and 'there would be no reason to check you out any further would there. As long as, if something happened, and if it was for the right reason'.

55. The last sentence indicates that 'Woody' was not suggesting that the applicant would get away with a lie told to further his admission to the 'family'. 'Woody' had throughout been insistent on having a full and honest account regarding any involvement in the killing in Burnaby. On the other hand, 'Woody' had also held out that, if the applicant was involved, it would not be or be regarded as a problem of any sort. And in this last passage (with its colourful references to being on a 'pedestal' and to a 'rite of passage') he was clearly indicating that it would on the contrary probably be regarded as a positive qualification. A critical question is whether the magistrate was entitled to conclude that 'Woody's' insistence in these terms upon knowing the full story of any involvement was not likely to have led the applicant to make a false confession so as to satisfy 'Woody's' evident belief that the applicant knew more than he was saying and to obtain membership of the 'family'.

56. This is however a question which can only be answered by considering the whole course of events and circumstances up to and as at the time when the initial confessions were made. It depends not merely upon the bare words exchanged but upon an assessment of the applicant, which the magistrate was well placed to undertake, having observed him for three hours on video and having read voluminous transcripts. The whole exercise and the question to which it was directed under s 76 of PACE were for the magistrate to undertake. This court should only interfere with his decision if satisfied that he misdirected himself or came to a conclusion which no reasonable magistrate would have reached. For my part, and despite the arguments which Mr Massih was able to deploy (particularly with regard to the exchanges leading up to the critical initial confession), I am unable to conclude that the magistrate either misdirected himself or arrived

at a decision which no reasonable magistrate could on the material before him have reached. I would therefore dismiss the applications so far as they relate to s 76 of PACE. It matters not in this respect whether they are formulated as applications for habeas corpus or by way of judicial review.

(ii) *Section 76(2)(a) of the Police and Criminal Evidence Act 1984*

57. Mr Massih further submits that the prosecution has failed to satisfy the onus upon it to show that the confession was not obtained by oppression of the applicant within s 76(2)(a) of PACE. He invokes in this connection considerations overlapping with a number of those relied upon in the context of s 76(2)(b) of PACE. He takes the definition of oppression adopted in *R v Fulling* [1987] 2 All ER 65 at 69, [1987] QB 426 at 432 per Lord Lane CJ: 'Exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc; the imposition of unreasonable or unjust burdens'. In *R v Parker* [1995] Crim LR 233, it was pointed out that the use of the word 'wrongful' should be understood in the context of the rest of the definition, particularly the words 'burdensome' and 'harsh' which precede it and 'unjust or cruel treatment' which follow. Mr Massih relies on the references to violence in the discussions between 'Woody' and the applicant, to the evident willingness of 'Mac' and 'Woody's' 'family' to use violence and to the applicant's references to being scared. I have already indicated my conclusion that, when the applicant referred to being scared, it was not fear which caused him to make the confessions, but fear arising because he realised that he was running a risk of disclosure to others, particularly the police, by making such disclosures to anyone. No threat of violence was made towards the applicant. There was no burdensome, harsh or wrongful application of the hand of authority upon him. Oppression of a person in an inferior position is a quite different matter from a trick leading someone to believe that he is among friends and about to be accepted as a member of a 'family' engaged in nefarious activity (see also *R v Parker* [1995] Crim LR 233 at 234). Once the suggestion that the applicant was motivated by fear of 'Mac' and 'Woody' is rejected, there is nothing in the facts which could conceivably constitute oppression. The magistrate concluded:

> 'Mr Proulx was never subjected to or threatened with any violence, although he was led to believe that he was in the company of others who were prepared to use violence. I do not regard, in the circumstances here, that as amounting to oppression of Mr Proulx.'

Again I see no reason to disagree with the magistrate.

(iii) *Section 78 of the Police and Criminal Evidence Act 1984 and/or common law*

58. Section 78 of PACE has already been set out. We were also referred to the common law principles and authorities governing the admissibility of evidence, and the exclusion of confession evidence in particular, which are preserved by s 82(3) of PACE. Since it is accepted, in the present context, that any entitlement at common law to have the applicant's confession excluded would also be embraced by either s 76(2) or s 78 of PACE, these constitute for present purposes no more than background. The respective roles of the magistrate and Divisional Court cannot differ according to whether the applicant's complaint is based on s 78 of PACE or the common law.

59. Regardless whether the admissibility of a confession falls to be considered under s 76(2) of PACE, its admissibility may fall to be considered under s 78 of

PACE (see *R v Mason* [1987] 3 All ER 481 at 484, [1988] 1 WLR 139 at 144). The decision required under s 78 must be made having regard to all the circumstances. Whether or not a confession is likely to be reliable is one relevant factor, and there is nothing in s 78 to require the court, under s 78, to exclude from consideration any material which may with hindsight shed light on the confession's actual accuracy (see e g *R v Lin, R v Hung, R v Tsui* [1995] Crim LR 817, [1994] CA Transcript 741, p 26). But 'possible unreliability is not the sole reason for rejecting a confession which has been obtained by improper means' (see *Lam Chi-ming v R* [1991] 3 All ER 172 at 176, [1991] 2 AC 212 at 218 per Lord Griffiths). Lord Griffiths went on:

> '... the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody. All three of these factors have combined to produce the rule of law applicable in Hong Kong as well as in England that a confession is not admissible in evidence unless the prosecution establish that it is voluntary. This, perhaps the most fundamental rule of the English criminal law, now finds expression in England in s 76 of [PACE] ...' (See [1991] 3 All ER 172 at 178, [1991] 2 AC 212 at 220.)

60. Lord Griffiths was, as the concluding sentence makes clear, directing himself primarily towards situations falling within s 76 of PACE, the confessions in *Lam Chi-ming*'s case being the consequence of police brutality. But the three factors which he identified all also inspire s 78 of PACE. Both the privilege against self-incrimination and the provisions of Code C governing police behaviour in relation to suspects (whether in custody or not) may have a very important impact on the fairness of admitting evidence of, in particular, confessions.

61. Mr Massih submits that the whole concept and conduct of 'Operation Implore' were fundamentally irregular and misconceived. The circumstances in which the confessions were obtained both infringed English notions of fairness with respect to police conduct and the trial of criminal charges, and also 'outrage civilised values'; and the magistrate should have excluded the confession on this basis. Mr Massih graphically portrays what occurred as a 'descent into hell' brought about by the Faustian tactics of the police. Mr Massih relies upon like considerations to those which should in his submission lead to the exclusion of the evidence under s 76 of PACE. But he also relies upon s 78 of PACE irrespective of whether the magistrate was (as I have held) entitled to conclude that the applicants' confessions were not obtained as a result of things said or done likely in the circumstances to render them unreliable within the meaning of s 76 of PACE.

62. At the very forefront of Mr Massih's submissions is an objection to the deception and entrapment involved in 'Operation Implore'. Mr Massih points out that the applicant was living a humdrum life in Kent, before being drawn into apparent involvement in illegitimate activity and offered inducements of a financial, personal and sexual kind. That is all correct. But I find myself unable to accept Mr Massih's further submissions that the applicant should be regarded as someone of good character whose private life and personal relationship with his girlfriend were sorely infringed. I have already considered why I see little scope for any convincing grievance in respect of the operation's interference with his private life and relationship with his girlfriend in 1998. Further, the applicant

needed no urging to involve himself in apparently unlawful activities. Indeed, he was keen to continue to do so, during the long period when 'Woody' returned to Canada in mid-1998. His conversation does not disclose any scrupulous attitude to temptation or violence at any point. During discussions with 'Woody', he disclosed both his own youthful involvement in car theft, and violence towards his ex-girlfriend's new boyfriend. I see no reason to doubt these particular admissions. Indeed, even if I had concluded that the applicant's confessions to involvement in Stacey Koehler's killing were made as a result of things said or done which were likely to render them unreliable, this would not amount to condemning the actual confessions as inaccurate. If the question were whether the confessions were actually accurate, I have already indicated that I would attach weight to the applicant's videoed conduct and conversation as a whole, after as well as before making his confessions.

63. Mr Massih further seeks under s 78 of PACE to invoke the delay occurring between 1995 and 1998. I do not see how that could merit any real weight in this or any context, and certainly it cannot have decisive weight. The applicant was interviewed and made a statement regarding his whereabouts at an early stage. If that statement was true, he and his former girlfriend should still be able to support it. If it was false, he is unlikely to have forgotten the truth, which he on that basis for some reason presumably did not want at the time to disclose, and there is nothing to show that he would have any greater difficulty in backing up any other account now than then. As to the time that has passed, the applicant left Canada. It took some time for the RCMP to mount 'Operation Implore' with the Kent Police. There is no evidence which would justify a conclusion that either police force was in this respect at fault, whether in locating the applicant or in setting up the operation.

64. I return to the central question of fairness having regard to the nature and object of the undercover operation. We were taken to a large number of English decisions under s 78 of PACE. In *R v Christou* [1992] 4 All ER 559, [1992] QB 979, the police set up undercover a supposed jewellery shop with the object of recovering stolen property and obtaining evidence of thieves or handlers who might bring stolen property to the shop. Transactions and conversations with the appellants were thus videoed, which were allowed to be adduced in evidence at their trial. The court upheld the judge's admission of such evidence:

> '... the trick was not applied to the appellants; they voluntarily applied themselves to the trick. It is not every trick producing evidence against an accused which results in unfairness. There are, in criminal investigations, a number of situations in which the police adopt ruses or tricks in the public interest to obtain evidence. For example, to trap a blackmailer the victim may be used as an agent of the police to arrange an appointment and false or marked money may be laid as a bait to catch the offender. A trick, certainly; in a sense too, a trick which results in a form of self-incrimination; but not one which could reasonably be thought to involve unfairness.' (See [1992] 4 All ER 559 at 564, [1992] QB 979 at 989.)

65. As to Code C, the court considered it simply inapplicable in such a situation. The appellants were not being questioned by police officers acting as such. Conversation was on equal terms. There could be no question of pressure or intimidation. The case was in this respect quite different from *R v Mason* [1987] 3 All ER 481, [1988] 1 WLR 139, where a confession was elicited by a lie about discovery of a fingerprint told by police to the appellant in custody and to his

solicitor; and from *R v Payne* [1963] 1 All ER 848, [1963] 1 WLR 637, where the appellant in custody had been induced to undergo a medical examination by a representation that it was no part of the doctor's duty to examine him to give an opinion as to his fitness to drive; see per Lord Taylor of Gosforth CJ in *R v Christou* [1992] 4 All ER 559 at 566, [1992] QB 979 at 991. But Lord Taylor CJ went on:

> 'In reaching that conclusion, we should ourselves administer a caution. It would be wrong for police officers to adopt or use an undercover pose or disguise to enable themselves to ask questions about an offence uninhibited by the requirements of the code and with the effect of circumventing it.'

66. Mr Massih submits that that is what the present operation involved. The present operation was not directed to observing and recording continuing involvement in theft or handling, but to obtaining from a suspect his confession to a killing committed some three years previously.

67. *R v Smurthwaite, R v Gill* [1994] 1 All ER 898 were again cases where undercover police had set up traps in which they caught two appellants who solicited them to murder their respective spouses. In upholding the admission of the evidence in each case, Lord Taylor CJ (at 903) gave this further guidance on the application of s 78 of PACE:

> 'In exercising his discretion whether to admit the evidence of an undercover officer, some, but not an exhaustive list, of the factors that the judge may take into account are as follows. Was the officer acting as an agent provocateur in the sense that he was enticing the defendant to commit an offence he would not otherwise have committed? What was the nature of any entrapment? Does the evidence consist of admissions to a completed offence, or does it consist of the actual commission of an offence? How active or passive was the officer's role in obtaining the evidence? Is there an unassailable record of what occurred, or is it strongly corroborated? In *R v Christou* ([1992] 4 All ER 559, [1992] QB 979) this court held that discussions between suspects and undercover officers, not overtly acting as police officers, were not within the ambit of the codes under the 1984 Act. However, officers should not use their undercover pose to question suspects so as to circumvent the code. In *R v Bryce* ([1992] 4 All ER 567) the court held that the undercover officer had done just that. Accordingly, a further consideration for the judge in deciding whether to admit an undercover officer's evidence is whether he had abused his role to ask questions which ought properly to have been asked as a police officer and in accordance with the codes. Beyond mentioning the considerations set out above, it is not possible to give more general guidance as to how a judge should exercise his discretion under s 78 in this field, since each case must be determined on its own facts (see *R v Samuel* ([1988] 2 All ER 135 at 146, [1988] QB 615 at 630), *R v Parris* ((1988) 89 Cr App R 68 at 72) and *R v Jelen, R v Katz* ((1989) 90 Cr App R 456 at 465), and other cases cited in *Archbold's Pleading Evidence and Practice in Criminal Cases* (44th edn, 1993) para 15-364.)'

68. In the present case, the answer to the first and third of these questions is that the sole object of 'Operation Implore' was to obtain the applicant's confession to a killing committed some three years previously. In nature it involved the creation of circumstances in which the applicant would feel sufficiently comfortable, safe and motivated to confess, although repeated emphasis was laid on the importance attached to any disclosure being honest.

69. As to the fourth question, although 'Woody' had and used no detailed information, the effect of the supposed telephone conversation from 'Mac' was to direct the applicant's attention to some striking incident involving a female in Burnaby, about which the applicant who was known also to be from Burnaby had had some involvement. The ensuing conversation with the applicant involved 'Woody' actively suggesting that he had information from 'Mac' about the applicant's involvement and actively pressing the applicant to disclose the full details of such involvement, on the basis that the applicant was not being frank and that honest disclosure was what mattered. 'Woody' also assured the applicant that anything said would be kept secret. The applicant, having willingly taken part in apparently illegitimate activity and being intent to join an apparent 'mafia' family, cannot I think assert any legitimate expectation that 'Woody', however much he trusted him, would necessarily keep his word in this respect. Nevertheless, the whole operation was designed to elicit a confession from a suspect which no one can have thought that he would have been prepared to make had any interview been made or attempted. This is not therefore a case where the applicant had taken any prior step towards joining, or even demonstrated any prior wish to join, any criminal organisation. Contrary to Mr Hardy's submission, it is not a case in which the applicant can be said to have applied himself to the trick. The trick was applied to him and the most that the government can say is that it succeeded because he fell in with it and for it.

70. In *R v Bryce* the undercover police had not only participated in an undercover operation designed to provide evidence of the appellant in possession of a recently stolen car offering it for sale at a knock-down price, but during the course of such participation had asked questions and obtained answers about the car's provenance, which went directly to the critical question of guilty knowledge. Further, the questions and answers were not recorded, and so the appellant had no means of showing by a neutral, reliable record what was or was not said. In these circumstances, the Court of Appeal held that the trial judge erred in admitting them. In *R v Smurthwaite* it was the former aspect (asking questions so as to circumvent the code) which this court highlighted.

71. In two first instance decisions, judges have, on facts apparently close to the present, relied on the former aspect to exclude evidence: see *R v H* [1987] Crim LR 47 (Gatehouse J), a ruling which is however only very briefly reported, and *R v Hall* (2 March 1994, unreported) a decision of Waterhouse J, who has been able to supply us with a transcript. In *R v Hall* the defendant's wife had disappeared and the police suspected murder. An undercover police officer, 'Liz', befriended the defendant over several months, to the point where he became interested in marrying her. In a taped conversation she interrogated him repeatedly about what had happened to his wife, on the pretext that she had not been able to sleep, because she had been worried to death about his children if they were to become friendly with her and his wife were then to return. She made it clear that she was not satisfied that the defendant had told her all he knew about his wife's disappearance. The defendant agreed to meet on the next day and to tell her 100%. They met. He started by saying he had not murdered his wife, that he knew she would not return because of dreams and that she had walked out on him in the middle of the night. 'Liz' repudiated these accounts in strong language, saying that she just wanted some sort of reasonable explanation as to where his wife was so that she could understand, accept and put it on one side and get on with her life. The underlying theme was that she wanted to know in order to commit herself to him. She wanted the truth and accept it and forget

completely about it. All this was the final prelude to the defendant's confession, following which 'Liz' questioned him persistently about why he had done it, what he had done with the body and what had happened about his motor car. The conversation took place on the basis that the two were in love and that she wanted to hear the truth once and never again and that his disclosure would never be repeated. Applying Lord Taylor CJ's dictum in *R v Christou*, Waterhouse J held that the confessions must be excluded under s 78(1) of PACE as having been obtained in circumstances circumventing the code.

72. Another first instance decision, *R v Stagg* (14 September 1994, unreported) a decision by Ognall J, was much relied upon by Mr Massih. I do not find it of real assistance in the present context. The circumstances involved an attempt by the police by an undercover operation involving a woman police officer, 'Lizzie', to obtain either a confession or (that failing) a psychological profile which it was hoped could be adduced in conjunction with expert evidence to support a case that the defendant had a profile matching that of the killer of Rachel Nickell. Despite the most protracted operation lasting over seven months, and despite an invitation ultimately to admit the crime as a condition of maintaining the liaison that he was manifestly desperate to continue at almost any cost, the defendant repeatedly and continuously denied any involvement in the killing. As to the fantasies which the defendant expressed to 'Lizzie', the judge held that their—

> 'increasingly extreme character ... was the product of deliberate shaping by the policewoman and encouragement by her. Much of what she said to him demands the conclusion that she was deliberately deceiving the accused by encouraging him to express his innermost fantasies because she enjoyed them and the more extreme, the better.'

73. Indeed, at one point he even confessed to a murder which had never taken place. I do not regard this first instance decision as analogous to the present case on the facts or of any assistance in its resolution.

74. Equally, it seems to me that the respondent government obtains no real comfort from *R v Lin*, of which we have also seen a full transcript. The undercover officers there did not go along to find out about the Inland Revenue cheque although that became the ultimate subject of prosecution. That merely sparked off their investigation, the aim of which was to discover the future plans of the conspirators.

75. In the light of previous authority in this court, and in view of the nature and object of 'Operation Implore', I would, if the issue under s 78 of PACE related to a killing in this country and fell to be decided in a purely domestic context, expect the respondents to face very considerable difficulty in seeking to uphold a first instance decision which had admitted the applicant's confessions. I say this despite the margin allowed to such a court in a domestic context under the *Wednesbury* approach to appellate review.

76. Mr Hardy submits however that the present case can be distinguished from any previous authority and falls outside the scope of Lord Taylor CJ's dictum in *R v Christou*. He points out that 'Woody', as an RCMP officer, had no official status in this country at all. But 'Woody' was operating in conjunction with English police officers and within the framework of a joint Canadian-English police operation, so that point does not by itself impress. Next, however, Mr Hardy points out that the killing which was being investigated was not justiciable in this country, and that the applicant could never therefore have been arrested here. In circumstances where there was no other way in which the

applicant could have been interviewed, an undercover operation must, he suggests, be permissible. Further, the provisions of Code C cannot, he suggests, apply to an investigation which could never lead to prosecution here.

77. As to these points, the mere fact that there was no other way of interviewing the applicant cannot conclude the question whether it was fair to interview him in the way suggested. Newman J also pointed out in argument that it is possible, at least in theory, that the RCMP could have sought an order to take evidence from the applicant in England under the Criminal Justice (International Co-operation) Act 1990 as part of their ongoing investigation into Stacey Koehler's killing. Whether the Secretary of State would think it fit to refer such a request to a court under s 4(2) of the 1990 Act may be a different matter. The applicant would anyway be entitled to be and would no doubt be forewarned of his right to refuse give any evidence which might incriminate himself (see para 4(1)(a) of Sch 1 to the 1990 Act). We were told that no one on the respondent's side gave any thought prior to 'Operation Implore' to the possibility of invoking the 1990 Act. That does not surprise me. If the thought had occurred, one can be confident that it would have been quickly put aside. It would have been contemplated (correctly as it would seem to me) that an attempt to use the 1990 Act would have done nothing save forewarn the applicant that he was under continuing investigation and suspicion. The applicant himself would have been most unlikely to say anything, whether interviewed formally or informally, let alone anything incriminating which is what the respondent and the police were aiming to obtain.

78. The codes of practice under s 67 of PACE apply both to police officers and to 'persons other than police officers who are charged with the duty of investigating offences or charging offenders' (see s 67(9) and (10) of PACE). I agree with Mr Hardy that this makes it difficult to apply their provisions to situations where there is under English law no offence which can be the subject of either arrest or investigation. Again, that cannot mean that an undercover operation is necessarily permissible. But it links with the more fundamental difficulty faced by the applicant in arguing that the magistrate should have refused to admit the evidence about 'Operation Implore' on the ground that it circumvented Code C. Code C, even if it were capable in the eyes of English law of having any relevance to the present operation, is on any view a domestic code, in the sense that it has no application in Canada, where trial is sought. It is for that very reason that any argument that the magistrate erred in refusing to exclude the evidence of confessions under s 78 of PACE must be viewed on a different, international basis. The issue is whether (once again bearing in mind the margin allowed to the magistrate under the *Wednesbury* approach) he ought to have excluded the evidence in the extradition context as 'outraging civilised values'.

79. The general requirement of fairness in the admission of evidence in criminal proceedings may be expected to be reflected in any developed system of law. But it is a quite different matter to suppose that it will in its application involve throughout the civilised world the same results as would follow in England from decided authorities, whether under s 78 of PACE or under common law. Current English thinking and practice as to what is fair and appropriate cannot be transmuted axiomatically into the touchstone of the outer limits of civilised values.

80. Mr Massih referred to guidance in the European Court of Human Rights on the general international significance of the privilege against self-incrimination

(see esp *Funke v France* (1993) 16 EHRR 297 and *Saunders v UK* (1997) 2 BHRC 358, (1997) 23 EHRR 313). In the latter case the court said:

> '68. The Court recalls that, although not specifically mentioned in art 6 of the convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under art 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of art 6 (see the above-mentioned *Murray v UK* ((1996) 22 EHRR 29), *Funke v France* ((1993) 16 EHRR 297)). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in art 6(2). 69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the contracting parties to the convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing. In the present case the Court is only called upon to decide whether the use made by the prosecution of the statements obtained from the applicant by the inspectors amounted to an unjustifiable infringement of the right. This question must be examined by the Court in the light of all the circumstances of the case. In particular, it must be determined whether the applicant has been subject to compulsion to give evidence and whether the use made of the resulting testimony at his trial offended the basic principles of a fair procedure inherent in art 6(1) of which the right not to incriminate oneself is a constituent element.' (See (1997) 2 BHRC 358 at 373–374, (1997) 23 EHRR 313 at 337–338.)

The court went on:

> 'Nor does the Court find it necessary, having regard to the above assessment as to the use of the interviews during the trial, to decide whether the right not to incriminate oneself is absolute or whether infringements of it may be justified in particular circumstances. It does not accept the government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure. Like the Commission, it considers that the general requirements of fairness contained in art 6, including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings. It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the Serious Fraud Office cannot, as a

general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right.' (See (1997) 2 BHRC 358 at 373–374, (1997) 23 EHRR 313 at 339–340 (para 74).)

81. In *Saunders v UK* the court was concerned with the use in subsequent criminal proceedings of statements obtained from the accused in interviews conducted by Department of Trade and Industry inspectors under compulsion of law. It did not have to examine the scope of the concept of compulsion, still less situations of undercover activity. Nor is any direct assistance to be obtained in the present circumstances from authority such as *Khan v UK* (2000) 8 BHRC 310 —where the only complaint was that tape recordings made in breach of right of privacy under art 8 should not have been permitted to be used in criminal proceedings), save that it is perhaps worth noting that the court said (at 319 (para 34)):

'While art 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law (see *Schenk v Switzerland* ((1988) 13 EHRR 242 at 265–266 (paras 45–46)), and, for a more recent example in a different context, *Teixera de Castro v Portugal* ((1998) 4 BHRC 533 at 540, (1998) 28 EHRR 101 at 114–115 (para 34))). It is not the role of the court to determine, as a matter of principle, whether particular types of evidence—for example, unlawfully obtained evidence—may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another convention right is concerned, the nature of the violation found.'

82. The general approach adopted in the European Court of Human Rights appears thus to be in harmony with that found in the common law and now under s 78 of PACE.

83. I for my part fully accept the privilege against self-incrimination as a principle that one looks to find generally recognised throughout the world. But that again is not the same as saying that there is no scope for argument about its application in particular circumstances. The general principle is by no means absolute in England, as Lord Taylor CJ's words, quoted above, in *R v Christou* aptly illustrate. English courts have been careful to emphasise the importance of balancing all relevant factors in all the circumstances of each case. I am unable to accept that the present circumstances fall within that exceptional class of case, where the magistrate was bound to conclude that a consensus of civilised opinion exists which would be outraged if the present confessions were to be admitted.

84. Mr Massih referred us to *Soering v UK* (1989) 11 EHRR 439, a case where extradition would have led to a real risk of treatment contrary to art 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). In such a case, there are 'clear limits' to the rights which individual states otherwise possess 'to control the entry, residence and expulsion' of nationals of other states (see *Chahal v UK* ((1996) 1 BHRC 405, (1996) 23 EHRR 413), as discussed in Starmer, *European Human Rights Law* (1999) p 509. I note however that the court in *Soering v UK* also attached importance to the same international theme as that which I understand

underlies Lord Hoffmann's words in *R v Governor of Brixton Prison, ex p Levin* [1997] 3 All ER 289, [1997] AC 741. The court said:

> 'What amounts to "inhuman or degrading treatment or punishment" depends on all the circumstances of the case ... Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.' (See (1989) 11 EHRR 439 at 468 (para 89).)

85. The present case is concerned with extradition to stand trial in Canada. No doubt has been suggested about the fairness and justice of Canada's legal system, either generally or in respect of this specific case. That Canada has a well-developed system of protection of human rights under the Canadian Charter of Rights and Freedoms is well-known. That s 24(2) of the Charter makes inadmissible evidence obtained in breach of its provisions, when the administration of justice would otherwise be brought 'into disrepute' is stated in *Mohammed v The State* [1999] 2 AC 111 at 122, [1999] 2 WLR 552 at 561. But there was before the magistrate, and is indeed before us, no information about the impact which this or any other provision of the Canadian Charter might have on the evidence gathered by the present kind of undercover operation. The only, very limited information put before the magistrate consisted in Det Insp Bungay's general observation that there are 'no restrictions on undercover officers questioning suspects in Canada'. It is impossible to conclude that the applicant is at risk of being treated in any manner which would flout any convention value.

86. For these reasons, the present case was and is in my opinion pre-eminently one where an English court applying s 9(2) and (8) of the 1989 Act should refuse to exclude the confessions under s 78 of PACE. The magistrate was right. It should and will be for the Canadian court of trial to consider any issues of fairness and admissibility arising from the circumstances of the undercover operation and from the confessions to which it led.

OTHER BASES OF APPLICATION

87. I turn to the applicant's submissions that he should be discharged under s 11(3)(b) and/or (c) of the 1989 Act. I take first para (c). Mr Massih accepts that he cannot suggest any bad faith in the laying by the government of Canada of the accusation against the applicant, though he would wish to add the rider that this is because the full basis of the accusation has never been disclosed. However, he suggests that the case can be regarded as one of 'supervening' bad faith, invoking words of Sedley J in *Re Calis* (19 November 1993, unreported). I am at a loss to see how that case assists, or in what the alleged supervening bad faith is supposed to consist in the present case.

88. Paragraph (b) can also be dealt with shortly. I have already made observations on the subject of delay in the context of s 78 of PACE. I see no basis for suggesting

that it would in all the circumstances be unjust or oppressive by reason of the passage of time since the commission of the offence to return the applicant to Canada for trial there. Further, if there were any real reason at all to suspect that the applicant's defence will have suffered any prejudice by the delay, there is no reason to doubt that the Canadian trial judge would be able to give appropriate relief or directions.

CONCLUSION

89. In the upshot, I consider that the magistrate was entitled to reach the decision to which he came under s 9(8) of the 1989 Act and I would dismiss the applications both for habeas corpus and judicial review and for relief under s 11 of the 1989 Act.

NEWMAN J. I agree.

Applications dismissed.

Dilys Tausz Barrister.

Swain v Hillman and another

COURT OF APPEAL, CIVIL DIVISION, AT CARDIFF
LORD WOOLF MR, PILL AND JUDGE LJJ
21 OCTOBER 1999

Practice – Summary judgment – Principles – CPR 24.2.

Under CPR 24.2[a], the court has the power to dispose summarily of claims and defences which have 'no real prospect' of being successful. The word 'real' directs the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success. It is important that judges in appropriate cases should make use of the power contained in Pt 24. In doing so, they will give effect to the overriding objectives contained in Pt 1. It saves expense, achieves expedition, avoids the court's resources being used up on cases where that serves no purpose and is in the interests of justice. If a claimant has a case which is bound to fail, it is in his interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible. However, it is important that the power under Pt 24 is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at trial. The proper disposal of an issue under Pt 24 does not therefore involve the judge conducting a mini-trial (see p 92 *j*, p 95 *a b*, and p 96 *a c*, post).

Cases referred to in judgments
Taylor v Midland Bank Trust Co Ltd [1999] CA Transcript 1200.

Cases also cited or referred to in skeleton arguments
Lane v Shire Roofing Co (Oxford) Ltd [1995] IRLR 493, CA.

Appeal
By notice dated 15 July 1999 the defendants, Thomas Hillman and Trevor C Gay, appealed with permission of Judge Graham Jones, sitting as a judge of the High Court at Cardiff, from his decision on 17 June 1999, dismissing their application under CPR Pt 24 for summary judgment in proceedings for personal injuries brought against them by the claimant, Terence Paul Swain. The facts are set out in the judgment of Lord Woolf MR.

Neil Bidder QC (instructed by *Palser Grossman*, Cardiff) for the defendants.
Graham Walters (instructed by *Petersons*, Newport) for the claimant.

21 October 1999. The following judgments were delivered.

LORD WOOLF MR. This is an appeal from a decision of Judge Graham Jones, sitting as an additional judge of the High Court, given on Thursday 17 June 1999 at Cardiff. The judge was dealing with a case management conference in respect of a claim by Mr Paul Swain for personal injuries against Mr Hillman and Mr Gay who are builders. The chronology in this case makes sorry reading.

a Rule 24.2 is set out at p 92 *e f*, post

The accident in relation to which Mr Swain brings his claim occurred on 8 March 1989, over ten years ago. The position is complicated by the fact that in 1992 the claimant also had a traffic accident in relation to which the defendants have admitted liability, so there is a possible problem of causation in relation to the claimant's injuries. However, if the claimant is suffering from the injuries he alleges, which cumulatively are fairly serious, it is unfortunate that the claim has not been dealt with before.

As was pointed out by Judge LJ in the course of argument, one of the matters of which the claimant is complaining is depression. Nothing is more likely to aggravate depression than to have a case hanging over the claimant all these years. I would emphasise that the claimant's present legal advisers, both counsel and solicitors, have only been involved in this case since the spring of this year and there can be no criticism made of them for the fact that the claimant's case has not been pursued faster. Fortunately, a relatively early hearing date is anticipated and, if this case is to proceed, it is important that that date should, if at all possible, be adhered to.

Judge Graham Jones had an application before him that the case should be disposed of summarily. He obviously found the case near to the borderline as to whether or not it should be disposed of summarily. I say that because the judge invited the parties to address him as to whether or not he should make a conditional order, which he would only have done if he thought that it was a borderline case. In fact the judge did not make a conditional order, but dismissed the defendants' application that he should dispose of the matter summarily.

The power of a court to make a summary order is now contained in Pt 24 of the Civil Procedure Rules (CPR). CPR 24.2 provides the grounds for summary judgment:

> 'The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—(a) it considers that—(i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other reason why the case or issue should be disposed of at a trial.'

There is a note to r 24.2 referring to r 3.4. Rule 3.4 makes provision for the court to strike out a statement of case, or part of a statement of case, if it appears that it discloses no reasonable grounds for bringing or defending a claim.

Clearly, there is a relationship between r 3.4 and r 24.2. However, the power of the court under Pt 24, the grounds are set out in r 24.2, are wider than those contained in r 3.4. The reason for the contrast in language between r 3.4 and r 24.2 is because under r 3.4, unlike r 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim.

Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.

When Pt 24 came into force, and when the matter was before the judge, it was supported by a practice direction which has since been amended. It stated in para 4.1:

> 'Where a claimant applies for judgment on his claim, the court will give that judgment if: (1) the claimant has shown a case which if unanswered would entitle him to that judgment, and (2) the defendant has not shown any reason why the claim should be dealt with at trial.'

Paragraph 4.2 dealt with the obverse position as to a defendant. In similar terms it dealt with a defendant's right to apply for judgment if—

> '(1) the claimant has failed to show a case which, if unanswered, would entitle him to judgment, or (2) the defendant has shown that the claim would be bound to be dismissed at trial.'

I now refer to para 4.3, not because it is, in view of the judge's decision, directly relevant, but because it provides confirmation for what I previously referred to as to his state of mind. Paragraph 4.3 states: 'Where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order, as described below.'

Because the judge was considering making a conditional order in this case, it is fair, as Mr Bidder submits on behalf of the defendants, to take the view that the judge regarded this as a case where he thought that it was possible, but improbable, that the claim or defence would succeed.

Since the judge's decision, the practice direction to Pt 24 has been amended by deleting paras 4.1 and 4.2. The reason for that deletion is obvious. It was perceived that there was a conflict between 4.1 and 4.2 and the provisions of Pt 24. The practice direction was laying down a different standard which indicated that the approach required was one of certainty. The judge could only exercise his power under Pt 24 if he was certain or, to read the actual language of the practice direction, 'he thought that a claim would be bound to be dismissed at trial'. If that was thought to be the effect of the practice direction, that would be putting the matter incorrectly because that did not give effect to the word 'real' to which I have already referred.

It is not necessary to have viewed the practice direction in that way. In the (so far) unreported case of *Taylor v Midland Bank Trust Co Ltd* [1999] CA Transcript 1200 (Stuart-Smith and Buxton LJJ and Rattee J), Stuart-Smith LJ in a minority judgment, but a judgment which was not in the minority on this particular point, rationalised the possible conflict between Pt 24 and the practice direction in its original form by saying that the correct view of the effect of the practice direction is to be gleaned from the heading to the paragraph to which I have been referring which reads 'The court's approach'. It indicates no more than examples of situations where it could be right to give summary judgment in favour of one party or the other.

It is not necessary to say any more about Stuart-Smith LJ's approach, which may well be right, since Mr Bidder accepts, in my view properly, that we now have to apply the practice direction in its present form, in which only para 4.3 survives. It is however right, as Mr Bidder submits, that it appears that the judge, through no fault on his part, was misled by the language of the practice direction in its original form. I detect from the judge's judgment that he was looking at the matter on the basis that he had to be certain that the case could not succeed and

was bound to fail before he could appropriately accede to the defendant's application.

Although I consider that the judge therefore adopted the wrong approach for that reason, I am quite satisfied that he came to the right decision. It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible.

In my view the judge was right to come to the conclusion which he did, it follows that I take the view that, on the material which was before the judge, this case will proceed. That being the position, it is important that I do not say anything more than necessary about the facts of the case because, unless the parties sensibly compromise the present proceedings, the result will be that another judge on the date to which I have referred will have to try the issues.

However, it would be wrong of me not to give some indication of my reasons for rejecting the attractive and careful arguments advanced by Mr Bidder. They focus on the fact that in this case the claimant is saying that a plank, which was standing upright against a fence, fell on him suddenly without warning, although the plank had apparently been in that position for three days. One immediately appreciates that, if a plank has been in a position for three days, something must have happened to cause that plank to fall on the claimant, a fact which is not in dispute.

The defendants dispute that they were in occupation of the site where the accident occurred but, on the evidence which was before the judge and is before this court, that is an issue which is controversial, requiring investigation at the trial. However, putting that matter on one side, Mr Bidder still contends that the claimant should do more than he really is able to do at the present, which is merely to say that the defendants were in control of this site and the plank fell on him. He should say more to the defendants than, 'You explain how this happened without you [the defendants] being negligent, or for somebody for whose act you are responsible being negligent'.

On the evidence, there is an indication that quite apart from the defendants, there were other sub-contractors working on the site. As I understand the evidence, it is also clear that the claimant is entitled to say that the work was coming to an end; there was no need for planks to be on site at all; that there was rubble on the site, albeit that the defendants say that the site had been cleared up. The claimant is thus entitled to argue that that plank had no reason to be standing on end for two or three days against the fence. While he cannot say who caused the plank to be in an insecure position, perhaps put at too acute an angle against the fence, or precisely when that happened, this is a matter for which the defendants are responsible and, in the circumstances, they do have, on the material which he can put forward, a responsibility for explaining what occurred.

The claimant has two witnesses, his father and another person. He does not allege that his father was responsible for what went wrong, although he was there at the time. If the judge accepts the evidence of the claimant's witnesses and the claimant, the inference would be that someone else was responsible for the plank being removed and that person could have been negligent. Likewise, the defendants

could be negligent because they left a plank in a position which was inappropriate as a result of which it was interfered with, thus resulting in the accident.

Those are matters which will have to be considered carefully by the judge at the trial. I am not seeking to indicate what his view should be on those facts. It is a matter to be dealt with by the judge at a trial and not at a summary hearing. Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.

I would dismiss the appeal.

PILL LJ. What has concerned me about this case is the state of the evidence as to how the accident occurred. I accept that the judge was entitled to find that there was evidence which was not intrinsically incredible that the plank fell on the claimant. I also accept that there is a real prospect of establishing that the defendants had responsibilities as main contractors for the condition of the building site in this comparatively small contract.

Mr Bidder QC has analysed the pleadings and the evidence. It is alleged against the defendants that they failed to remove the plank, permitted the plank to be positioned where it was and failed to have a sufficient system of inspection and maintenance on the site. That is elaborated in further particulars wherein it is said that the plank of wood was leaning upright against the fence. It is said that: 'The Plaintiff will allege that a plank of wood was placed against the fence by one Paul Gay. It was so placed 3 days prior to the Plaintiff sustaining his injury.' And that: 'Nobody was present in the garden when the accident occurred. People were present at the side of the house and in the house.'

What is conspicuously absent from the pleading is an allegation that someone for whom the defendants were responsible negligently displaced the plank. Mr Bidder has referred to the evidence before the judge of the claimant's father, Mr Albert George Swain, that the plank was a scaffolding board approximately 12 feet long and had been leaning against the coal bunker for two to three days. The building owner, Mr Malacrino, said that he believed that those boards had been lying around for quite some time, and Mr Dyer, a supporting witness, said that he would confirm that there was plenty of room to pass by the boards without knocking them or brushing past them at all.

The claimant needs to establish, first, that there was negligence in the manner pleaded. It appears to me to be placing a very high standard of care upon a building contractor simply to allege that a plank should not be left upright on a building site such as this.

The second question is to consider how the plank fell in the absence of any allegation in the pleading that it was pushed.

Two suggestions have been raised in argument. The first was that a short time before someone may have dislodged it; the second (Mr Walters) was that it may have been a puff of wind which did so. These seem to be very unlikely possibilities on the material at present before the court.

However, having expressed my misgivings in that way, I have come to the conclusion, as has Lord Woolf MR, that the judge was entitled to hold in this case that there was a real, as distinct from a fanciful, prospect of success within the

meaning of CPR 24.2. There are matters of fact for trial by a judge and on those grounds, like Lord Woolf MR, I would dismiss this appeal. *a*

JUDGE LJ. To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require. Hence the discretion in the court to give summary judgment against a claimant, but limited to those cases where, on the evidence, the claimant has no real prospect of succeeding. *b*

This is simple language, not susceptible to much elaboration, even forensically. If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable. If that were the court's conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court. *c*

As there is to be a trial, I deliberately and expressly do not have any comment to make on the factual issues which have been canvassed in argument before us.

I agree with the judgment of Lord Woolf MR and the reasons he has given for dismissing the appeal.

Appeal dismissed.

Kate O'Hanlon Barrister.

Re DWS (deceased)
Re EHS (deceased)
TWGS (a child) v JMG and others

COURT OF APPEAL, CIVIL DIVISION
SIMON BROWN, ALDOUS AND SEDLEY LJJ
12, 13 OCTOBER, 9 NOVEMBER 2000

Intestacy – Succession – Exclusion from benefit – Public policy – Murder of deceased – Plaintiff's father murdering his parents and being disqualified from succession on intestacy – Plaintiff claiming succession to grandparents' estates – Plaintiff capable of taking only if father predeceasing grandparents – Executors of grandfather's sister claiming succession to his estate on failure of trusts in favour of his issue – Whether disqualified child of intestate to be treated as having predeceased intestate – Whether sister taking even though intestate leaving disqualified son – Administration of Estates Act 1925, ss 46, 47.

R murdered his parents, both of whom died intestate, and was therefore disqualified by a rule of public policy from taking their estates to which he would otherwise have been entitled under s 46(1)(ii)[a] of the Administration of Estates Act 1925. In subsequent proceedings, R's son, T, claimed to be entitled to his grandparents' estates under s 47(1)(i)[b] of the 1925 Act which provided that the issue of the child of an intestate could take if that child had predeceased the intestate. T contended that the rule of public policy which had disqualified his father meant that s 47(1)(i) had to be construed as if R had predeceased the grandfather. That contention was challenged by the executors of the estate of the grandfather's sister, W. They argued that his estate had passed to W under s 46(1)(v) which provided that an intestate's estate could pass to his siblings if he left no issue. The judge rejected T's contention, but accepted the executors' argument, holding that s 46(1)(v) applied if there were no issue of the intestate capable of taking. Accordingly, he concluded that the grandfather's estate passed to the executors. On T's appeal, the executors relied primarily on s 47(2)(a) which provided that, in the event of the trusts in favour of the intestate's issue failing by reason of no child or other issue attaining an absolutely vested interest, the estate devolved as if the intestate had died without leaving issue living at his death. In response, T contended that s 47(2) applied only if the child had failed to obtain an absolute vested interest because he did not attain the age of 18 or marry.

Held – On the true construction of s 47(1)(i) of the 1925 Act, the issue of a child of the intestate could take only if the intestate's child had actually predeceased the intestate. Such a construction gave effect to the clear intention of Parliament that a child of surviving issue could not take in preference to his parent, and a conclusion to the contrary would require a complete rewording of s 47(1)(i). Nor was there anything absurd in construing that provision so that the child of surviving issue could not inherit his grandparents' estates even when the surviving issue was disqualified. Indeed, there was no reason why the child should take in such

a Section 46, so far as material, is set out at p 99 *j* to p 100 *e*, post
b Section 47, so far as material, is set out at p 100 *e* to 101 *c*, post

circumstances. It followed in the instant case that T could not inherit his grandfather's estate since his father had survived the intestate. Instead, (Sedley LJ dissenting) the estate passed to W's executors under the combined effect of ss 46(1)(v) and 47(2)(a). The words of the latter provision were not qualified or restricted to particular events which would prevent the child attaining an absolute vested interest, and the sub-section was wide enough to cover the instant case. R had not attained an absolute vested interest because he was disqualified, while T had not attained such an interest for the reasons set out above. Accordingly, the estate should be held as if the grandfather had died without leaving issue, and the appeal would therefore be dismissed (see p 103 *e g* to *j*, p 104 *b* to *d j*, p 105 *a* to *c h* to p 106 *a g j* and p 108 *a d* to *j*, post).

Re Lockwood (decd), Atherton v Brooke [1957] 3 All ER 520 distinguished.

Decision of Blackburne J [2000] 2 All ER 83 affirmed.

Notes

For the effect of a culpable homicide on the rules of succession, see 17(2) *Halsbury's Laws* (4th edn reissue) para 586.

For the Administration of Estates Act 1925, ss 46, 47, see 17 *Halsbury's Statutes* (4th edn) (1999 reissue) 452, 457.

Cases referred to in judgments

Callaway (decd), Re, Callaway v Treasury Solicitor [1956] 2 All ER 451, [1956] Ch 559, [1956] 3 WLR 257.

Cleaver v Mutual Reserve Fund Life Association [1892] 1 QB 147, [1891–4] All ER Rep 335, CA.

Duo v Duo [1992] 3 All ER 121, sub nom *Duo v Osborne* [1992] 1 WLR 611, CA.

Lockwood (decd), Re, Atherton v Brooke [1957] 3 All ER 520, [1958] Ch 231, [1957] 3 WLR 837.

Norton (decd), Re (1944) 156 ALR 617, (1945) 161 ALR 439, Oregon SC.

Peacock (decd), Re, Midland Bank Exor and Trustee Co Ltd v Peacock [1957] 2 All ER 98, [1957] Ch 310, [1957] 2 WLR 793.

R v Horseferry Road Magistrates' Court, ex p K [1996] 3 All ER 719, [1997] QB 23, [1996] 3 WLR 68, DC.

Rasor v Rasor (1934) 175 SE 545, South Carolina SC.

Scott (decd), Re, Widdows v Friends of the Clergy Corp [1975] 2 All ER 1033, [1975] 1 WLR 1260.

Cases also cited or referred to in skeleton arguments

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810, [1975] AC 591, HL.

Crippen (decd)'s Estate, Re [1911] P 108, [1911–13] All ER Rep 207.

Gore, Re (1971) 23 DLR (3d) 534, Ont HC.

Hall's Estate, Re, Hall v Knight [1914] P 1, [1911–13] All ER Rep 381, CA.

Hunter's Exors, Petitioners 1992 SLT 1141, Ct of Sess.

Jones (decd), Re, Jones v Midland Bank Trust Co Ltd [1997] 3 FCR 697, CA.

K (decd), Re [1985] 2 All ER 833, [1986] Ch 180, CA.

Luke v IRC [1963] 1 All ER 655, [1963] AC 557, HL.

Pittalis v Grant [1989] 2 All ER 622, [1989] QB 605, CA.

Public Trustee v Fraser (1987) 9 NSWLR 433, NSW SC.

Robertson (decd)'s Estate, Re, Marsden v Marsden (1963) 107 SJ 318.

Royse (decd), Re, Royse v Royse [1984] 3 All ER 339, [1985] Ch 22, CA.

Sigsworth, Re, Bedford v Bedford [1935] Ch 89, [1934] All ER Rep 113.

Sinclair (decd), Re, Lloyds Bank plc v Imperial Cancer Research Fund [1985] 1 All ER 1066, [1985] Ch 446, CA.

Appeal

By notice dated 18 June 1999 the plaintiff, TWGS (T), a child acting by his mother as next friend, appealed with leave of Blackburne J from his decision, sitting as Vice-Chancellor of the County Palatine of Lancaster, on 5 March 1999 ([2000] 2 All ER 83) whereby he (i) dismissed T's proceedings for a declaration that he was entitled to succeed on intestacy to the estates of his grandparents, DWS and EHS, and (ii) allowed a counterclaim by the first to third defendants, the executors of the estate of the grandfather's sister, Winifred, that they were entitled to the grandfather's estate. Proceedings against the fourth and fifth defendants, the grandmother's blood nephews, were stayed with liberty to restore. The facts are set out in the judgment of Aldous LJ.

Francis Barlow (instructed by *Crombie Wilkinson*, York) for T.
James Barker (instructed by *Hague & Dixon*, Pickering) for the executors.

Cur adv vult

9 November 2000. The following judgments were delivered.

ALDOUS LJ (giving the first judgment at the invitation of Simon Brown LJ).

1. In 1993 Mr and Mrs S were murdered by their son, R. They died intestate. This appeal from the judgment of Blackburne J of 5 March 1999 ([2000] 2 All ER 83) is concerned with the question of who was entitled to inherit their estates.

2. Mr and Mrs S were survived by their son R and his son T. T claims the estates of his grandparents by his mother as his next friend. Mr S did not at his death have a surviving parent, but did have a sister, Winifred, who died in April 1995. Her estate was represented by the first, second and third defendants. I will refer to them as Winifred's executors.

3. Mrs S was in a similar position. She did not have a surviving parent, but had a brother, Jack, and a sister, Gladys. They both died before her, but Gladys had two children who are the fourth and fifth defendants.

4. These proceedings were launched in 1995. T sought grants of administration to the estates of his grandparents and a declaration that he was entitled to those estates contingent upon him attaining the age of 18. The grants were made and therefore the only issue before the judge concerned entitlement.

5. The Treasury Solicitor did not appear as he has taken the view that the Crown has no interest. The proceedings against the fourth and fifth defendants have been stayed pending resolution of the appeal, as any entitlement they have to Mrs S's estate must be the same as that of Winifred's executors in respect of Mr S's estate.

6. It was accepted at the trial that R was disqualified from benefiting from his parents' estate under the principle of public policy enunciated in such cases as *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 156–157, [1891–4] All ER Rep 335 at 340. It followed, because the Crown made no claim, that the only relevant claims to Mr S's estate were by T and Winifred's executors.

7. As Mr S died intestate, ss 46 and 47 of the Administration of Estates Act 1925 applied. So far as material those sections as then in force are as follows:

> '**46.**—(1) The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely:—(i) If the

intestate leaves a husband or wife, then in accordance with the following Table ... (ii) If the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate; (iii) If the intestate leaves no husband or wife and no issue but both parents, then ... the residuary estate of the intestate shall be held in trust for the father and mother in equal shares absolutely; (iv) If the intestate leaves no husband or wife and no issue but one parent, then ... the residuary estate of the intestate shall be held in trust for the surviving father or mother absolutely; (v) If the intestate leaves no husband or wife and no issue and no parent, then ... the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely:—First, on the statutory trusts for the brothers and sisters of the whole blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then Secondly, on the statutory trusts for the brothers and sisters of the half blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then Thirdly, for the grandparents of the intestate and, if more than one survive the intestate, in equal shares; but if there is no member of this class; then Fourthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the whole blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then Fifthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the half blood of a parent of the intestate) ... (vi) In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as bona vacantia, and in lieu of any right to escheat ...

47.—(1) Where under this Part of this Act the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely:—(i) In trust, in equal shares if more than one, for all or any the children or child of the intestate, living at the death of the intestate, who attain the age of eighteen years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of eighteen years or marry under that age of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking ...

(2) If the trusts in favour of the issue of the intestate fail by reason of no child or other issue attaining an absolutely vested interest—(a) the residuary estate of the intestate and the income thereof and all statutory accumulations, if any, of the income thereof, or so much thereof as may not have been paid or applied under any power affecting the same, shall go, devolve and be held under the provisions of this Part of this Act as if the intestate had died without leaving issue living at the death of the intestate; (b) references in this Part of this Act to the intestate "leaving no issue" shall be constructed as "leaving no issue who attain an absolutely vested interest"; (c) references in this Part of this Act to the intestate "leaving issue" or "leaving a child or other issue" shall be construed as "leaving issue who attain an absolutely vested interest."'

(3) Where under this Part of this Act the residuary estate of an intestate or any part thereof is directed to be held on the statutory trusts for any class of relatives of the intestate, other than issue of the intestate, the same shall be held on trusts corresponding to the statutory trusts for the issue of the intestate (other than the provision for bringing any money or property into account) as if such trusts (other than as aforesaid) were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate.

(4) References in paragraph (i) of subsection (1) of the last foregoing section to the intestate leaving, or not leaving, a member of the class consisting of brothers or sisters of the whole blood of the intestate and issue of brothers or sisters of the whole blood of the intestate shall be construed as references to the intestate leaving, or not leaving, a member of that class who attains an absolutely vested interest.'

The judgment

8. The judge considered first whether T was entitled to the estate of Mr S. When Mr S died he had two issue, namely his son R and his grandson T. It followed that s 46(1)(ii) applied. The judge pointed out that T's entitlement arose, if at all, under the statutory terms set out in s 47(1)(i). He said ([2000] 2 All ER 83 at 88):

'The plaintiff's entitlement arises, if at all, under the statutory trusts set out in s 47(1)(i). Under the terms of that provision, however, the plaintiff, as the son of a child of the intestate, can only qualify if he is within the definition of "issue living at the death of the intestate who attain the age of eighteen years or marry under that age of any child of the intestate who predeceases the intestate". On its face, therefore, s 47(1)(i) requires:(a) that as issue of a child of the intestate, the plaintiff should:(i) be living at the death of the intestate (which he was); (ii) attain the age of 18, or marry under that age (which although not yet achieved, he may yet do); but (b) that his father, RS, being a child of the intestate, should have predeceased the intestate (which RS did not). Literally applied, therefore, the plaintiff cannot satisfy the conditions laid down for him to take.'

9. Mr Barlow, counsel for T, had submitted to the judge that s 47(1)(i) should be construed as if R had predeceased his father. That was rejected by the judge (at 89):

'Persuasively though the argument was put, and sympathetic though I am to the plaintiff's plight, I cannot accept Mr Barlow's submissions. In my view, the relevant authorities do not justify such an approach. If anything they assume that, as happened of course, the offender must indeed be taken to have survived his victim.'

10. The judge went on to consider a number of authorities and accepted the submission of counsel for Winifred's executors that the subsection could not be construed so as to enable T to inherit. He said (at 92):

'While the rule of public policy obliges the court to disregard what would otherwise be the wrongdoer's entitlement under the statute, it does not require the court to go further. It does not enable the court, in the case of s 47(1)(i) any more than in the case of a will, to disregard the plain meaning of the relevant provision with a view, having disregarded the wrongdoer, to enable one person (in this case the plaintiff) to take rather than another or others. In a case such as the present it does not enable the court to ignore

the requirement, if the plaintiff is to take, that RS should predecease the intestate, or to construe it to mean something different from the meaning which it plainly bears.' *a*

11. Having decided that T could not inherit pursuant to s 47(1)(i) as his father had not predeceased the intestate, he turned to consider whether Winifred's executors were entitled to take. The difficulty that they encountered was that issue survived Mr S and therefore s 46(1)(v) did not seem to apply. Mr Barker, *b* counsel for Winifred's executors submitted that, even so, s 46(1)(v) should be construed to enable that to be done.

12. The judge accepted that the words of s 46(1)(v) required there to be no issue before brothers and sisters of the whole blood could take. However he concluded that it was appropriate to read the subsection as if the words 'capable *c* of taking' were included. It followed that, as he had concluded that neither R nor T were capable of taking, Winifred's executors could. He obtained support from *Re Scott (decd), Widdows v Friends of the Clergy Corp* [1975] 2 All ER 1033, [1975] 1 WLR 1260. He said ([2000] 2 All ER 83 at 95):

'That decision provides a precise analogy. The fact that it concerned a case *d* of disclaimer rather than forfeiture does not seem to me to be a material point of distinction. Mr Barlow did not suggest it was wrong: on the contrary he relied on this decision, albeit in relation to a different point. In my view, it provides a commonsense, if not entirely logical, answer to the problem posed by RS's disqualification from benefit. I propose to follow it in this case. If necessary (I do not think that it is) the same result is achieved by implying *e* the words "capable of taking" after the words "no issue" in s 46(1)(v). The alternative, that Mr S's estate passes to the Crown as bona vacantia, would seem all the more perverse, given that the Crown in this case has indicated that it asserts no claim.'

13. Counsel for T had submitted to the judge that, if it was permissible to *f* ignore the strict wording of s 46(1)(v) to ensure that one of the classes in that section took rather than the Crown as bona vacantia, it must equally have been permissible to ignore the requirement that R should have predeceased the intestate by assuming that R did predecease the intestate or somehow adapting the wording of s 47(1) to enable T to take. The judge rejected that submission. *g* He said:

'The second question is quite distinct from the first. The fact that it is possible to imply something into the language of s 46(1) to avoid the estate passing to the Crown as bona vacantia where next of kin are capable of taking does not mean that it is permissible to ignore, much less to distort, the *h* clear language of s 47(1)(i) to achieve the result for which Mr Barlow contends.'

14. My summary of the judgment does not do justice to its learning and clarity. It is sufficient as a lead in to my reasons for coming to the same result. My reasons are not, in all respects, identical to those of the judge, but that reflects further *j* consideration and research by counsel since the judge gave his judgment and the resulting difference in the submissions.

The first question—is T entitled to inherit his grandfather's estate?

15. Mr Barlow first submitted that s 47(1)(i) had to be construed in accordance with the underlying intention of Parliament. The court should not construe a legislative provision literally, if to do so would defeat the obvious intention of

Parliament. Further the court should strain against producing an absurd result or one which is irrational or illogical.

16. Mr Barlow then drew to our attention the structure of s 46. It provided for husbands and wives to be first in the queue; thereafter issue took before collaterals and collaterals before the Crown. It followed, he submitted, that it was the intention of Parliament that nearer kin should be preferred to remoter kin, and in particular, that issue should be preferred to collaterals. Section 47 was consistent with that approach, but it made clear that the junior generation could not compete with living senior members. As Harman J said in *Re Lockwood (decd), Atherton v Brooke* [1957] 3 All ER 520 at 521, [1958] Ch 231 at 234:

> 'The object of the two statutes [the 1925 Act and the Intestate Estates Act 1952] was to distribute the estate of the intestate among her next of kin, and not to prefer the more to the less remote.'

17. It followed, Mr Barlow submitted, that it would be contrary to the expressed intention of Parliament to prefer Winifred's executors to T who was an issue of the intestate. The correct approach was that of Harman J in *Re Lockwood* when he refused to give effect to the literal meaning of s 47(5), since repealed, to arrive at a result which was absurd. The court should construe s 47(1)(i) so that an issue of a child of the intestate could inherit provided that the child was prevented from doing so by reason of his death, disqualification or disclaimer.

18. Mr Barlow also criticised the way that the judge had read into s 46(1)(v) the words 'capable of taking', but had not been prepared to read words into s 47(1)(i). He submitted that the judge's approach to construction was inconsistent and contrary to the expressed intention of Parliament.

19. Mr Barker submitted that s 47(1)(i) was clear. It expressed the intention of Parliament and there was no need, nor was it possible, to read into it any words that would allow T to take. I believe he is right.

20. Section 47(1) applies 'Where ... the residuary estate of an intestate ... is directed to be held on the statutory trusts for the issue of the intestate'. In this case, s 46(1)(ii) so directs as two issue, R and T, survived. The terms of the trust are set out in para (i) of s 47(1). The estate is held in trust 'for ... any ... child of the intestate ... who attains the age of eighteen years'. R qualified. The subsection goes on to name other beneficiaries under the trust as 'all or any of the issue living at the death of the intestate who attain the age of 18 years or marry under that age of any child of the intestate who predeceases the intestate'. Thus living grandchildren can take provided that their relevant parent is dead. To enable T to inherit, the words 'of any child of the intestate who predeceases the intestate' have to be construed as covering cases where the child is alive, but is disqualified or disclaims his interest. But that was not the intention of the draftsman. The subsection goes on to state that the grandchild or grandchildren shall take 'the share which their parent would have taken if living at the death of the intestate' and concludes 'and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking'.

21. The subsection emphasises that no issue can take if the parent is living at the death of the intestate. R was living and therefore the words of the subsection make it clear that T cannot inherit.

22. Mr Barlow submitted that the court should disregard R, but that would not help as he was living at the death of the intestate. Further the court could not assume that R was not living at the death of the intestate as that assumption would in this case be inconsistent with the murder that he carried out. The

disqualification arises because he murdered his father. In any case the authorities such as *Cleaver*'s case and *Re Callaway (decd), Callaway v Treasury Solicitor* [1956] 2 All ER 451, [1956] Ch 559, provide that the rule of public policy is that the murderer is disqualified or struck out, not that his existence or the murder should be disregarded.

23. Mr Barlow accepted that T's right would be the same if R had disclaimed. In such a case there could be no rule of public policy which required the court to disregard the true facts, namely that R was living at the time that the intestate died. The acceptance by Mr Barlow that T's position would be the same if R had disclaimed emphasises the major surgery that would have to be done to s 47(1)(i) to satisfy Mr Barlow's submissions. In effect the requirement that the father of the child had to predecease the intestate would have to be rewritten as a requirement that the father, for some reason, does not inherit. If that had been the intention of Parliament, the last part of the subsection would have been completely different.

24. I accept Mr Barlow's submission that it was the intention of Parliament that issue should take before collaterals. But that formulation disregards the clear intention of Parliament that a child of surviving issue cannot take in preference to his parent. There is nothing absurd in the result that if a surviving parent is prevented from taking by disclaimer or disqualification, the intestate's estate should pass, not to his child, but to others. If it was absurd, then I would not have expected the rule to exist that, in the case of a class gift, the share of the person excluded went to swell the shares of the remaining members of the class (see *Re Callaway (decd), Callaway v Treasury Solicitor* [1956] 2 All ER 451 at 453–454, [1956] Ch 559 at 564 and *Re Peacock (decd), Midland Bank Exor and Trustee Co Ltd v Peacock* [1957] 2 All ER 98, [1957] Ch 310 and *Re Scott (decd), Widdows v Friends of the Clergy Corp* [1975] 2 All ER 1033 at 1043, [1975] 1 WLR 1260 at 1270).

25. Mr Barker drew our attention to the decision of the Oregon Supreme Court in *Re Norton (decd)* (1944) 156 ALR 617 and (1945) 161 ALR 439. The facts in that case were equivalent to those in the present. The applicable law was not identical to that in this country, but the conclusion reached by the Supreme Court was the same as that to which I have come. I accept that the judgments of the Oregon Supreme Court do not seek to establish how s 47(1)(i) should be construed, but they do add support to Mr Barker's submission that there is nothing absurd in construing that section so that the child of surviving issue cannot inherit his grandparents' estate even when the surviving issue is disqualified.

26. As Mr Barlow pointed out, Harman J did in *Re Lockwood* ignore certain words in s 47(5) of the 1925 Act because 'he was convinced that Parliament could not have intended to promote those more remote over those nearer in blood'. As he said: 'I decline to come to a conclusion which would necessitate holding that first cousins twice removed should be preferred to nephews and nieces.' (See [1957] 3 All ER 520 at 524, [1958] Ch 231 at 238.) In that case a new subsection had been introduced into the Act by amendment to clarify the law. Harman J held that 'when read literally, the subsection had not achieved its purpose' and it was subsequently repealed. The judgment supports Mr Barlow's submission that a court can, when appropriate, disregard words in a statute, but that is all. That approach is not applicable in this case. To disregard the requirements in s 47(1)(i) that the children of issue cannot take if their parent survives the intestate, would require a complete rewording of that section.

27. Mr Barlow's submission, when analysed, was that Parliament did not have in mind, when enacting s 47(1)(i), circumstances where the parent did not predecease

the intestate, but disclaimed or was disqualified. Therefore the court should construe the section on the assumption that Parliament would have intended that the child should take in those circumstances. Although he may be right that Parliament did not have in mind that a parent might disclaim or be disqualified, it is not open to the court to disregard the clear meaning of the section, particularly when the result cannot be said to be absurd or contrary to the expressed intention of Parliament. There is in my view no reason why the child should take in such circumstances. Take for example a case where a man had two sons living at his death. If he had made a will in the terms of s 47(1)(i), the authorities suggest that the issue of a disclaiming or disqualified son would not inherit as the whole estate would pass to the other son. Why should this court assume that Parliament intended a contrary result should occur on an intestacy? I conclude that s 47(1)(i) should be given its literal meaning. The result is that T cannot inherit as his father survived the intestate.

The second question—can Winifred's executors' inherit?

28. Before the judge Mr Barker submitted that Winifred's executors inherited as the trust which arose pursuant to s 46(1)(ii) had failed. It followed that Winifred's executors' could and did inherit under s 46(1)(v). That submission was accepted by the judge who interpreted the restriction in s 46(1)(v) that the intestate had to leave no issue as meaning that he had to leave no issue capable of taking.

29. Before us Mr Barker's primary submission was that s 47(2) applied. He submitted that as neither R nor T had attained an absolute vested interest, the residuary estate devolved and was held 'as if the intestate had died without leaving issue living at the death of the intestate' (see s 47(2)(a)). It followed that s 46(1)(ii) to (vi) applied with the result that Winifred's executors' inherited under (v). That submission was not made to the judge.

30. Mr Barlow rightly did not object to that submission being advanced for the first time in this court. He submitted that it was misconceived. He drew to our attention the five classes in s 46(1)(v) and that all but the third were qualified by the words 'but if no person takes an absolutely vested interest under such trusts'. He submitted that the reason why the third class was not similarly qualified was because the sole type of vested interest contemplated, namely attaining 18 years of age and marrying, did not apply to grandparents. It followed that the words 'absolutely vested interest' in s 47(2) should be given the same meaning. Thus the subsection only applied if the child failed to obtain an absolute vested interest because he did not attain the age of 18 or marry. In support he referred us to the judgment of Walton J in *Re Scott (decd), Widdows v Friends of the Clergy Corp* [1975] 2 All ER 1033 at 1043, [1975] 1 WLR 1260 at 1269–1270.

31. I accept the logic of Mr Barlow's submission. It may be that the draftsman of s 47(2) only had in mind that a child could fail to attain an absolute vested interest by reason of the conditions in s 47(1)(i) and it is for that reason that the third class in s 46(1)(v) contains no reference to an absolute vested interest. But the words of s 47(2)(a) are not qualified or restricted to particular events which would prevent the child attaining an absolute vested interest, and I do not believe it right to read into the subsection a qualification in the terms appearing in s 47(1)(i). To do so would mean that R would be considered to have attained an absolute vested interest even though he was disqualified from having any interest. Subsection (2) is wide enough to cover the present case. R did not attain an absolute vested interest because he was disqualified. T did not attain such an interest for reasons which I have already set out. The judgment of Walton J in *Re Scott* deals with the problem, but his conclusion does not form part of the decision. For my part

I believe the better approach is that of Professor EC Ryder in *The Conveyancer and Property Lawyer* [1976] Conv 85 at 86. It follows that the residuary estate should be held as if Mr S had died without leaving issue, with the result that Winifred's executors' are entitled to Mr S's estate pursuant to s 46(1)(v).

32. For the reasons that I have given I would dismiss this appeal.

SEDLEY LJ.

33. Intestacy is not necessarily the result of improvidence. People may very well decide not to make a will because they are content with the way the intestacy rules will operate on their death. What they are not likely to anticipate is that their death will be brought about by the deliberate act of the adult son whom they expect to succeed to their estate. Most people in the situation of the two deceased parents in the present case, if told that in such an unimaginable event their son would be disqualified from inheriting and asked what they would then like to happen, would say that they would like their estate to go to their grandchild.

34. We have not had to be taken through the parliamentary history of ss 46 and 47 of the Administration of Estates Act 1925, which was of course a consolidating statute; but it is probable (I will explain later why I say that) that at no stage of its life did either the drafter or Parliament consider what was to happen if the lineal successor became disqualified from taking or—just as problematically—disclaimed. Had that useful analogue of the officious bystander, the alert backbencher, intervened in the debate to ask, the minister would have had to undertake to consider the matter and to return to the House with proposals. For this appears to be a casus omissus, a gap in the Act, and one which (subject to another possibility which I consider below) Parliament would most probably have filled in the way I have suggested.

35. But it does not follow that the courts may simply write in what they surmise Parliament has left out. A rectifying construction is one thing: Bennion *Statutory Interpretation* (3rd edn, 1997) p 623, section 268, gives instances where this mode of construction has been used to supply omissions; but against this he instances (p 684, section 287) cases where the gap is too large for it to be constitutionally possible for the courts to fill it: see *Duo v Duo* [1992] 3 All ER 121, sub nom *Duo v Osborne* [1992] 1 WLR 611, *R v Horseferry Road Magistrates' Court, ex p K* [1996] 3 All ER 719, [1997] QB 23. To close the present gap, in fact, would require us to go further than mere infilling: it would involve cutting back the provision, which is very plainly there, that a grandchild cannot inherit while his or her parent is alive. To this it may very well be replied that the entire disqualification of a son who kills his intestate parents is a judicial interpolation in a statute which says nothing whatever on the subject: so that to limit the effect to the killer, and to preserve the policy of preferring the less to the more remote, by treating his disqualification as equivalent in law to his prior death is not nearly so invasive of Parliament's role as first appears.

36. To take this course, however, would require an examination of the operation of the equivalent rule in the law of wills and involve a sweep of argument much greater than we have heard. It would also have to take account of the implicit adoption of the common law rule by the enactment in the Forfeiture Act 1982, ss 1 and 2, of a power to mitigate its operation where the crime is not murder. It may be that one day this will have to be undertaken. For the present I concur, albeit with some reluctance, in the view of the other members of the court that the grandson cannot take.

37. It is consequently with sympathy for the grandchild's situation that I turn to the alternative claim of the estates of the sisters of the murdered couple. They too need something written into the Act if the estate is not to go to the Crown as bona vacantia. While Mr Barlow understandably protests at our doing for the sisters what we will not do for the grandson, there is no necessary parity between the two things and certainly no call for simple tit-for-tat reasoning. Even so, it seems to me that he has a point.

38. The objections to the addition to the requirement that the deceased should have left no issue of the words 'capable of taking' are not of the same class as the objections to the grandson taking on the son's disqualification. As Simon Brown and Aldous LJJ have pointed out, s 47 is shot through with the express qualification that issue who do not obtain an absolutely vested interest do not take. Although, therefore, the proviso to s 46(1)(v) that the intestate has left no issue is not literally met, there is force in the argument that issue means issue capable of taking. If so, for reasons already explored, this does not include the grandson and the way is open for collateral succession.

39. But to adopt this approach is to consider the positions of the grandson and the sisters in isolation from one another. If one looks at them together, the answer is a lot less obvious, because it is at least conceivable that the want of provision for lineal succession and the want of provision for collateral succession in circumstances such as the present are *both* deliberate: in other words, that the very lapse in entitlement which is to break the automatic succession of issue is also intended to cut out the otherwise consequent collateral succession, enabling the Crown to step in and make an equitable allocation of the estate in what are ex hypothesi uncatered for circumstances. This is, if nothing else, a consistently literal reading, albeit faute de mieux, of an Act for which, as we have seen, attempts at purposive reading can be treacherous.

40. What convinces me that it is also a tenable construction is that, going back to my alert backbencher, I do not believe for a moment that the minister's answer would have been that the legislation was deliberately so configured that in the event of a son's disqualification or disclaimer collaterals would step in and inherit in preference to a grandchild. No more was this the case in Oregon, where in *Re Norton (decd)* (1944) 156 ALR 617 and (1945) 161 ALR 439 the identical legislative gap produced a judicial outcome inviting the editorial criticism contained in the latter report (at 449–450). In South Carolina, where it appears that the legislature (alerted perhaps by the history of Lizzie Borden) had foreseen this very problem, the legislative solution was that which I have surmised the United Kingdom Parliament might also have adopted, namely to jump a generation and let the grandchild inherit: see *Rasor v Rasor* (1934) 175 SE 545.

41. So here, where the grandson's entitlement has to be inferred, because of the want of provision about it, to have lapsed with his father's crime, there is something to be said for the view that a comparably literal reading of the collaterals' entitlement will redress the unfairness, not by robbing everyone of their interest in the estate but by allowing the Crown to dispense it as equitably as circumstances allow. If the Crown in such a situation were to follow the axiom of Harman J in *Re Lockwood (decd), Atherton v Brooke* [1957] 3 All ER 520, [1958] Ch 231 that the policy of the law is to prefer the less to the more remote, nobody would be surprised.

42. I would therefore, for my part, hold that the estate in the present circumstances has become bona vacantia. I do so with deference to what is now a formidable body of judicial opinion to the contrary, but with the comfort that

by agreeing (albeit hesitantly) with others about the inevitability of the grandson's disentitlement, and by disagreeing about the sisters' consequent entitlement, I arrive at an outcome which is potentially less unjust than either.

SIMON BROWN LJ.

43. I agree with all that Aldous LJ has said and add a short judgment of my own only because of the skill and force of Mr Barlow's arguments on the appeal. His cri de coeur, it will be appreciated, is that whilst the court is refusing to stretch the language of the legislation to accommodate the innocent grandson's claim, it is nevertheless prepared to do just that to allow the sister's claim to succeed. That, he complains, is not merely unfair but is contrary to the plain underlying intention of the legislation which is to prefer issue to collaterals, in the same way that less remote next of kin are to be preferred to the more remote—see *Re Lockwood (decd), Atherton v Brooke* [1957] 3 All ER 520, [1958] Ch 231.

44. Powerfully though these arguments were formulated, I, like Aldous LJ, feel unable to accept them. My reasons can be stated really very shortly.

45. The language of s 47(1)(i)—the only section under which the appellant can inherit—is in my judgment wholly unambiguous: '... issue ... of any child of the intestate' can only inherit (a) if their relevant parent 'predeceases the intestate', (b) 'the share which their parent would have taken if living at the death of the intestate', and (c) 'so that no issue shall take whose parent is living at the death of the intestate'. In short, the subsection makes the same point no fewer than three times: the issue's parent must have predeceased the intestate.

46. There is simply no room for doubting the effect of this provision. Nor in my judgment is its effect as offensive as Harman J understandably found the effect of the short-lived s 47(5) to have been in *Re Lockwood*.

47. By s 46(1)(v), Winifred's executors fall to inherit (under the 'First' provision, she being a sister of the whole blood of the intestate) provided, most pertinently, that the intestate left no issue. The intestate here, of course, *did* leave issue, namely R and T, but it is at this point that s 47(2) comes into play. This provision, rather like s 47(1)(i), makes its point three times: unless the issue left attain 'an absolutely vested interest', the intestate is to be treated as having left no issue. True it is that the draftsman almost certainly contemplated that the only reason for the non-attainment of an absolutely vested interest would be in the event of the issue not attaining the age of 18 or marrying under that age (see particularly in this regard the 'Thirdly' clause of s 46(1)(v) as to grandparents). But that cannot justify cutting down the plain language of s 47(2) and applying it here to save the sister's interest, still less when to do so would leave the intestate's estate to the Crown as bona vacantia, (and would, of course, have that same result even had R been childless).

48. I well recognise that the appellant would prefer bona vacantia to the sister succeeding in her claim, in the hope (perhaps expectation) that the Crown would then in fact confer the benefit on him. This too, however, can provide no sound reason for giving s 47(2) the artificially narrow construction contended for by Mr Barlow.

49. For these reasons, which essentially just summarise in my own words those given by Aldous LJ, I too would dismiss this appeal.

Appeal dismissed. Permission to appeal refused.

Dilys Tausz Barrister.

Western Digital Corp and others v British Airways plc

COURT OF APPEAL, CIVIL DIVISION

MORRITT, MANCE LJJ AND HARRISON J

24, 25 FEBRUARY, 12 MAY 2000

Carriage by air – International carriage – Right of action – Goods lost in transit – Owner of goods not named as consignor or consignee of goods in air waybill – Carrier notified of damage to goods but not of loss – Whether owner of goods not named as consignor or consignee entitled to claim against carrier – Whether notice to carrier sufficient notice of complaint – Carriage by Air Act 1961, Sch 1, arts 18, 26(2) – Carriage by Air (Supplementary Provisions) Act 1962, Schedule.

The second claimant, WDS, agreed to supply seven consignments of computer equipment to the third claimant, its sister company, WDN. The equipment was to be consigned cif from WDS in Singapore to a freight forwarder in England, ECF, using an IATA-accredited freight forwarder, LEP. LEP arranged for the carriage by air of the equipment with an airline, Q Ltd, and acted as Q Ltd's agent in issuing an air waybill which identified LEP as consignor and ECF as consignee. LEP issued house air waybills to WDS in respect of the consignments, which showed WDS as consignee and ECF as consignee. The carriage was subject to the amended Warsaw Convention, as set out in Sch 1 to the Carriage by Air Act 1961, and the Guadalajara Convention, as set out in the schedule to the Carriage by Air (Supplementary Provisions) Act 1962. In the event, the carriage by air was not performed by Q Ltd but by the defendant, BA plc, a member of the same airline 'alliance'. The consignments were lost and ECF wrote to the defendant, advising, however, that the consignments had been received in a damaged condition, rather than that they had been lost. Two years later, the claimants commenced proceedings. The judge held that the claimants had no cause of action against the defendant on the ground that the owner of a consignment carried by air for reward who was not named as consignor or consignee or the person entitled to delivery under the air waybill sued on was not entitled to claim against the carrier under art 18[a] of the Warsaw Convention. He further struck out part of the writ which referred solely to the waybill issued by Q Ltd. The judge also declared that the letters sent by ECF to the defendant had complied with art 26(2)[b] of the Warsaw Convention, in that they had given it sufficient notice to conduct inquiries as to whether the cargo had been lost and it had not been shown that they had done so. Both parties appealed.

Held – (1) The contractual model assumed and to some extent imposed by the Warsaw Convention allowed for flexibility both in the identification of the consignor or consignee and, more importantly, in the identification of the principals of persons named in the air waybill as consignor or consignee. There were strong considerations of commercial sense in favour of an interpretation which

a Article 18 is set out at p 115 *f g*, post

b Article 26(2) is set out at p 121 *h*, post

recognised and gave effect to the underlying contractual structure, save in so far as that was inconsistent with the Warsaw and Guadalajara Conventions. A conclusion to the contrary would require named consignors and consignees to be prepared to litigate against air carriers at peril of liability for costs in matters in which they had no real interest. In the instant case, the claimants had a properly arguable claim with a real prospect of success against the defendant on the basis that (a) it was a principal of the consignor or consignee named in the air waybill issued by Q plc and (b) the defendant had performed the carriage which was the subject of that air waybill and was therefore liable for the short delivery of the cargo under the Guadalajara Convention. Furthermore, the conventions did not exclude claims against an actual carrier based on title to the relevant baggage or cargo, but subsumed them within the scheme of liability contained in ch III of the Warsaw Convention. Thus, although the nature and standard of any liability on the defendant's part was regulated by the Warsaw and Guadalajara Conventions, title to sue fell to be determined by the law governing extra-contractual claims. Accordingly, the claimants' appeal would be allowed in part and the court would set aside those parts of the judge's order in which he held that the claimants did not have a properly arguable case against the defendants and that the conventions did not exclude claims against an actual carrier based on title to the relevant baggage or cargo (see p 139 *g* to p 140 *f*, p 141 *h j* and p 147 *c d*, post); *Gatewhite Ltd v Iberia Lineas Aereas de España SA* [1989] 1 All ER 944 and *Sidhu v British Airways plc, Abnett (known as Sykes) v British Airways plc* [1997] 1 All ER 193 considered.

(2) Although a complaint under art 26(2) of the Warsaw Convention needed only to be made in general terms, there nevertheless had to be, within the time stated, a complaint made which at least embraced the damage to which the subsequent action related. In the instant case, such complaint as was made within the relevant time was specifically limited to physical damage to identified items and did not embrace the loss of such items, which formed the subject of the action. The complaint indicated a problem about the condition of the identified items, not about their arrival. It followed that art 26(2) had not been complied with. Accordingly the defendant's cross-appeal would be allowed and the claimants' action would fail (see p 145 *b* to *d* and p 147 *c d*, post); *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 considered.

Decision of David Steel J [1999] 2 All ER (Comm) 270 reversed in part.

Notes

For loss of or damage to cargo during carriage by air, see 2 *Halsbury's Laws* (4th edn reissue) para 1623.

For the Carriage by Air Act 1961, Sch 1, see 4 *Halsbury's Statutes* (4th edn) (1998 reissue) 30.

For the Carriage by Air (Supplementary Provisions) Act 1962, Schedule, see 4 *Halsbury's Statutes* (4th edn) (1998 reissue) 51.

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Fothergill v Monarch Airlines Ltd [1980] 2 All ER 696, [1981] AC 251, [1980] 3 WLR 209, HL.

Gatewhite Ltd v Iberia Lineas Aereas de España SA [1989] 1 All ER 944, [1990] 1 QB 326, [1989] 3 WLR 1080.

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Polatex Trading Co Pty Ltd v SAS (1984) IATA Rep 652, NSW District Ct.

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Sidhu v British Airways plc, Abnett (known as Sykes) v British Airways plc [1997] 1 All ER 193, [1997] AC 430, [1997] 2 WLR 26, HL; *affg* 1996 SLT 529, Ct of Sess.

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Thomas Cook Group Ltd v Air Malta Co Ltd [1997] 2 Lloyd's Rep 399.

X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC [1995] 3 All ER 353, [1995] 2 AC 633, HL.

Appeal and cross-appeal

The claimants, Western Digital Corp, Western Digital (Singapore) Ltd and Western Digital Netherlands, appealed from the decision of David Steel J ([1999] 2 All ER (Comm) 270) made on 28 June 1999 that the claimants had no cause of action for the loss of goods carried by air against the defendants, British Airways plc, on the ground that the owner of a consignment carried by air for reward who was not named as consignor or consignee or person entitled to delivery under the air waybill sued on covering the carriage was not entitled to claim against the carrier under art 18 of the Warsaw Convention. The defendants cross-appealed against the judge's finding that letters sent by the claimants' freight forwarders complied with art 26(2) of the Warsaw Convention. The facts are set out in the judgment of Mance LJ.

Philip Shepherd (instructed by *Beaumont & Son*) for the claimants.

Michael Crane QC and *Akhil Shah* (instructed by *Barlow Lyde & Gilbert*) for the defendants.

Cur adv vult

12 May 2000. The following judgments were delivered.

MANCE LJ (giving the first judgment at the invitation of Morritt LJ).

INTRODUCTION AND FACTS

1. This appeal and cross-appeal raise issues concerning title to sue and the complaints procedure under the Warsaw Convention (as set out in Sch 1 to the Carriage by Air Act 1961) (the convention) as amended by the Hague Protocol in 1955 and under the Guadalajara Convention. The Warsaw and Guadalajara Conventions were, 'so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees and other persons', given the force of law in this country by virtue of, respectively, the 1961 Act and the Carriage by Air (Supplementary Provisions) Act 1962. The relevant

carriage took place in June 1996. We are not directly concerned with amendments to the convention (particularly to art 24) introduced by the Montreal Protocol scheduled to the Carriage by Air and Road Act 1979, when in force.

2. The case arises from the loss of two consignments of computer equipment which the second claimants (Western Digital Singapore) agreed to supply to the third claimants (Western Digital Netherlands). These companies were subsidiaries of the first claimants, Western Digital Corp of California. The equipment was to be consigned 'cif/freight prepaid' to Western Digital Netherlands c/o Express Cargo Forwarding of Liddall Way, West Drayton, Middlesex (from which they were to be collected by 'Irish Express Cargo Forwarding' for onward delivery to Dublin). Express Cargo Forwarding Ltd, the fuller name of the company with a Liddall Way address, describes itself as a 'division'—and was presumably a subsidiary—of Irish Express Cargo Ltd, a company with a Dublin address. Western Digital Singapore used the services of an accredited IATA freight forwarder, LEP International (S) Ltd (LEP), to arrange delivery to Express Cargo Forwarding. LEP combined the two consignments with five others in relation to which they had also received instructions from Western Digital Singapore. LEP then arranged for their carriage by air with Qantas Airways Ltd (Qantas). LEP acted also as Qantas's agent in issuing an air waybill no 081-95894934 dated 21 June 1996. The Qantas air waybill identified LEP as consignor and Express Cargo Forwarding in Middlesex as consignee, adding under the head 'Accounting Information': 'Freight prepaid a/c of Western Digital (S) Pte Ltd.' The air waybill gave a general description of the seven consignments, with the further information 'Consolidation as per manifest attached'.

3. LEP itself issued to Western Digital Singapore separate house air waybills (HB 041777 and HB 041784) dated 21 June 1996 for each of the two consignments subsequently lost. Each identified at its head the 'Master Air waybill' as '081 SIN 95894934', and included boxes headed 'to' and 'By first Carrier' which were completed respectively 'LON' and 'QF9'. Each showed Western Digital Singapore as consignor and Express Cargo Forwarding as consignee. The claimants' case is that the manifest attached to the Qantas air waybill included copies of the LEP air waybills, although there is an issue about that, which cannot at this stage be resolved. The actual carriage was performed by the defendants, British Airways plc, by flight BA036 on 21 June 1996, under arrangements presently unknown, although British Airways is a major shareholder of Qantas and the two companies are part of an 'alliance' of airlines.

4. Two letters dated 28 June 1996 were written to British Airways under the letterhead of Express Cargo Forwarding Ltd describing itself at the foot of its letter paper as 'a division of Irish Express Cargo Ltd'. They were signed 'for and on behalf of Irish Express Cargo Ltd'. Quoting respectively the references '081-95894934 HB 041777' and '081-95894934 HB 041784', each letter read:

> 'Please be advised that the above mentioned consignment was received in a condition which obliges us to reserve the right to claim against you as carriers. Brief details are mentioned below but full particulars will be furnished as soon as they are ascertained. You are kindly requested to inform us in writing of your opinion in this matter without delay.'

5. No details were in fact 'mentioned below' or enclosed. A formal claim with back-up documentation was later made on 23 July 1996. A writ was issued on 19 June 1998, claiming against British Airways:

'Damages for breach of contract made in or about June 1996 as evidenced by or contained in Air Waybill No. 081-95894934; and/or breach of Article 18 of the Warsaw Convention as Amended at the Hague in 1955, and/or breach of duty and/or negligence and/or conversion in and about the loading, handling, custody, care and arrangements for taking and making delivery of the Plaintiffs' cargo computer disks carried under the said Air Waybill, and the carriage thereof from Singapore to London on or about 21st June 1996 which resulted in loss and/or damage to the said cargo ...' *a* *b*

6. Originally, the writ pursued claims against Qantas with reference to air waybill no 081-95894934 and against LEP with reference to its air waybills 'Nos. 041784 and 041777 which were consolidated under Air Waybill 081 95894934', but these claims were deleted in October 1998 by amendment under RSC Ord 20, r 1. Points of claim served on 16 November 1998 pursued the claim against British Airways, on the primary basis that the contract for carriage contained in or evidenced by Qantas air waybill no 081-95894934 was made by LEP as named consignor acting on behalf of the first and/or second claimants, with the named consignee, Express Cargo Forwarding Ltd, acting on behalf of the third claimant (para 2). Further or alternatively, it was alleged that at all material times the first and/or second and/or third claimants were owners of the lost consignments (para 6). On 18 January 1999, the claimants purported under Ord 20, r 3 to amend the points of claim to add the following para 3A: *c* *d*

'Further and in the alternative and without prejudice to paragraph 2 herein, if LEP did not act on behalf of the first and/or second plaintiff in concluding the contract with Qantas, then the second plaintiff will claim in these proceedings as the consignor named in LEP's house air waybills numbered 041784 and 041777, which comprised a contract of carriage between the second plaintiff and LEP. It is averred, as pleaded below at paragraph 8, that the defendant performed the contract of carriage between the second plaintiff and LEP.' *e* *f*

The defendants applied under Ord 20, r 4(1) to disallow this amendment.

7. By judgment handed down on 28 June 1999 and consequential order dated 14 July 1999, David Steel J ([1999] 2 All ER (Comm) 270) declared that the claimants had no cause of action against British Airways in respect of any of the matters complained of in the action, on the ground that— *g*

'the owner of a consignment carried by air for reward, who is not named as consignor or consignee or person entitled to delivery under the Air Waybill sued on, covering the ... carriage, is not entitled to claim against the carrier under Article 18 of the convention.' *h*

He also struck out para 3A, having regard to the fact that the writ (as amended in October 1998) referred solely to the Qantas air waybill. The claimants appeal against these rulings.

8. David Steel J further declared that the two letters dated 28 June 1996 complied with art 26(2) of the Warsaw Convention, in that it sufficed if they in fact gave British Airways sufficient notice to conduct inquiries as to whether the cargo had been lost, and it had not been shown that they did not do so. The defendants cross-appeal against that ruling, and seek an order striking out the writ and amended points of claim under art 26(4). *j*

THE CLAIMANTS' CASE ON THE APPEAL

9. Mr Michael Crane QC for the claimants submits that the facts can be analysed in two alternative ways. The primary (and original pleaded) case is that LEP acted as agents for the second and/or third claimants in contracting with Qantas. The alternative amended case, for which he seeks to reinstate para 3A, is that the second and/or third claimants contracted with LEP as principals. On either case, he relies against British Airways upon the Guadalajara Convention, which provides:

> *'ARTICLE I*
>
> ... (b) "contracting carrier" means a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor;
>
> (c) "actual carrier" means a person, other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph (b) but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention. Such authority is presumed in the absence of proof to the contrary.
>
> *ARTICLE II*
>
> If an actual carrier performs the whole or part of carriage which, according to the agreement referred to in Article I, paragraph (b), is governed by the Warsaw Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Convention, be subject to the rules of the Warsaw Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which he performs.'

10. The relevant rule of the Warsaw Convention is art 18, which reads:

> '(1) The carrier is liable for damage [dommage] sustained in the event of the destruction or loss [perte] of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage [dommage] so sustained took place during the carriage by air.
>
> (2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.'

11. The first step to applying the Guadalajara Convention is to identify an agreement for carriage governed by the Warsaw Convention. Mr Crane submits that the claimants' primary and alternative cases are no more than different routes to establishing British Airways' position as actual carrier with potential responsibility by virtue of art II of the Guadalajara Convention and art 18(1) of the Warsaw Convention. Accordingly, in his submission, the judge was wrong to strike out para 3A of the amended points of claim, by which the claimants seek to pursue the alternative case.

12. Liability as an actual carrier under the Guadalajara Convention depends upon the existence of a specific agreement for carriage with a specific contracting carrier. Recourse to an actual carrier depends upon identifying the carriage, or

part of the carriage, under that agreement which the actual carrier (not being the contracting carrier) performed by virtue of authority from the contracting carrier. The writ (as amended) and the points of claim as originally served rely exclusively upon the Qantas air waybill as evidencing the relevant contract of carriage, and also upon LEP's alleged role as agents in bringing the second and/or third claimants into contractual relations with Qantas. British Airways is by implication alleged to have performed the carriage by authority of Qantas. The alternative case that LEP itself contracted as principal for carriage by air of the two consignments under the LEP air waybills asserts a new and different contract (or possibly two contracts) as the basis for saying that British Airways became responsible as actual carriers (acting by implication with authority from LEP) under arts I and II of the Guadalajara Convention.

13. Article 29(1) of the Warsaw Convention provides:

> 'The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.'

14. Mr Crane's submission is that an action was brought within two years against British Airways as actual carrier, and that all that is now wished is to redefine the basis upon which British Airways were actual carriers. This has some attraction in the light of the wording of art 29(1). But I have come to the conclusion that it paints with too broad a brush. Article 29(1) extinguishes any right to damages if an action is not brought to enforce it within two years. The right to damages here depends upon there being a specific agreement with a specific carrier from whom the actual carrier receives his authority. If an action is brought against a carrier on the basis that it was an actual carrier with reference to a different agreement, contracting carrier and authority, that involves a different right to damages (or in English terms a different cause of action), even though it relates to the same cargo and the same physical carriage. The first right to damages is not the subject of any action and is extinguished, because action was not brought upon it within two years. Although the introduction by amendment of para 3A would not deprive the defendants of the benefit of any defence to this new claim under art 29(1) (see *Payabi v Armstel Shipping Corp, The Jay Bola* [1992] 3 All ER 329, [1992] QB 907), it would still be wrong to permit the introduction of a claim which was clearly extinguished by lapse of time. On this basis, the judge was in my judgment right to disallow the amended case sought to be introduced in para 3A.

15. Before us in oral argument, Mr Shepherd for British Airways also suggested that the claimants' case based on LEP's alleged agency was, even on common law principles, doomed to failure, and should be struck out on that ground. This is a point which was not raised by the summons before the judge, or argued or considered below. Nor is it raised by the notice of appeal. Apart from this, on the limited submissions which we heard on it, I do not think that the claimants' case of agency can be said to be either unarguable or without a real prospect. It involves some conceptual problems. But they may not be insuperable. LEP's house air waybills were each expressly subject to LEP's general trading conditions (1990 edn) set out on their reverse, which provided inter alia:

'2.(i) The Company is a Freight Forwarder and, subject to the following provisions, shall be entitled either to arrange all or any of the carriage, storing, packing or handling of the goods, or any other services required by the Customer, as agent on behalf of the Customer, or to provide all or any part of such services as principal contractor. The word "goods" in these conditions shall include any packing containers, or equipment.

(ii) When acting as an Agent, the Company does not make or purport to make any contract with the Customer for the carriage, storage, packing or handling of any goods nor for any other physical service in relation to them and acts solely on behalf of the Customer in securing services by establishing contracts with third parties so that direct contractual relationships are established between the Customer and such third parties.

(iii) To the extent that the Company itself by its own servants performs all or any part of the carriage, storage, packing or handling of the goods, or any other services required by the Customer, the Company shall be deemed to provide such services, or the part so performed, as principal contractor.

(iv) Where the Company has held itself out to be the operator of a regular line or service over the route, or part of the route, on which the goods are to be carried, and has accepted instructions for the carriage of the goods by that line or service, the Company shall (except where the Company procures a bill of lading or other document evidencing a contract of carriage between the carrier and the Customer or Owner) be deemed to provide such carriage, or such part thereof, as principal contractor, without prejudice to the question whether any of the other services are arranged by the Company as agent or provided as principal contractor.

(v) Except to the extent set out in sub-clause (iv) the Company shall be deemed to be acting as agent in any case where the Company enters into a contract with any other person for the carriage, storage, packing or handling of the goods or for any other services in relation thereto and such contract is capable of being enforced by the Customer or Owner as principal, whether or not the Customer or Owner is named or disclosed as principal by the Company.

(vi) The charging or agreement to charge a fixed price for any services shall not of itself determine whether the Company arranges such services as agent or provides the same as principal contractor.'

16. It seems to me doubtful whether LEP held itself out as the operator of a regular line within sub-cl (iv). So sub-cll (v) and (vi) on their face suggest that the situation should if possible be analysed as one where LEP acted as agents for the claimants when contracting with Qantas. One difficulty about such an analysis is that LEP consolidated the two relevant consignments with five others. But, in the present case, those five others were the subjects of precisely parallel delivery instructions from Western Digital Singapore to LEP. Another is that LEP made one contract with Qantas, but (probably) received seven sets of instructions from Western Digital Singapore and may well therefore have made seven separate contracts with Western Digital Singapore, although there has been no detailed investigation of their relationship. None the less it appears possible, in the light of sub-cll (v) and (vi) and what must have been the certainty that consolidation would occur, that LEP had authority from Western Digital Singapore to make a single combined contract with Qantas. The third difficulty is that the sum of

LEP's charges to Western Digital Singapore for the seven consignments is likely to have been less than the lump sum for which LEP incurred liability towards Qantas, the difference representing LEP's profit or fee. But this is expressly catered for by sub-cl (vi), and I do not see why a principal and agent may not contract on terms that the agent will arrange a contract for the principal with a third party for whatever he can, but that the principal will only pay the agent a limited sum. Further difficulty might, I suppose, arise if the third party contract was at a greater freight than the principal had agreed to pay, but that is unlikely in the present situation, and may in any event represent a risk that the principal incurs under conditions such as LEP's.

17. The court should therefore, in my view, approach this appeal on the basis that the second and/or third claimants have a properly arguable case for saying, under common law principles, that they were party to a contract for carriage by air evidenced by the Qantas air waybill and embracing all seven consignments, including the two which were lost. Further, so far as this may be relevant, it seems to me that, under common law principles, this would not be a case of agency for an undisclosed principal. Qantas had notice that LEP was acting for an agent, indeed for a named agent, Western Digital Singapore, although the latter may as an fob seller have been acting in turn as agent for Western Digital Netherlands.

THE WARSAW CONVENTION

18. I turn to the central question which the judge determined. It is whether the Warsaw Convention permits suit against a contracting or actual carrier in respect of loss of or damage to cargo by anyone other than a person named in the air waybill as consignor or consignee or a person entitled to delivery under the air waybill.

19. The scope of the convention is found in art 1. The convention applies to all international carriage of persons, baggage and cargo performed by aircraft by air for reward, as well as to gratuitous carriage by aircraft performed by an air transport undertaking (art 1(1)), though not to carriage of mail or postal packets (art 2(2)). For its purposes 'the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination' are within territories of different contracting states or are within the territory of a single contracting state but with 'an agreed stopping place' within the territory of another state (art 1(2)). By art 1(3):

> 'Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.'

20. In parenthesis, art 30 regulating liability in cases of successive carriage further provides that a successive carrier—

> 'is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.'

21. These provisions all contemplate the existence of an agreement, contract or contracts between parties for the relevant international carriage. Chapter II (arts 3 to 16) dealing with documents of carriage (passenger tickets, baggage checks and air waybills) does so likewise. The passenger ticket to be delivered by an air carrier under art 3(1) must contain inter alia—

> '(a) an indication of the places of departure and destination; (b) ... (c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.'

By art 3(2) 'The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage' though:

> 'The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22.'

Article 22(1) limits the carrier's liability in the carriage of persons, but adds: 'Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.'

22. Article 4(1) provides for delivery of a baggage check containing a like indication and notice, mutatis mutandis, to that required for tickets under art 3(1). Under art 4(2) the baggage check 'shall constitute *prima facie* evidence of the registration of the baggage and of the conditions of the contract of carriage'. Its absence, irregularity or loss has a similar consequence to that provided in the case of a passenger ticket.

23. Under art 5(1), the carrier has the right to require the consignor to make out and every consignor has the right to require the carrier to accept an air waybill, although under art 5(2):

> 'The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage which shall, subject to the provisions of Article 9, be none the less governed by the rules of this Convention.'

24. Article 8 provides for an air waybill to contain a like indication and notice, mutatis mutandis, to that required for tickets and checks under arts 3(1) and 4(1). Article 9 removes the carrier's entitlement to limit under art 22, if with its consent, cargo is loaded on board an aircraft without an air waybill or with an air waybill without the notice regarding limitation of liability required by art 8(c). By art 11: 'The air waybill is prima facie evidence of the conclusion of the contract, of the receipt of the cargo and of the conditions of carriage.'

25. Under art 22(2)(a), the limit of the carrier's liability in the carriage of registered baggage and cargo applies unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest, in which case the carrier is liable to pay up to the declared sum, 'unless

it proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination'. Article 12(1), (2) and (3) confers on the consignor and regulates rights of disposal during transit which are expressly '[s]ubject to his liability to carry out all his obligations under the contract of carriage'. Article 12(4) continues:

> 'The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the waybill or the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition.'

26. Article 13(1) provides that, except in circumstances where the consignor has exercised his right of disposal under art 12:

> '... the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the cargo to him, on payment of the charges due and on complying with the conditions of carriage set out in the air waybill.'

27. Article 13(2) requires the carrier to give notice to the consignee as soon as the cargo arrives, and art 13(3) provides:

> 'If the carrier admits the loss [perte in the French text] of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.'

28. Article 14 provides:

> 'The consignor and consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.'

29. Article 15(1) provides:

> 'Articles 12, 13 and 14 do not affect the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived from the consignor or from the consignee.'

30. By art 15(3) 'Nothing in this Convention prevents the issue of a negotiable air waybill'.

31. The judge derived from the provisions of Ch II a provisional conclusion that the owner of a consignment who was not the consignor or consignee named in an air waybill (or a person to whom the consignor had ordered delivery to be effected under art 12) could not hold the carrier liable under the provisions of art 18 in Ch III. He based this on the emphasis placed in Ch II on the central role of the consignor and consignee and their special status vis-à-vis the carrier. Before considering this conclusion further, it is appropriate to look at Ch III.

32. The convention deals separately in Ch III with liability of the carrier. Articles 17, 18 and 19 provide for the three subjects of death/bodily injury, loss (perte) or damage (avarie) to baggage or cargo and delay. Article 20 provides a limited defence if the carrier 'proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures', while art 21 provides for damage (dommage)

caused or contributed to by a claimant's own fault. Article 22 is the limitation provision. Articles 24, 25A, 26, 27, 28, 29 and 30 read as follows:

'Article 24

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

Article 25A

(1) If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.

(2) The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.

(3) The provisions of paragraphs (1) and (2) of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article 26

(1) Receipt by the person entitled to delivery of baggage or cargo without complaint is *prima facie* evidence that the same has been delivered in good condition and in accordance with the document of carriage.

(2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of carriage or by separate notice in writing despatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his estate.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination.

(2) Questions of procedure shall be governed by the law of the court seised of the case.

Article 29

(1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court seised of the case.

Article 30

(1) In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or cargo is subjected to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

(2) In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.'

THE CONVENTION AS A CODE

33. That the convention contains a code which supersedes common law rules relating to the nature and standard of liability is now clearly established. In *Sidhu v British Airways plc, Abnett (known as Sykes) v British Airways plc* [1997] 1 All ER 193, [1997] AC 430, the House of Lords was concerned with English and Scottish actions in respect of a scheduled airline flight from London to Kuala Lumpur which put down in Kuwait in the early hours of 2 August 1990 some hours after the Iraqi invasion had begun. In the English action commenced on 30 July 1993

the plaintiffs claimed damages at common law for personal injuries and negligence. In the Scottish action the pursuer claimed damages for delay at common law for breach of a condition allegedly to be implied in her contract that the airline would take reasonable care for her safety. It was common ground that neither the English plaintiff nor the Scottish pursuer had suffered any 'accident' on board the aircraft or in the course of embarking or disembarking, so that art 17 could not assist. (Further the Scots pursuer at least had not suffered any bodily injury.) It was further common ground that, if a party had a claim under art 17, there could be no concurrent common law remedy. The House of Lords held, by parity of reasoning, that in the field of liability for personal injury, for baggage or cargo or for delay, where the circumstances are such that no claim exists under the provisions of Ch III, the convention excludes any common law claim:

> 'It would be largely destructive of the system which this chapter seems to have been designed to lay down if a passenger were to be able, for example, to maintain a claim of damages for non-bodily injury, for loss of or damage to the personal possessions which he had with him inside the aircraft or for economic loss, outside the conditions and limits set by the convention while maintaining a claim under the convention for the bodily injury.' (See [1997] 1 All ER 193 at 207, [1997] AC 430 at 448 per Lord Hope of Craighead.)

> 'The convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals—and the liability of the carrier is one of them—the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law.' (See [1997] 1 All ER 193 at 212, [1997] AC 430 at 453 per Lord Hope.)

34. This approach was followed by the US Supreme Court in *El Al Israel Airlines Ltd v Tsui Yaun Tseng* (1999) 525 US 155, where a passenger claimed damages in tort under New York law for emotional injuries allegedly suffered as a result of an obtrusive security search at John F Kennedy International Airport before a flight to Tel Aviv. There was no 'accident' and no 'bodily injury' within art 17. The court held that no such claim was possible, saying:

> 'Given the Convention's comprehensive scheme of liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct nonuniform liability rules of the individual signatory nations.'

35. The court also considered the Montreal Protocol No 4, amending art 24 to read as follows:

> '1. In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their prospective rights.
>
> 2. In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in the Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights ...'

36. Focusing on the 28 words of the amended art 24(1), the court said:

> 'Both parties agree that, under the amended Article 24, the Convention's preemptive effect is clear: the treaty precludes passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty. Revised Article 24, El Al urges and we agree, merely clarifies, it does not alter, the Convention's rule of exclusivity.'

37. This reference to the Montreal Protocol No 4 highlights the difference between the issues before the courts in *Sidhu*'s case and in the *El Al Israel* case and the issue in the present case. It could subvert the convention if air carriers were exposed to liability of a nature or cause not specified in the convention. But title to sue in respect of such a liability is a different matter. The Montreal Protocol No 4 goes on expressly to make clear that the exclusivity which it provides in respect of passenger, baggage and cargo claims is 'without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights'. So, under the Montreal Protocol No 4, the intention seems clear to reserve a significant role to national law when it comes to determining by whom the claims allowed by arts 17 to 19 may be brought. Previously this was explicitly stated in respect of passenger claims: see art 24(2) of the Warsaw Convention as amended by the Hague Protocol. Special emphasis on the rights of, for example, personal representatives and dependants in cases of passenger liability is understandable. But art 24(1) of the Warsaw Convention itself refers to 'any action for damages, however founded'. The phrase 'however founded' is capable of wide application, and suggests awareness of the possibility of non-contractual claims. Here too, the Montreal Protocol No 4 may be clarificatory, rather than amendatory, in its effect.

38. In *Sidhu*'s case and the *El Al Israel* case the claimants were party to the relevant contract of air carriage. That is the typical situation which the draftsmen of the convention took as their basic working model. The convention has been described as operating by imposing statutory terms upon contracts of carriage: see *Grein v Imperial Airways Ltd* [1936] 2 All ER 1258 at 1277–1279, [1937] 1 KB 50 at 74–77 per Lord Greene MR and *Holmes v Bangladesh Biman Corp* [1989] 1 All ER 852 at 858, 867, [1989] AC 1112 at 1129, 1141 per Lord Bridge of Harwich and Lord Jauncey of Tullichettle respectively. But examination of some not uncommon situations indicates that the convention may operate more widely. Passenger tickets are frequently bought for persons who are either incapable of contracting for them (e g very young infant members of a family) or for persons who do not contract for them (e g partners, or dependants for whom parents or grandparents pay), and luggage is frequently handed over on their behalf on the same basis. They must be passengers within the meaning of the convention: see *Chitty on Contracts* (28th edn, 1999) vol 2, p 387, para 35-023. This is confirmed by *Fellowes (or Herd) v Clyde Helicopters Ltd* [1997] 1 All ER 775, [1997] AC 534, where police officers carried on an aircraft chartered by a police authority were held within the equivalently worded schedule to the domestic order (The Carriage by Air Act (Application of Provisions) Order 1967, SI 1967/480). In *Fellowes*' case (although it was not cited to us) the House of Lords held that the effect of the language of the Warsaw Convention supported by the terms of s 1 (of the 1962 Act) was to introduce 'general rules with regard to the liability of the carrier in respect of the contract of carriage' rather than 'merely as statutory contractual terms' (see [1997] 1 All ER 775 at 782–783, [1997] AC 534 at 543 per Lord Mackay of Clashfern LC,

with whom Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Clyde agreed, and [1997] 1 All ER 775 at 789–790, 791–792, [1997] AC 534 at 551, 553 per Lord Hope).

39. The fact that the draughtsmen of the convention worked, understandably, from a typical contractual model must not be allowed to detract from the role of the convention as a code introducing certain general rules. It is easy to find in the text of the convention formulations which, taken literally, would be inconsistent with a sensible set of rules. I can take two examples from the presently uncontroversial area of passengers. (a) Article 22(1) refers to the carrier and the passenger agreeing by special contract to a higher limit of liability and art 22(2) to the passenger making a special declaration of interest at the time the package was handed over to the carrier and paying any supplemental sum required. But a third party (for example, a parent, spouse or employer) must also be able to make a relevant special contract or declaration. The convention must, like any code, be interpreted flexibly and analogically to cater for such situations: compare the provision in section 1-102(1) of the American Uniform Commercial Code that it should be liberally construed and applied to promote its underlying purposes and policies, and the commentary that this 'consecrates the general process of development or unfolding of the code, so that it decides by analogy what it does not control by genuine development' (Mitchell Franklin in 'On the Legal Method of the Uniform Commercial Code' (15) 16 Law and Contemporary Problems 330). (b) Article 30 regulates the right of action of 'the passenger or his representative'. It makes no reference to claims by dependants although by art 24(2) the provisions of art 17 apply 'without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights'. Claims not merely by personal representatives, but also by dependants must be contemplated. Yet they are not mentioned expressly in art 30(2) at all.

40. Flexibility is, I think, important if the convention is to continue over time to fulfil its role as a set of general rules governing the rights and liabilities of the (in effect unlimited) categories of persons referred to in s 1(1) of the 1961 Act. As Lord Hope said in *Fellowes (or Herd) v Clyde Helicopters Ltd* [1997] 1 All ER 775 at 791, [1997] AC 534 at 553:

> 'In my opinion the convention agreed at Warsaw, as amended at The Hague, was intended to be, and is, capable of accommodating changes in the practice of airlines and aircraft operators with regard to the purposes of which aircraft are used to carry people and goods, and in the contractual arrangements in pursuance of which people and goods are carried by air for reward.'

PRELIMINARY ANALYSIS OF THE CONVENTION

41. While it is clear that in certain respects the convention scheme provides general rules rather than merely statutory contractual terms, it is also clear that the draughtsmen had very much in mind as a premise to its application the existence of a relevant contract of carriage by air. Who may sue or be sued on such a contract are, on the face of it (and subject to any convention provisions), matters for domestic law.

42. So far as both baggage and cargo were concerned, the typical model which the draftsmen had in mind was one under which the passenger in the case of baggage and the consignor in the case of cargo would be party to the contract of carriage. That is evident from, for example, arts 4, 5, 10(2), 11(1), 12(1), 16(1) and

22(2)(a). An assumption that the person with whom the carrier deals on a principal-to-principal basis will be a party to the contract of carriage is entirely understandable. Even where such a party is obviously a forwarding agent, he will commonly be expected to incur personal liability (as IATA accredited agents expressly undertake). However, the convention does not attempt to define or confine the concept of consignor and in its amended form does not even require the consignor's identity to appear in any documentation. Further the air waybill is itself no more than prima facie evidence of the conclusion of the contract. None of this suggests a rigid approach to the concept of consignor. None of it suggests an intention to exclude from consideration any person who under domestic law would be a party to the contract through or in addition to a person named as consignor in the air waybill.

43. The common law recognises that an agent, even though himself party to and entitled to sue or be sued on a contract under its terms or by custom (as often the case with forwarding agents), may at the same time be acting for a principal: see eg *Chitty* pp 50–52, paras 32-083 to 32-085, 'Agency' (written by Professor Reynolds) and the extensive authority there cited. Further, under common law principles, not only a disclosed but also an undisclosed principal may sue or be sued on a contract made by his agent: see *Chitty* pp 53–54, paras 32-087 to 32-088. The concept of an undisclosed principal has, it seems, no exact counterpart in civil law, although a similar result may often be achievable by other routes (see *Bowstead and Reynolds on Agency* (16th edn, 1996) pp 10 and 409, paras 1-018 and 8-070; Zimmerman *The Law of Obligations* (1990) ch 2, section II, Agency). A note of caution appears appropriate in respect of any such generalisation, since (a) we were, understandably, not given the benefit of any comparative law material in this area and (b) as Lord Bingham of Cornhill CJ, speaking extra-judicially, has recently recalled, 'the civil law as found in (say) France, Germany, Italy, Spain or The Netherlands is no more uniform than the common law as found in (say) England, the United States, Canada and Australia' ('A New Common Law for Europe', published as one of the Clifford Chance Millennium Lectures, and in turn citing Cappelliti *New Perspectives for a Common Law of Europe* (1978)). The references by Professor Tosi to French maritime law in the commentary referred to later in this judgment also point towards the need for caution.

44. Under English law and practice the right of suit in contract is commonly associated with ownership of the goods. If the person shipping or consigning goods is owner, he can sue. If he is acting for the owner, the owner can intervene and sue. In the case of a sale on terms that property and risk pass fob on shipment or consignment, the ordinary inference is that the shipper/consignor contracts with the carrier as agent for the consignee. A reservation of risk is however sufficient to establish loss for the purposes of a contractual claim, whether or not property may have passed. And a consignor who has parted with both property and risk may still make and sue on a 'special contract' with the carrier, under which he can recover substantial damages, which he will then hold on trust for the person really interested: see *The Albazero* [1976] 3 All ER 129 esp at 133–135, [1977] AC 774 esp at 842–844 per Lord Diplock. In some cases the circumstances in which delivery is made (for example against payment of freight) may also justify the inference of a contract with a consignee: see *Brandt & Co v Liverpool Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575, [1923] All ER Rep 656.

45. There is nothing in the convention which expressly excludes the application of such principles. Indeed, *Shawcross and Beaumont* Air Law (4th edn

reissue) vol 1 (Issue 64, October 1996) para VII (188) (now VII (622)) cited by Lord Hope in *Sidhu v British Airways plc, Abnett (known as Sykes) v British Airways plc* [1997] 1 All ER 193 at 210, [1997] AC 430 at 450 states that the rule in civil law countries is that only a party to a contract of carriage, *or a principal for whom he was acting*, is regarded as the appropriate plaintiff, and it was submitted before us that the draughtsmen of the convention had, primarily, a civil law rather than common law, theory of contract in mind. Mr Crane also submits that the passage in *Shawcross and Beaumont* overlooks the possibility that under civil law systems a consignee may take the benefit of a contract of carriage as a third party. Interestingly, perhaps, although the recent Contracts (Rights of Third Parties) Act 1999 generally excluded contracts for carriage by air from its operation, the reason for such exclusion may very well be that the extent to which third parties are entitled to take such benefit is expressly governed by the Warsaw Convention. Again, however, it is to be observed that the convention does not attempt to define or confine the concept of consignee, does not require the consignee to be named in any documentation and makes the air waybill no more than prima facie evidence of the conclusion of the contract and the conditions of carriage.

46. Mr Shepherd submits that there is nevertheless to be derived from the scheme of the convention and from, in particular, its frequent references to the consignor and the consignee, a conclusion that the only persons entitled to assert any rights, or under any liabilities, vis-à-vis the carrier, are those named as consignor or consignee in the air waybill. This involves the review of the terms of, in particular, Chs II and III, which led the judge to a provisional conclusion in favour of Mr Shepherd's submission.

47. Mr Crane points out that Ch II is primarily concerned with regulating the relations between the two sides in respect of documentation and arrangements for receipt, carriage and delivery, and in that connection it is also natural that the chapter should confer rights and impose obligations on those actually dealing with each other as principals. In contrast, the subject of liability is dealt with in Ch III, and that focuses, in general, upon the carrier's position, rather than upon the identity or characteristics of the 'plaintiff' (see arts 22(4) and 28) to whom the carrier is or may be liable. In my judgment, this distinction has some force, but it is not entirely watertight. In Ch II, art 13(3) is on one view addressing the conditions under which a consignee may claim for loss of an entire consignment. In Ch III, art 22(2) assumes a passenger or consignor having an 'actual interest in delivery at destination', although this to my mind illustrates no more than the typical model on which the draughtsmen were working. Article 30 regulates successive carriage in terms requiring a passenger or his representative to (art 30(2))—

> 'take action only against the carrier who performed the carriage during which the accident or delay occurred, save in cases where, by express agreement, the first carrier has assumed liability for the whole journey'

and distributing the claims which a passenger or consignor or consignee may make regarding baggage and cargo between the first and last carrier and the carrier performing the carriage during which the destruction, loss, damage or delay took place (art 30(3)).

48. In *Gatewhite Ltd v Iberia Lineas Aereas de España SA* [1989] 1 All ER 944, [1990] 1 QB 326 Gatehouse J confined art 13(3) (also art 14) to the exercise of

rights of disposal (ie under art 13(1) and (2)). I myself see some difficulty about accepting this. Article 13(3) appears to me to be more a footnote (or proviso as the judge said) to art 26. But, as such, I think it addresses the conditions for a claim for loss (perte) rather than the identity of the claimant. As to art 30, which refers to the consignor and consignee in the context of Ch III dealing with liability, that article is clearly focused upon a perceived need to regulate and distribute the rights of claim between two sides in the very specific situation of successive carriage, rather than being aimed at any identification or limitation of those entitled to present themselves either as, or through, the consignor or consignee. Article 14 underlines the role of the consignor and consignee as parties to the contract, but what is noticeable is the absence of any general rules of the convention providing who may sue as 'plaintiffs' for loss and damage or excluding others from maintaining such claims.

49. It may be said that the answer to the point made in the last sentence of this quotation lies in energetic or purposeful extrapolation, from other provisions of the Warsaw Convention such as arts 13(3), 26(1) and (2) and 30(3), of some underlying intention to confer general rights of suit on consignors and consignees or persons to whom they may direct delivery. But, even assuming that this were done, the need for such extrapolation highlights the fact that the convention does not expressly regulate certain key aspects of everyday liability claims. That being so, there is even less reason in my judgment to construe the convention as intended not merely to *confer* rights of suit on consignors or consignees named as such in the air waybill (or on other persons entitled under art 12(1)), but also to *exclude* suit by those party to the relevant contract for air carriage as their principals.

50. There are, it seems to me, also some positive pointers in the language of the convention, towards an entitlement on the part of others besides a named consignor or consignee to claim for loss or damage. I have referred to the phrase 'however founded' in art 24(1). The provisions of art 14, confirming that the consignor or consignee can exercise the rights given by arts 12 and 13 although acting in the interests of another, might be said to be unnecessary if other provisions of the convention anyway confine attention to the consignor or consignee.

51. Moreover, art I(b) of the Guadalajara Convention defines contracting carrier as a person who as principal makes an agreement for carriage governed by the Warsaw Convention 'with a passenger or consignor or with a person acting on behalf of the passenger or consignor'. That must in the case of a passenger embrace situations of a parent contracting with an airline 'on behalf of' an infant child, although the only legally binding agreement is or can be between the parent and the airline. Equally, however, it must embrace a ticket agent who is required by the airline to accept personal liability on the contract for the ticket price, when making a contract to which the passenger also becomes party. In the case of cargo, this provision is capable of covering the situation of an agent acting for a disclosed principal, and incurring no liability on the contract. But it seems improbable that this was the reason for its insertion. It would, as it seems to me, cover the readily foreseeable case of the agent who acts for a principal but who, although he is an agent, is required to commit himself personally under the contract. I see no reason in this situation why it should then be restricted to cases where the agent discloses that he is so acting.

52. A reading of the convention which restricts claims for loss of or damage to baggage or goods to the person named in the relevant documentation as consignor or consignee would have some odd consequences. Baggage checks for baggage delivered by a family at a check-in desk may, not uncommonly, be affixed en bloc by airlines to the ticket of any one member of the family, or distributed at random among the tickets of different family members. It seems unlikely that anyone contemplates by this practice that the only member of the family who can claim for loss, damage or delay is the passenger to whose ticket the baggage check happens to have been affixed, although he has no interest in the relevant baggage and did not even put it on the conveyor at check-in.

53. Pausing here, I am not therefore persuaded on a simple reading of the text of the convention that its draughtsmen intended the limitation in respect of loss or damage claims for which British Airways contends. I have concentrated up until this point on claims brought under the convention by principals of a named consignor or consignee in circumstances where, as a matter of domestic law and by the terms of the convention, such consignor or consignee falls to be treated as party to the relevant contract of carriage. The other aspect of the general issue determined by David Steel J concerns the possibility under English law of claims in the absence of any contractual relationship, based simply on ownership of the baggage or cargo lost or damaged in transit.

54. Common law (and I have little doubt at least some civil law) systems recognise that ownership of property (or it may be an immediate right to its possession) may give rise to a tortious or delictual claim against a person in whose possession such property is lost or damaged. Such claims have long been recognised at common law: see *The Albazero* [1976] 3 All ER 129 at 135, [1977] AC 774 at 844 citing *Hayn, Roman & Co v Culliford* (1879) 4 CPD 182. In air carriage falling outside the scope of the convention, they have been recognised as a basis for holding responsible a carrier from whose possession goods have been lost: see eg *Moukataff v British Overseas Airways Corp* [1967] 1 Lloyd's Rep 396 (where at 412–413 the argument was rejected that the statutes governing Crown proceedings and the Post Office excluded any tortious claim against an air carrier for loss of mails). To counter attempts by goods owners to use this route to avoid contractual terms by pursuing claims against sub-bailees, the doctrine of bailment on terms has been developed and recognised: see *The Pioneer Container, K H Enterprise (cargo owners) v Pioneer Container (owners)* [1994] 2 All ER 250, [1994] 2 AC 324. In German law a similar doctrine to bailment on terms evidently exists (cf the response by Assessor Erich Schõnwerth and Dr Wolf Müller-Rostin in (1993) ZLW (Zeitschrift für Luft und Weltraumrecht) 21 to a previous article by Dr Robert Kuhn in (1989) 38 ZLW 21, both articles being cited in note 23 of para VII/622 of *Shawcross and Beaumont* (Issue 79, April 2000).

55. The unamended Warsaw Convention referred to a carrier and not to his servants or agents. The Hague Protocol introduced amendments into arts 25 and 25A to refer to 'servants and agents'. Article 25 as amended, deals simply with the extent to which the carrier's liability under art 22 may be affected by acts or omissions of his servants or agents. Article 25A gives any servant or agent, acting within the scope of his employment by carrier, an entitlement to avail himself of the limits of liability which the carrier is entitled to invoke under art 22. Nothing in arts 17 to 21 or in art 25A itself imposes any liability on a servant or agent. Following *Sidhu*'s case the language of art 25A ('damage to which this Convention relates') may restrict the nature of the claim which may be made against any

responsible servant or agent. But that is a different matter. Whether a servant or agent may be held liable at all must, on the face of it, be determined by domestic law; as to that, see *Scruttons Ltd v Midland Silicones Ltd* [1962] 1 All ER 1, [1962] AC 446 (while noting the discussion regarding the different United States position in *Shawcross and Beaumont* at para VII (644) (Issue 79). Servants or agents do not have under the convention the protection of other provisions, for example, the two-year time limit in art 29, although that is specifically provided under English law by s 5(1) of the 1961 Act. Accordingly, art 25, appears specifically to contemplate and to regulate tort claims, which would necessarily be brought by the owner or person with an immediate right to possession of baggage or cargo. Whether art 25 could extend protection to a sub-contractor (such as British Airways in the present case) may be open to debate. The Guadalajara Convention was on any view introduced in order specifically to protect such sub-contractors. It deals specifically with non- contractual claims. It extends to sub-contractors, in respect of the carriage they performed, the full liability and protection provided by the rules of the Warsaw Convention. British Airways seeks to read the Guadalajara Convention as substituting for their previous exposure to baggage and cargo owners a new exposure to no one except consignors or consignees named in an air waybill to which British Airways was never a party and which it may never have seen, and to do this even though such consignors or consignees may have suffered no actual loss at all. Other servants or agents would on any view continue liable under art 25A to the persons really interested in the claim, that is the owners or persons immediately entitled to possession who suffered the loss. I would in these circumstances be disinclined to read into the Guadalajara Convention the intention for which British Airways contends unless compelled by other consideration. The Guadalajara Convention also extends the protection of the limits of liability in the Warsaw Convention to servants or agents of the actual carrier: see arts V and VI. Once again, the exposure of servants or agents arises on its face under domestic law and will be to the owner or person entitled to immediate possession of the baggage or cargo lost or damaged.

56. Whilst considering the possibility of extra contractual claims, it is to be noted in parenthesis that the limit of liability for hand luggage in art 22(3) is not matched by any provision providing for liability in respect of or regulating the standard of liability in respect of hand luggage. Either claims for hand luggage are regulated by domestic law (as the draughtsmen of the convention appear to have thought: see the initial report and opening address to the Second International Conference at Warsaw which led to the finalisation of the original Convention in 1929, by Mr Henri de Vos reported at pp 22 and 253 at the minutes) or the convention provisions of arts 17 to 21 must be extended analogically to cater for such claims. In either case there is nothing expressed in the convention to prevent the owner of hand luggage suing whether or not he happens to be the passenger carrying it on board.

57. There remains the question whether a carrier by air who contracts for carriage under an air waybill and actually carries (and loses or damages) the relevant cargo may incur not merely liability to the consignor or consignee or their principals based on the existence of the contract of carriage, but also extra contractual liability to an owner of such cargo who cannot claim to be such a principal. Bearing in mind the different status of a contracting carrier and an actual carrier, the answer is not inevitably the same in each case. Further, the question does not directly arise for consideration in the present case, since British

Airways was simply an actual carrier under the Guadalajara Convention. I see cause, however, to be cautious about a proposition that the owner of baggage or cargo cannot ever claim for its loss or damage against a contracting carrier.

58. First, the Guadalajara Convention shows that the provisions of Ch III are perfectly capable of operating between non-contracting parties. Secondly, the words 'however founded' in art 24(1) are wide enough to cover such claims. Thirdly, and more fundamentally, there are situations where an owner may be a complete stranger, not merely to the contract of carriage but to any suggestion or idea that his goods would be carried anywhere, as for example where his goods have been borrowed or stolen or taken by mistake and are without his knowledge or authority handed to a carrier for carriage to a consignee: see *Chitty* p 446, para 36-050.

59. British Airways' case involves the proposition that the only person able to claim their delivery up, or to claim in respect of their loss or damage, is the passenger carrying them or the person named as their consignor or consignee. Take the not uncommon situation of a stolen artefact or work of art. If it is shipped abroad by air, the only person who could direct or claim delivery up by the airline would be a thief, handler or dishonest forwarding agent, if such appeared as consignor and consignee. On British Airways' case, these too would then also be the only persons who could sue the airline for any loss or damage. Mr Shepherd submitted that this was in effect the price the innocent world at large must pay for the benefit of air transport. It seems most improbable that the convention was intended to have that effect. Here too, I prefer to view the convention as establishing the general framework, including the nature and standard of liability, but to read its provisions as operating with some flexibility, and as allowing a role for the relevant domestic law, when identifying those entitled to sue in situations where the convention is not in terms exclusive. The most that airlines could sensibly expect in situations such as these is that they would still enjoy in relation to the true owners the benefit of the internationally agreed and statutorily enacted scheme provided by Ch III of the Warsaw Convention.

PREVIOUS AUTHORITY ON TITLE TO SUE

60. I turn to authority specifically in point on the issue of title to sue. There is surprisingly little and the direction in which it points has changed. The judge examined many of the relevant authorities. We were shown further authorities together with a review of the jurisprudence 'The Cargo Owner's Right to Sue under the Warsaw Convention' (1992) 17 Annals ASL (II) 441 by Robert Wilkinson, a former partner in the applicants' solicitors who wrote it well before the subject matter of this case for an October 1991 meeting of the Aviation Law Association of Australia and New Zealand.

61. I start with European authority. A line of French authority restricts the right of suit to the consignor or consignee named in the air waybill. It is summarised in footnote 5 on p VII/303 of *Shawcross and Beaumont* (Issue 79), together with a decision of the Tribunal de Commerce of Brussels (15 May 1981) and the Cameroon Supreme Court (7 October 1982). The decisions are, as customary, briefly reasoned. They include three decisions in the French Cour de Cassation. In *Ste International Transit Transport v Ste Industrielle et Commerciale* (23 February 1981, unreported) SIC entrusted SITT with arranging the carriage by air of electronic equipment from Paris to Ibadan. SITT used Air France for the purpose. SIC was not named as consignor or consignee on the air waybill. The

Cour de Cassation upheld the Court of Appeal's decision that SIC could not sue under the contract of carriage, since it was not party to it, and referred for support to arts 18(1) and (2), 24(1) and 30(3) of the Warsaw Convention. This reasoning appears to treat the Warsaw Convention as defining, and limiting, by reference to the air waybill the agreement for carriage upon which its operation is predicated. In *Cie Iberia v Cie d'Assurances La Concorde* (23 June 1987, unreported), the air waybill box headed 'Consignee' was completed with the name of a bank (probably the bank issuing a letter of credit covering payment) under whose name also appeared the words 'NOTIFY: Galerie Maison et Jardin', the buyer. The Cour de Cassation adopted a slightly more relaxed attitude, upholding the Court of Appeal's decision that Galerie Maison et Jardin was entitled to sue Cie Iberia. In *Ste France Handling and Lufthansa v Ste Japan Time SA* (14 May 1991, unreported) the Cour de Cassation overturned the lower court's decision allowing Ste Japan to sue as buyer and importer, in circumstances where, although it appeared on the relevant air waybills as 'notify party', the banks financing the transactions appeared as consignees. The court referred to arts 12 to 15 and 30(3) of the convention.

62. An article in *Transport Aérien* by Professor J-P Tosi (professor at the University of Montpellier) considers the state of authority as at 1995. He points to the difference between the 'very narrow limits' adopted by French jurisprudence and the approach taken in the *Gatewhite* case (see below). He describes the French approach as based more on the consideration that 'a certain formalism is necessary in view of the risk that a carrier runs of seeing itself pursued by different claimants in courts competent under art 28 but not situated in the same country' than 'on very debatable textual arguments (the principal of which is based on art 30, which however only concerns successive carriers and which seems inspired more by practical than by juridical considerations)'. In dealing with the consignor's right of action under French law, he refers to authority establishing that entry on the waybill is a necessary but not sufficient condition of suit, on the basis that an fob seller has no interest after shipment and cannot be regarded as party to the contract of carriage, and questions whether this applies if the consignor can show that he has suffered loss. The consignee's right of action is, he indicates, linked to the right of disposal and the right to take delivery, but, he continues, the rights of consignor and consignee must be regarded as alternative, although this question has not been addressed in the French jurisprudence. He summarises the state of French authority with respect to actions by a 'real consignee', not featuring on the waybill, pointing out that French authority only affords a right of action 'in exceptional cases' and citing the Cour de Cassation's decision of 23 June 1987 as an example. He concludes his consideration of the position of a 'real consignee' with reference to a further Cour de Cassation decision of 7 July 1992 (BTL 1992, p 638) recognising the right of a 'a real' consignee to sue in a maritime context (ie the right of an owner to sue for damages he has suffered due to loss or damage to goods delivered against a bill of lading held and presented by a third company which did not declare itself to be acting for the owner). Professor Tosi is evidently unconvinced by the current state of aviation authority, since he comments that it ought not to survive unchanged this extension of the right to claim to a real consignee in a maritime context. As to the 'real consignor', Professor Tosi observes that in land transport French law allows a consignor who has contracted with a 'commission agent' to sue the carrier, even though not appearing on the consignment note, but points out that

this is based on an article in the French Commercial Code which is not applicable to air transport. Nevertheless, he continues by saying that 'it is however excessive to refuse an action to the real consignor when he is the sole person to have suffered damage. Maritime law is evolving towards the recognition of a right of action in this case' and citing authority, before concluding: 'Air law ought to move in the same direction.' A little later (and writing before *Sidhu*'s case), he draws attention to the different approaches of French law and common law regarding delictual liability.

63. In *NV Oregon v Seaboard World Airlines Inc* (25 May 1971, unreported) the Court of Haarlem, First Chamber held that the right of suit for non-delivery was limited to the named consignor or, after the goods had arrived at the place of destination, to the named consignee, basing its conclusions that the rights were alternative on arts 12 to 14 and that they were exclusive on a contrario extrapolation from art 24(2).

64. Turning to United States authorities, it is to be noted that the United States has never enacted the Hague Protocol, so that they were decided under the unamended Warsaw Convention which requires the identity of the consignor and consignee to be declared in the 'consignment note'. In *Manhattan Novelty Corp v Seaboard and Western Airlines Inc* (1957) 5 Avi Cas 17229 (New York Supreme Court), a plaintiff not named as consignor or consignee was held unable to sue, 'even though he has a proprietary interest in the goods shipped and even though the consignee may have been the plaintiff's custom broker'. This was followed in the New York State City Court in *Holzer Watch Co Inc v Seaboard and Western Airlines Inc* (1957) 5 Avi Cas 17854, with the statement that it was reasonable that an air carrier should answer only to those it knowingly deals with, and in *Pilgrim Apparel Inc v National Union Fire Insurance Co* (1959) 6 Avi Cas 17733 (New York State City Court), with the statement that 'others having an interest in the goods must look to the consignor or consignee'. In *Parke Davis & Co v British Overseas Airways Corp* (1958) 170 NYS 2d 385 at 387 (New York State City Court), the *Manhattan* and *Holzer* cases were distinguished, on the ground that:

> 'The carrier was not on notice that the plaintiff in those cases was the real party in interest ... Immediately following the name of the customs broker there appears, "a/c Parke, Davis & Co., Detroit, Michigan". Further, due to the necessity of having the shipment passed by U.S. Customs and U.S. Public Health Service, it was incumbent upon the real party in interest, Parke Davis & Company, to have the customs broker in New York, where the shipments first landed in this country, arrange these details.'

65. In 1979 in the Appellate Division of the Supreme Court of New York, it was held in *Leon Bernstein Commercial Corp v Pan American World Airways* (1979) 421 NYS 2d 587 at 588–589, that an undisclosed principal of the named consignor or consignee could sue:

> 'Although there are authorities to the effect that only the consignor or consignee named in the air waybill may sue, we have held that the Convention is not to be so narrowly construed, if to do so would defeat the rights of the true owner. (*American Banana Company, Inc. v. Venezolana Internacional De Aviacion S.A.* (*VIASA*) ((1980) 49 NY 2d 848)). In that case VIASA urged that the consignee named in the air waybill had no standing to sue because it was not the real party in interest. It has been held that the real

party in interest has standing to sue although not the consignee named in the air waybill. (*Parke Davis & Co. v. BOAC* ((1958) 170 NYS 2d 385)).'

66. In *Johnson (Mary C) v American Airlines Inc* (1987) 834 F 2d 721 (9th Cir) a Federal Court reserved judgment on the question whether a principal has standing to sue whose agent was the consignor or consignee named in the consignment note. In the US District Court in *Rank Precision Industries v Jardine Air Cargo (US) Ltd* (1987) 20 Avi Cas 18325, the court held that the right to bring suit was limited to the consignor or consignee, and that a reference to a company as 'co-load' did not alter that result. Since the court cited as authority the *Parke Davis & Co* case, its decision on the latter point may merely mean that it regarded that reference as too obscure to constitute the notice of agency to which it was argued that it amounted.

67. The *Leon Bernstein* case was applied in *BRI Coverage Corp v Air Canada* (1989) 725 F Supp 133 (US District Court of New York), where the undisclosed principal of both the consignor and the consignee was allowed to sue.

68. In *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150, the South African Appellate Division was again concerned with the unamended Warsaw Convention, and had before it, necessarily, only the older American cases on the convention in that form. A diamond merchant had consigned a parcel to the Post Office for despatch to New York. The South African Postal Administration consigned it by air to the United States Postal Administration. The merchant sued the air carriers in delict for its loss. The case was argued on the pleadings. Four out of five judges considered that, where a consignment note had been issued, only the consignor and consignee could sue. But a different majority (composed of two of the four, Holmes JA and Potgieter JA, and the fifth, Steyn CJ) held that, in the absence of any plea that a consignment note had been issued, the action was maintainable. The restriction of suit to the consignor and consignee was treated as an exclusion or limitation of liability in the context of art 9. Holmes JA, with whose judgment Potgieter JA concurred, voiced doubt about the assumption, which the court was required to make, that the convention contemplated either Postal Administration as consignor or consignee.

69. The majority, in considering that, where there was a consignment note, the right of suit was limited to consignor or consignee, referred to the American *Parke Davis, Pilgrim Apparel* and *Manhattan Novelty* cases. Ogilvie Thomson JA said that: 'If attainable without doing violence to the language of the convention, uniformity is, in an international matter of this kind, manifestly desirable.' He also said that: 'Exactly what persons answer those descriptions [ie of consignor and consignee] need not be decided in this appeal.'

70. A similar division of opinion between a majority (Luckhoo J with whose judgment on this point Bollers CJ agreed) and minority (Sir Kenneth Stoby C) appears in *Bart v British West Indian Airways Ltd* [1967] 1 Lloyd's Rep 239. This too was a decision under the unamended Warsaw Convention. After citing the *Manhattan Novelty, Holzer Watch, Pilgrim Apparel* cases and the South African *Pan American* case, Luckhoo J referred to the statements in the House of Lords underlining the importance of uniformity in the construction of international conventions, and expressed himself to be 'coerced' by the cumulative effect of the articles of the unamended convention to conclude that only the consignor or consignee could sue. Sir Kenneth Stoby C took the view that the convention did

not intend to remove the title to sue of either undisclosed principals or bailors, who had suffered the loss.

71. In *Tasman Pulp and Paper Co Ltd v Brambles J B O'Loghlen Ltd* [1981] 2 NZLR 225, the plaintiff did not appear as either consignor or consignee on the air waybill, but claimed to sue the air carrier for damage to a package of fabric in contract and/or in tort as owner of the goods. The only issue actually decided was whether the plaintiff's action against the air carrier should be struck out. But after a full review of the authorities as they then stood, Prichard J made clear, in respect of the alternative claim, that he preferred the view taken by Steyn CJ in the *Pan American* case and Sir Kenneth Stoby C in *Bart's* case, namely that the owner of goods lost or damaged retained a common law right to sue. As to the claim based on breach of contract, it seems clear that he held a similar view with respect to any claim by those interested in goods to sue on a contract for air carriage as unnamed or undisclosed principals of the named consignor or consignee. This aspect was adjourned for the plaintiff to reconsider its pleadings with a view to alleging expressly that it was party, and upon what factual basis, to the contract for air carriage (at 236).

72. In reaching his decision Prichard J took into account the desirability of uniformity in the construction of an international convention. He identified as 'the real question ... whether the convention should be construed so as to abrogate the common law rights of the injured party', particularly common law rights to sue for damages. To that extent, his reasoning may be vulnerable to criticism, in the light of *Sidhu's* case and the *El Al Israel* case, for not recognising the respects in which the convention scheme of responsibility does supersede common law principles of liability. But, in the particular area of title to sue, there is in my view force in both his approach and his reasoning. He pointed out that the emphasis on the positions of consignor and consignee in Ch II is understandable in the context of a chapter dealing with matters of documentation and procedures for stoppage in transit and uplifting of cargo at destination (at 234); that art 14 is in terms restricted to the enforcement of rights under arts 12 and 13 (at 227–228 and 233–234); and that if the intention had been to limit the right of suit for cargo damaged or destroyed to the consignor and consignee in all cases, one would have expected the convention to provide for the consignor and/or consignee to have such rights in comprehensive and exclusive terms (at 233–235). Above all, he was clearly reluctant to conclude that, in a common situation like that before him, the convention confines title to sue to persons who have suffered no actual loss and puts the persons really interested and at risk in the hands of nominal claimants. I quote later in this judgment one particularly forceful passage from Prichard J's judgment in this connection.

73. *Polatex Trading Co Pty Ltd v SAS* (1984) IATA Rep 652 (District Court of New South Wales) is a pithily reasoned decision from the South West Pacific area (as the judge in the *Polatex Trading* case identified it). The judge's reasoning pays due regard to the considerations informing the House of Lords' later decision in *Sidhu's* case. He was content to accept that 'the entire scope of the parties' rights and obligations are to be found in the contract evidenced in the air waybill and/or as found in the application of' the relevant Australian statute enacting the convention, so that Polatex could not evade that scheme of liability. But he rejected the argument that the only person who could maintain an action to enforce that scheme of liability was a named consignor or consignee. The issue

was narrow, whether the endorsee of a consignee could sue, but the judge's observations have more general force: *a*

> 'The word "consignee" is not defined in the Convention. Perhaps it does not need any definition. It means at least the person to whom the goods are consigned. Certainly art 14 entitles that person to enforce whatever rights are conferred by arts 12 and 13. But, as is pointed out in Shawcross [on Air Law], the words of art 14 are enabling only and not exclusive. The argument that the carrier should know from the face of the air waybill the identity of the contracting parties is to me of superficial attraction only. In the modern commercial world of today and even as it existed in Warsaw in 1929 or in The Hague or in Mexico in later time, it is ever the fact that international trade was financed by banking houses and that the security for any loan made for such a purpose might be the very goods to be transhipped. To effect that security, it is ever the fact that the tender would acquire some measure of title over the goods and to that end may well insist on being the named consignee. But all of that is in the knowledge that the consignee so nominated might endorse the bill to another.' *b c d*

74. David Steel J apparently thought that the only person other than the consignor or consignee named in the air waybill who could ever claim was someone to whom the consignor had under art 12(1) ordered delivery to be made in lieu of a named consignee (see the last sentence in his judgment, before the heading 'Conclusion' ([1999] 2 All ER (Comm) 270 at 286)). He also thought that *e* this conclusion was supported by and consistent with the decision in the *Polatex Trading* case. But in that case it was the consignee (Scholefield Goodman (Aust) Pty Ltd), not the shipper or consignor (Bibazir C) who endorsed the air waybill 'On payment of all charges deliver to the order of Polatex Trading Co Pty Ltd', the actual owner of the goods during the transit, whose name also appeared as *f* notify party on the air waybill. Neither art 12 nor art 13 provides expressly for a consignee to specify delivery to some other consignee, although it is possible that this might be implied.

75. In the *Gatewhite* case, decided in the English Commercial Court, Gatehouse J undertook a full reconsideration of the issue. The second plaintiffs, growers of *g* chrysanthemums in Grand Canary, had agreed to sell a quantity to the first plaintiffs, Gatewhite, under a contract under which property passed on their shipment by air. The second plaintiffs consigned the chrysanthemums via Iberia Airlines under an air waybill naming the first plaintiffs' customs clearing agents, Perishables Transport, as consignees. The first plaintiffs only appeared on the waybill as notify party. There was delay in transit and the chrysanthemums were *h* spoiled. The sole issue before Gatehouse J was whether the first plaintiffs, as owners throughout the air carriage, had title to sue the airline. After a full review of the authorities he concluded that they did. He reminded himself of the need to avoid too parochial a view of an international convention ([1989] 1 All ER 944 at 948, 950, [1990] 1 QB 326 at 331, 334). He reminded himself of the desirability *j* of uniform construction of international conventions, but pointed out that in 1989 there was 'already a division of opinion on the issue, to be found not only in dissenting judgments but in actual decisions' ([1989] 1 All ER 944 at 950, [1990] 1 QB 326 at 335). He found in the convention nothing to exclude the right of an owner to sue for damage to or loss of goods in carriage or to restrict such right to

the consignor or consignee. He echoed the view, similar to that expressed by Prichard J, that:

> 'It would be a curious and unfortunate situation if the right to sue had to depend on the ability and willingness of the consignee alone to take action against the carrier, when the consignee may be (and no doubt frequently is) merely a customs clearing agent, a forwarding agent or the buyer's bank. It would seem artificial in the extreme to require a special contract in the air waybill itself under art 15(2) to provide the goods owner with a remedy in such a normal situation.' (See [1989] 1 All ER 944 at 950, [1990] 1 QB 326 at 334–335.)

76. In the subsequent Hong Kong authority of *Regalite International Ltd v Aircargo Consolidation Service (HK) Ltd* [1996] 3 HKC 453, Mr Recorder Edward Chan QC refused to follow the previous decision of Traynor J in *Cordial Manufacturing Co Ltd v Hong Kong-America Air Transport* [1976] HKLR 555. In the *Cordial* case the first plaintiff, an fob seller, had consigned goods under an air waybill which named the bank issuing a letter of credit on behalf of the second plaintiff, the buyer. Traynor J held that the fob seller, although named in the air waybill as consignor, could not sue for loss of the goods (delivered to a lorry driver who produced forged documents), since he had parted with all interest in the goods on their shipment, had ceased under arts 13 and 14 to have any claim, had made no special contract with the air carrier, and had by shipping the goods simply brought such a contract into existence (at 584) 'between the carrier and another, be it the consignee (Irving Trust Inc) or the second plaintiff'. He also held that the buyer, the second plaintiff, could not sue, on the basis that the scheme of the convention, particularly arts 13 and 14, was to confine rights of action to the named consignor or, once the goods had arrived at destination, the named consignee.

77. In the *Regalite* case goods were delivered at destination by the air carrier to the notify party (their intended buyer), contrary to the seller/consignor's instructions to deliver only to the named consignee, the buyer's bank (Bank of America). In a detailed judgment Mr Recorder Chan said that the decision in the *Cordial* case was surprising and had given rise to great inconvenience in cases of goods consigned to banks under letters of credit or on cash (or acceptance of draft) against payment terms. On the facts before him, he found a special contract between the consignor and air carrier, enabling the former to sue for its loss, whether or not it was owner. He also held that the consignor had retained ownership and preferred Gatehouse J's decision in the *Gatewhite* case to Traynor J's in the *Cordial* case, saying:

> 'The proposition that the owner of goods could not bring an action against the carrier for loss and damage to his cargo during the course of carriage is a startling proposition. In the case where goods are consigned to a banker under D/P arrangements but are wrongfully released to someone else, usually the consignee banker would have no real interest in the goods. In the present case, the Bank of America would not even have any interest in the goods as security as his customer got the goods without any payment and hence the overwhelming probabilities would be that the Bank of America had not even lent the price against the security of the goods. In this situation, it is understandable that the consignee banker would have little incentive to

be involved in any litigation against the carrier. It is also understandable that the plaintiff could not get the Bank of America to join as co-plaintiff as the Bank of America was basically the banker of [the buyer]'

78. In the Scottish courts in *Sidhu*'s case the decision in the *Gatewhite* case was distinguished as dealing with a quite separate aspect of the convention to that in issue in *Sidhu*'s case (per Lord Marnoch in the Inner House), while Lord Clyde in the Inner House said that the area of title to sue was one where the convention was not necessarily exhaustive (see 1996 SLT 529 at 537 and 546). In the House of Lords, Lord Hope cast some doubt upon the decision:

'This decision, however, does not sit easily with the idea that the object of the convention, in the areas with which it deals, was to provide uniformity of application internationally. As Shawcross and Beaumont *Air Law* (4th edn reissue) vol 1 (Issue 64, October 1996) para VII (188) have observed, the rule in civil law countries is that only a party to a contract of carriage, or a principal for whom he was acting, is regarded as the appropriate plaintiff. In common law countries the proper plaintiff is the owner of the goods, whose right to sue depends on his interest in the goods, not on the fact that he may also be a party to the contract. It would seem to be more consistent with the purpose of the convention to regard it as providing a uniform rule about who can sue for goods which are lost or damaged during carriage by air, with the result that the owner who is not a party to the contract has no right to sue in his own name. We were not asked to review the *Gatewhite* case in detail however, and as the point was not fully argued, I would not wish to cast further doubt on the decision which Gatehouse J reached. It is sufficient for present purposes to say that I am not persuaded that we should apply his reasoning to the question which is before us here, which is not concerned with the question of standing or title to sue but with the question whether a person who has an undoubted title to sue under the convention can pursue a claim outside the convention where the convention itself does not provide him with a remedy.' (See [1997] 1 All ER 193 at 210, [1997] AC 430 at 450–451.)

79. It is to be noted that Lord Hope's reservation about the *Gatewhite* case related specifically to the possibility of suit by an owner not party to the contract of carriage. His reference in the context of civil law to 'a party to a contract of carriage, or a principal for whom he was acting' is at least neutral in the context of the primary issue presented by the present case, which is whether a principal, for whom a person named as consignor or consignee is acting, may intervene.

80. Looking back over the whole body of authority which I have sought to review, it can be seen that a line of French authority from the 1970's to the 1990's, a Dutch authority (1971) and a Belgian case (1981) adopt the position for which British Airways contends (and the question marks which Professor Tosi writing in 1995 introduced in relation to the inevitability of this direction for future French law have not borne fruit, to date). Otherwise, however, the direction of international authority has swung from a refusal to recognise any right of suit in anyone but a consignor, consignee or other person entitled under art 12(1), towards a general readiness to recognise both the intervention of, firstly, (a) principals of whose existence notice was given (the *Parke Davis & Co* case in 1958), then, latterly, of (b) any, even undisclosed principals: see the *Leon Bernstein* case

in 1979 and the *BRI Coverage* case in 1989 in the United States, though a contrary note appears in the *Rank Precision* case in 1987, as well as the *Tasman Pulp* case in 1981 in New Zealand and the reasoning in the *Polatex Trading* case in 1984 in New South Wales, and the *Regalite* case in 1996 in Hong Kong. Thirdly, claims by (c) persons founding on their ownership of affected cargo were supported in the *Tasman Pulp* case in 1981 in New Zealand and the *Gatewhite* case in 1989 in England. The uniformity of international jurisprudential thinking which influenced the majority judges in the *Pan American* case in 1965 in South Africa and in *Bart's* case in 1967 in British Guyana has thus shifted markedly in an opposite sense.

FURTHER ANALYSIS

81. I take separately the positions of (I) principals of the person named as consignor or consignee on any air waybill and (II) claimants relying simply on their ownership or right to immediate possession of cargo to claim against an actual carrier responsible for its loss or damage. Mr Crane's submissions before us concentrated upon (I). This was understandable on the particular facts—and also no doubt because Lord Hope's doubt about the correctness of the *Gatewhite* case related to (II). If permissible at all, a claim under (II) would also require the claimant to establish his own ownership (or the right to immediate possession) as well as possession on the part of the relevant carrier at the time of the loss or damage.

(I) *Principals of a person named as consignor or consignee on any air waybill*

(1) Nothing in the convention as amended requires the naming of a consignor or consignee in the air waybill or explicitly restricts the concept of consignor or consignee to someone so named.

(2) The convention takes as a working model international carriage by air under an agreement or contract to which the consignor and consignee would be or fall to be treated as party. But the convention does not set out to define either consignor or consignee, or to exclude domestic contractual rules which would either define them or permit others to claim to be (or to be held liable as) their principals.

(3) In the view I take, the convention's references to consignor and consignee should not therefore be read in an exclusive sense. The convention assumes, and to some extent (eg in the context of arts 13(3) and 30(3)) imposes, a particular contractual model. But that model also allows for flexibility, both in the identification of the consignor or consignee and, more importantly, in the identification of the principals of persons named in the air waybill as consignor or consignee.

(4) I adopt the view, taken by other courts which have considered this problem, that there are, in this respect, strong considerations of commercial sense in favour of an interpretation which recognises and gives effect to the underlying contractual structure, save in so far this is positively inconsistent with the Warsaw and Guadalajara Conventions. These considerations were well expressed by Prichard J in *Tasman Pulp and Paper Co Ltd v Brambles J B O'Loghlen Ltd* [1981] 2 NZLR 225 at 235:

> 'The effect is that the owner of the goods is put completely in the hands of a nominal consignee who, for a variety of reasons, may be incapable of or averse to instituting proceedings against an airline. The consignee may be a

> customs agent or forwarding agent who is insolvent or in liquidation. Or the consignee may be a bank, the directors of which might well refuse to embark on costly litigation on behalf of a customer—even though that customer offered to indemnify the bank for costs. And, finally, however willing and able he may be, the action may not be one which the consignee is empowered to bring—his right to sue being limited to the rights conferred on him by Article 13.'

It may be, as I have indicated earlier in this judgment, that the last point made in this extract can be answered by both interpreting art 13(3) as a condition to loss (perte) claims and by extrapolating a general underlying intention to confer rights of suit for loss (perte) or damage (avarie) on the consignor or consignee, irrespective of their interest and of any actual damage which they may have sustained. There is still no reason to infer an equally general and unstated exclusion of any right of suit by any principal of the consignor or consignee who has really sustained the relevant damage.

Further, the points made in the first three sentences of the passage from Prichard J's judgment are valid in any event. Litigation is a costly and committing affair, and the analysis urged by British Airways would require named consignors and consignees to be prepared to litigate against air carriers at peril of liability for costs, in matters in which they had no real interest. Prichard J's observations can, I think, be further reinforced by the consideration that, if an airline can insist upon restricting its sights to the particular named consignor, consignee or person entitled, it would, presumably, follow that it can set off, in the liquidation of any such consignor, consignee or person entitled, debts which it may be owed (e g for freight unpaid) arising out of mutual dealings with that person quite unconnected with the present carriage, even though such debts would be incapable of set off because the carrier was on notice or had been given notice of the interests of the goods owner really concerned: see *Bowstead and Reynolds* p 439, art 83 (and, regarding the civil law position, the concluding sentence of para 1-018 (p 11)).

(5) I am not persuaded to a contrary view by the argument that a carrier must know in advance by whom he will be sued. There is no requirement even to identify any consignor or consignee in any document of carriage. Actual carriers are under the Guadalajara Convention exposed to suits by persons unknown relying on agreements to which actual carrier was not party. After any loss, damage or delay, it will become clear who is claiming, and it seems to me that there may even be potential advantages on both sides, if those with the incentive and information to mount a claim are at least able to do so. On any view, however, the considerations favouring a conclusion that cargo interests should be able to intervene and to sue for loss and damage as a principal on a contract evidenced by an air waybill issued to his shipping or customs agent appear to me considerably to outweigh any argument based on the supposed inconvenience or uncertainty that this might involve for air carriers.

(6) It is no answer to the claimants' submissions that, if the claimants had raised their alternative case in time, they might have succeeded in relying on the LEP air waybill as evidencing a contract for air carriage with LEP and in holding British Airways liable under the Guadalajara Convention accordingly. This was an alternative case which would be inapplicable if the claimants are right on their primary case. On their primary case, deriving from their analysis of LEP's conditions and of the contractual position, the LEP air waybill does *not* evidence

any contract for air carriage. Rather, it evidences an agency, and the issue is whether the claimants are entitled to assert LEP's agency on their behalf in relation to the making of the contract for air carriage with Qantas. As I have indicated, nothing suggests that agency situations are uncommon in the consignment of goods by air and the fact that they have arisen for consideration in a number of prior cases indicates that they are not.

(7) The interests of international uniformity no longer point towards a restriction of the right of suit to any named consignor, consignee or person entitled under art 12(1). The new magnetic pole of international jurisprudence draws quite strongly towards conclusions that there is no such general restriction in the convention, and that, at least under systems which recognise the rights of unnamed or even undisclosed principals, there is nothing in the conventions to prevent such principals of the named consignor or consignee intervening and suing (or being sued) in reliance on the relevant contract for carriage by air. As principals they will necessarily be subject to any limitations on suit which the convention imposes on their consignor or consignee agents.

(8) The amendments to art 24 under the Montreal Protocol No 4, although not in force in respect of this carriage, suggest strongly that there is no inconsistency between (on the one hand) detailed provisions such as those in Ch II or art 30(3), regulating a consignor's or consignee's right of suit, and (on the other hand) claims by others, particularly principals of a consignor or consignee permitted under domestic law rules to sue on the relevant contract. In this field also, I prefer to view the Montreal Protocol No 4 as clarificatory, rather than amendatory (see the words of the United States Supreme Court in the *El Al Israel* case, cited above).

(9) I would add that, even on the view adopted by some United States courts that only disclosed principals should be allowed to sue, the claimants in the present case have a properly arguable case that LEP's alleged agency on their behalf was disclosed, as a result of the combination of the reference on the Qantas air waybill of the information 'Freight prepaid a/c of Western Digital (S) Pte Ltd' and the manifest consisting of the relevant LEP air waybills which are said (though there is a factual issue about this) to have been attached to or to have accompanied the Qantas air waybill: see generally *Bowstead and Reynolds* p 441, para 8-110. The fact that LEP acted as issuing agents in respect of the Qantas air waybill may reinforce this argument, although consideration would require to be given to the significance of LEP's dual capacity on the attribution to Qantas of any knowledge which LEP had.

(10) For these reasons, I consider that Western Digital Singapore or (if Western Digital Singapore as fob seller proves to have acted as agent for its buyers) Western Digital Netherlands had a properly arguable claim with a real prospect of success against British Airways, on the basis that (a) it was a principal of the consignor or consignee named in the air waybill issued by Qantas and (b) British Airways performed the carriage the subject of that air waybill and is liable accordingly for the short delivery of the cargo under the Guadalajara Convention. I would set aside the declaration made by the judge in para 2 of his order dated 14 July 1999, in so far as he held that the claimants were not entitled to pursue any such claim under art 18 of the convention.

(II) Claimants relying on their ownership (or right to immediate possession) of cargo to claim against an actual carrier responsible for its loss or damage

(1) I find this a more difficult point to resolve. A possible view of the convention is that its provisions only contemplate liability claims based upon or at least ancillary to an underlying contractual relationship (whether this derives from the relevant governing law or is imposed by the specific provisions of the convention). On this view, arts 17 to 21 cannot fix the nature or standard of any duty owed other than to a party to such a contract. If this view is correct, then on the basis of *Sidhu's* case and the *El Al Israel* case, any possibility of any non-contractual claim would appear to be superseded and excluded by the convention. But I have come to the conclusion that this is not the preferable view and that the scheme of the Warsaw and Guadalajara Conventions is to read as permitting such claims, where they would be allowed under the relevant domestic law.

(2) Firstly, the extension of the convention scheme to an actual carrier by the Guadalajara Convention illustrates that the provisions of the Warsaw Convention are fully capable of operating between non-contracting parties, and the conventions contain provisions which contemplate parallel non-contractual claims, particularly against servants or agents, which depend on ownership or a right to immediate possession.

(3) Secondly, the phrase 'however founded' in art 24(1) itself suggests the possibility of extra-contractual claims in respect of baggage or cargo under art 18. In this respect, as I have said, I would prefer to view the Montreal Protocol No 4 amendments as clarificatory. The fuller wording used in art 24(2) does not justify a contrary conclusion, and appears explicable by reference to the special considerations governing dependency claims in personal injury cases.

(4) If the owner of cargo has a claim against an actual carrier responsible for its loss or damage, the provisions of Ch III are fully capable of regulating that claim. The claim will be based and restricted accordingly. Domestic law may establish title to sue, while the convention, as the House of Lords held in *Sidhu's* case, will regulate the nature and standard of responsibility. Neither the detailed provisions of Ch II nor the presence of art 30(3) regulating specific aspects of the carrier's position in relation to the consignor and consignee are, in my view, inconsistent with this.

(5) The amendments to art 24 by the Montreal Protocol No 4 confirm the consistency—by elaborating the phrase 'however founded' to make clear that it embraces tort-based claims and adding the phrase 'without prejudice to the question who are the persons who have the right to bring suit and what are their respective rights'. Similar confirmation is found if one looks at a parallel convention in the same family as the Warsaw Convention—that is, the Convention on the Contract for the International Carriage of Goods by Road (Geneva; 19 May 1956) (CMR) enacted by the Carriage of Goods by Road Act 1965. Chapter III of CMR corresponds closely to Ch II of the Warsaw Convention, while Ch VI of CMR contains provisions regulating successive carriage. Yet art 28(1) in Ch IV of CMR expressly contemplates extra-contractual claims.

(6) The two common law authorities in point, the *Tasman Pulp* case and the *Gatewhite* case, favour recognition of claims on such a basis, although they predate *Sidhu's* case which casts doubt upon them in this respect. The practical considerations identified by Prichard J in the *Tasman Pulp* case all militate in

favour of recognising that non-contractual actions may be brought against actual carriers by the persons really interested, that is by the relevant baggage or cargo owner (or person entitled to immediate possession). Again I find the contrary considerations of simplicity and uniformity uncompelling, and, in the case of an actual carrier facing a non-contractual claim, the argument that he must be entitled to know where he stands lacks virtually any force. As the present case confirms, even where the relevant documents are obtained, there may be considerable room for argument which evidences the relevant contract of carriage, who are the parties to it, and who is the consignor or consignee.

(7) That Ch III of the convention would govern such non-contractual claims, if admissible at all, is clear under English law from *Sidhu*'s case. I note also, in parenthesis, that, in their article on the German legal position (referred to above), Schönwerth and Müller-Rostin conclude that extra-contractual claims by a third party owner (e g a cargo owner not party to the contract of carriage in the air waybill or an individual asking a passenger to take items for him) would—at least in circumstances where the owner knew or could have contemplated that his goods would be carried by air—be subject to the scheme of liability prescribed by arts 17 to 21 of the convention.

(8) Apart from straightforward cases of carriage in circumstances contemplated by those owning or having the right to immediate possession of the relevant baggage and cargo, the entirely foreseeable case of goods consigned without the knowledge or authority of those owning or having the right to their immediate possession suggests that the convention cannot confer on carriers by air any absolute immunity to claims by such persons.

(9) Despite the unfavourable dictum in *Sidhu*'s case, I would therefore conclude that the conventions do not exclude claims against an actual carrier based on title to the relevant baggage or cargo, but subsume them within the convention scheme of liability in Ch III of the Warsaw Convention. Thus, although the nature and standard of any liability on British Airways' part is regulated by the Warsaw and Guadalajara Conventions, title to sue is determined by the law governing extra-contractual claims. In this case, it is not suggested that such law, whichever it may be, does not permit an owner of goods lost in possession of a carrier by air to claim against that carrier in respect of such loss, apart from the convention. I would therefore also set aside the judge's declaration in para 2 of his order dated 14 July 1999, to the extent that he held the contrary as a matter of principle.

The cross-appeal—complaint under art 26(2)

82. I turn to the cross-appeal. Mr Shepherd for British Airways submits that the judge erred both in the test he applied and in his approach to the facts. What is required under art 26(2), in the case of damage (avarie), is that—

> 'the person entitled to delivery must complain to the carrier forthwith after discovery of the damage, at the latest, within ... fourteen days from the date of receipt in the case of cargo.'

Failing complaint within such time, no action lies against the carrier (art 26(4)). The claimants rely on the two letters dated 28 June 1996 as sufficient notice. Mr Shepherd submits, first of all, that any notice which these letters gave was not given by the person entitled to delivery, the consignee, Express Cargo Forwarding Ltd, but was given by Irish Express Cargo Ltd for whom they were

signed. Since the former's name appeared at their letter head with a note at the foot that the former were a division of the latter, I see no force in this. Irish Express Cargo Ltd must be taken to have been acting for and with the authority of Express Cargo Forwarding Ltd, the actual named consignee.

83. Much more significantly, it is submitted that the letters did not amount to a complaint, still less a complaint in relation to the subject matter of the claimant's primary case, that is the partial loss of packages from the larger consignment being carried by British Airways. Each letter related to an identified part of that consignment and that identified part had as a matter of fact been wholly lost. Yet each letter advised that the identified part 'was received' but was 'in a condition which obliges us to reserve the right to claim against you as carriers'. Mr Crane argues subtly that, on the authority of *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696, [1981] AC 251, the word 'damage' (avarie) in art 26(2) covers partial loss of baggage or cargo, so that advice of a claim in respect of the 'condition' of goods on arrival must be treated as covering both physical damage and partial loss. That appears to me specious. Letters relating to the condition of two sets of identified goods received cannot amount to a claim that those goods have not been received, even though in terms of the convention those sets of goods may constitute part of a larger consignment, in which context their loss would involve a partial loss or avarie, rather than a total loss or perte.

84. Lord Wilberforce said in *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 at 700, [1981] AC 251 at 272–273 that the purpose of art 26(2) appeared 'reasonably clear':

> 'It is (1) to enable the airline to check the nature of the "damage", (2) to enable it to make inquiries how and when it occurred, (3) to enable it to assess its possible liability, to make provision in its accounts and if necessary to claim on its insurers, (4) to enable it to ensure that relevant documents (e g the baggage checks or passenger ticket, or the air waybill) are retained until the issue of liability is disposed of. If one then inquires whether these considerations are relevant to a case of partial loss of objects contained in baggage, the answer cannot be doubtful: they clearly are. Moreover, prompt notification may give the airline an opportunity of recovering the objects lost.'

85. In *Fothergill's* case the plaintiff had on arrival home from holiday found that his suitcase was damaged, and he completed a 'property irregularity report' (PIR) which under the heading 'Nature of Damage' stated: 'Side seam completely parted from the case. [Damage] occurred on the homebound flight.' On arrival home he discovered items were missing from the case, but no further complaint was made within the time limit. His action failed. The PIR—

> 'said nothing about the contents of the baggage and it was totally insufficient for the purposes for which it was required ... One need only figure a case in which the objects lost were valuable jewellery to see the necessity for a specific complaint of the loss.' (See [1980] 2 All ER 696 at 704, [1981] AC 251 at 278.)

86. Lord Fraser of Tullybelton agreed:

> 'It gave no hint that such loss had occurred, and indeed, by referring only to damage to the suitcase, it implied that that was the only matter of

complaint. I entirely agree with the opinion of Kerr J to the effect that ([1977] 3 All ER 616 at 624, [1978] QB 108 at 120)—"the complaint must relate to the claim which the passenger is seeking to enforce. It must give sufficient notice to the carrier to enable him to make the relevant inquiries." ' (See [1980] 2 All ER 696 at 712, [1981] AC 251 at 289.)

87. Lord Scarman and Lord Roskill agreed with Kerr J's reasoning ([1980] 2 All ER 696 at 717, 721, [1981] AC 251 at 296, 302).

88. Lord Wilberforce's listing of the purposes of art 26(2) cannot, I accept, be read as suggesting that all such purposes can or must be satisfied merely by the notice required under that article. It is clear, as Kerr J's reasoning also confirms, that many of them would involve and could only be satisfied as a result of follow-up activity. I would also agree that a complaint under art 26(2) need only be in general terms. Nevertheless, there must be within the time stated a complaint, which must at least embrace the damage to which the subsequent action relates. In this case, such complaint as was made within the relevant time was specifically limited to physical damage to identified items and did not embrace the loss of such items the subject of this action. It indicated a problem about the condition of the identified items, not about their arrival. No doubt this could have been cured if, as contemplated by the form, the 'brief details' promised had been 'mentioned below' on the letters. But they were not. It follows in my view that art 26(2) was not complied with and the claimants' action falls to be dismissed on that ground.

89. The judge considered that the objective adequacy of the complaint was not the test. What mattered was whether it had in fact enabled British Airways to investigate the position. He considered that it had not been shown that it did not. He cited *Schmoldt Importing Co v Pan American World Airways* (1989) 21 Avi Cas 17974 and *BRI Coverage Corp v Air Canada* (1989) 725 F Supp 133. The former case does not assist. In the latter case, a claim in March 1985 that goods did not arrive 'in tact' and that the airline would be held responsible for the missing goods was held a sufficient complaint to permit an action for damage found on the goods when they were belatedly located and delivered in May 1985. The judgment places reliance on the investigation which the airline was able to make after the initial complaint. I do not find the reasoning or the result easy to follow, and on no view are the present facts analogous as to the course of events. Here, although the judge seemed to place the onus of proof on the airline to show that it did not make full investigations, there is nothing to show that it did so or that it entered into any sort of discussion with the consignees or with anyone interested in cargo which could have led them to consider that no further complaint was required. On the material available, British Airways' first response was to a later complaint (dated we understand 23 July 1996) made after the time limit had expired, and no reliance is placed on that response as debarring them from invoking art 26(2). In my judgment, the test under art 26(2) is an objective one. British Airways is right in its submission that no relevant complaint was made under that article within the relevant time. If the claimants were to avoid the natural consequence of the failure to make any timely complaint on any basis, the onus was upon them to do so. They have not done so.

90. Finally, Mr Crane submitted that Qantas had 'waived' or, more accurately, varied the period of notice required in respect of any claim for partial non-delivery, so as to extend it to 120 days. On this basis, Mr Crane relied on the

later complaint dated 23 July 1996 as within the prescribed time limit. This point was not pleaded or argued before David Steel J, or indeed included in the appellant's notice of appeal. But it was raised, very briefly, both in Mr Crane's skeleton, answered equally briefly by Mr Shepherd's, and in oral submissions. It did not appear to have merit at the time, and was unfortunately overlooked when preparing this judgment for handing down. We therefore received further written submissions from both sides, which set out the point more fully. The point still appears to me to lack merit, and I now state its nature and my reasons for this conclusion. The point turns on cl 12 of the terms and conditions on the reverse of Qantas's air waybill, reading:

> '12.1 The person entitled to delivery must make a complaint to the Carrier in writing in the case ...
>
> 12.1.1 of visible damage to the goods, immediately after discovery of the damage and at the latest within 14 days from receipt of the goods,
>
> 12.1.2 of other damage of the goods, within 14 days from the date of receipt of the goods,
>
> 12.1.3 of delay, within 21 days of the date the goods are placed at his disposal, and
>
> 12.1.4 of non-delivery of the goods, within 120 days from the date of the issue of the Air Waybill;
>
> 12.2 for the purpose of Subpara 12.1 above complaint may be made to the Carrier or to the last Carrier or to the Carrier who performed the transportation during which the loss, damage or delay took place;
>
> 12.3 any rights to damages against Carrier shall be extinguished unless an action is brought within two years from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.'

91. Mr Crane suggests that, since the Warsaw Convention prescribes no period for any complaint in respect of non-delivery, cl 12.1.4 would be ineffective if it referred to total non-delivery. It must therefore include partial non-delivery. However, it seems to me clear that Qantas's terms and conditions of carriage follow, carefully, the language and concepts which are familiar in air carriage. 'Damage' in the sense of avarie is covered by cll 12.1.1 and 12.1.2, which adopt the same time limits as expressed in the first sentence of art 26(2) of the Warsaw Convention. The subject matter moves to delay in cl 12.1.3, which adopts the same time limit as in the second sentence of art 26(2). Clause 12.1.4 deals with non-delivery, in relation to which it purports to introduce a 120 day time limit. Clause 12.2 appears to have been drafted with arts 26 and 29 of the Warsaw Convention and art IV of the Guadalajara Convention in mind. Clause 12.3 provides for a two-year limit for litigation, mirroring art 29(1).

92. As regards cl 12.1.4, it is true that the Warsaw Convention does not contain, or therefore under art 23 permit, in respect of international air carriage within its scope any such time limit in respect of total non-delivery (perte). But that cannot mean (and Mr Crane does not, as I read his skeleton dated 11 May 2000, suggest that it does mean), that cl 12.1.4 can be read as *confined* to partial non-delivery. Qantas's terms and conditions are elaborately drafted. If Qantas had had in mind a scheme so confusing and using terminology so differently from the conventions, the draftsman could and would surely have made this expressly clear. It follows that cl 12.1.4 must in circumstances of non-delivery (perte) be

ineffective—at least in cases of international air carriage within the relevant international conventions. But there is equally no reason in those circumstances to attempt to give cl 12.1.4 artificial partial validity by treating it as covering cases of partial non-delivery. On any ordinary canon of construction in the present aviation context, partial non-delivery must have been envisaged, and must be treated, as falling within cll 12.1.1 and 12.1.2 (avarie): see the extensive discussion of the internationally accepted scope of the concept of 'damage' (avarie), in relation to the time limit for complaint, in *Fothergill*'s case (and also, now, in the English context, s 4A of the 1961 Act).

93. The claimants' action in respect of the international carriage by air is thus barred, and falls to be dismissed. The cross-appeal succeeds accordingly.

Conclusion

94. In the result, the claimants are entitled to have para 2, but not para 3, of David Steel J's order dated 14 July 1999 set aside and the respondent is entitled to have para 1 of that order set aside. The result is that the claimants' action in respect of the international carriage by air must fail for want of any timely complaint. I consider that we should hear counsel on the appropriate form of order to give effect to such conclusions.

HARRISON J. I agree.

MORRITT LJ. I also agree.

Appeal and cross-appeal allowed.

Kate O'Hanlon Barrister.

Michael Gerson (Leasing) Ltd v Wilkinson and another

a

COURT OF APPEAL, CIVIL DIVISION

PILL, CLARKE LJJ AND BENNETT J

b

18, 31 JULY 2000

Sale of goods – Delivery – Constructive delivery – Sale and leaseback transaction – Unauthorised sale by original owner – Two sale and leaseback agreements made in relation to same goods – Position of buyers – Conversion – Whether making of agreement for sale and entering into the lease constituting 'delivery' – Whether buyers liable in conversion – Sale of Goods Act 1979, ss 24, 25.

c

The claimant finance company, G Ltd, had purchased plant and machinery from E Ltd under a sale and leaseback agreement under which E Ltd remained in physical possession of the goods. E Ltd sold part of the equipment (the schedule 3 goods), also under a sale and leaseback agreement, to the second defendant, S Ltd, a finance company. S Ltd was not aware that E Ltd might not own the goods. All the equipment remained in the physical possession of G Ltd. E Ltd did not maintain the payments due under the lease and it was terminated by G Ltd. G Ltd thereupon purported to sell the goods, including the schedule 3 goods, to B Ltd. Payment was not forthcoming from B Ltd. E Ltd did not maintain the payments due to S Ltd under the agreement and the lease was terminated. The schedule 3 goods were thereupon sold by S Ltd to B Ltd. G Ltd claimed damages for conversion against S Ltd and the second defendant, W, a subsequent innocent purchaser of the goods from B Ltd. The judge dismissed the claim and held that the effect of the transaction between E Ltd and S Ltd was that S Ltd became owner of the schedule 3 goods by virtue of s 24 of the Sale of Goods Act 1979, which provided that 'Where a person having sold goods continued or was in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person ... of the goods or document of title under any sale ... to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same'. The judge further held that G Ltd had sold the goods to S Ltd, in the alternative that S Ltd had obtained possession of the goods under a contract made with G Ltd and had subsequently passed good title to W by virtue of s 25[a] of the Act. G Ltd appealed, contending (i) that E Ltd had not delivered the goods to S Ltd under a sale and that s 24 of the Act did not therefore apply and (ii) that no contract had been made between G Ltd and B Ltd.

d e f g h

Held – (1) Where a seller in possession of goods sold acknowledged that he was holding the goods on account of the buyer in circumstances where he recognised the purchaser's right to possess as owner and that his continuing possession was as a bailee with possession derived from that right, the transaction amounted to delivery to the buyer immediately followed by redelivery to the seller as bailee, whether the seller's custody was in the character of a bailee for reward or of a

j

a Section 25, so far as is material, is set out at p 165 *a b*, post

borrower. An application of those principles to the instant case established a delivery of the goods by E Ltd to S Ltd and a redelivery by S Ltd to E Ltd. It was not necessary to identify a moment at which the goods were delivered by S Ltd to E Ltd. The effect of the sale and leaseback arrangement was that the goods had to be taken to have been delivered to S Ltd as S Ltd could not otherwise have leased them back to E Ltd. Moreover, the terms of the lease were consistent only with an acknowledgement by E Ltd that it held the goods on behalf of S Ltd. It followed that the making of the agreement for sale and the entering into of the lease was a sufficient voluntary act on the part of E Ltd for the requirement that for 'delivery' to be established there had to be a voluntary transfer of possession to be satisfied. Furthermore, it made commercial sense to hold that sale and leaseback arrangements involved a transfer of constructive possession to the finance company which bought the goods and leased them back, such that the innocent finance company might take advantage of the provisions of s 24 of the 1979 Act. Accordingly, S Ltd and thence W had acquired good title to the schedule 3 goods (see p 157 *j* to p 158 *f*, p 166 *f g*, p 169 *d e* and p 170 *d* to *g*, post); *Forsythe International (UK) Ltd v Silver Shipping Co Ltd, The Saetta* [1994] 1 All ER 851 distinguished, *Marvin v Wallace* (1856) 25 LJQB 369 and *Dublin City Distillery Ltd v Doherty* [1914] AC 823 considered.

(2) (Per Pill LJ and Bennett J) Although a contract had been made between G Ltd and B Ltd, the parties had not intended property to pass until payment, which in the event never occurred. Alternatively (per Clarke LJ), no contract had been made. It followed on either view that B Ltd did not at any stage obtain a good title to the goods as a result of a contract with G Ltd and accordingly W did not do so either. Furthermore, even if there had been a contract between G Ltd and S Ltd, but property in the goods had not passed under it, W's argument that s 25 of the 1979 Act operated so as to give him title to the goods would fail, as there was no evidence that at any relevant time G Ltd had consented to B Ltd having possession of the goods, as was required by the section. It followed that G Ltd's appeal against W, insofar as it relied upon a contract between G Ltd and B Ltd or on s 25(1) of the Act, would be allowed; however, on the evidence, S Ltd and thence W had obtained good title to the schedule 3 goods by virtue of s 24 of the Act. W had therefore innocently converted the goods other than the schedule 3 goods. Accordingly, the appeal would be allowed in part (see p 164 *d* to *g*, p 165 *f* to *j*, p 166 *d* to *g*, p 169 *d e* and p 171 *a b*, post).

Notes

For disposition by buyers and sellers in possession, see 21 *Halsbury's Laws* (4th edn reissue) paras 157–158.

For the Sale of Goods Act 1979, ss 24, 25, see 39 *Halsbury's Statutes* (4th edn) 96.

Cases referred to in judgment

Dublin City Distillery Ltd v Doherty [1914] AC 823, HL.

Forsythe International (UK) Ltd v Silver Shipping Co Ltd, The Saetta [1994] 1 All ER 851, [1994] 1 WLR 1334.

Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd (1987) 163 CLR 236, Aust HC; *affg* [1985] 3 NSWLR 475, NSW CA.

Ladd v Marshall [1954] 3 All ER 745, [1954] 1 WLR 1489, CA.

Marvin v Wallace (1856) 6 El & Bl 726, 25 LJQB 369, 119 ER 1035.

Meyerstein v Barber (1866) LR 2 CP 38.

Cases also cited or referred to in skeleton arguments

Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd [1981] 3 All ER 577, [1982] QB 84, CA.

Clifton v Palumbo [1944] 2 All ER 497, CA.

Johnson v Credit Lyonnais Co (1877) 3 CPD 32.

Lokumal (K) & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt [1985] 2 Lloyd's Rep 28, CA.

National Employers Mutual General Insurance Association Ltd v Jones [1988] 2 All ER 425, [1990] 1 AC 24, HL.

Newtons of Wembley Ltd v Williams [1964] 3 All ER 532, [1965] 1 QB 560, CA.

Nicholson v Harper [1895] 2 Ch 415, [1895–9] All ER Rep 882.

Norwegian American Cruises A/S v Paul Munday Ltd, The Vistafjord [1988] 2 Lloyd's Rep 343, CA.

Tasmania (owners and freight owners) v Smith, The Tasmania (1890) 15 App Cas 223, HL.

Worcester Works Finance Ltd v Cooden Engineering Co Ltd [1971] 3 All ER 708, [1972] 1 QB 210, CA.

Appeal

The claimant, Michael Gerson (Leasing) Ltd (Gerson), appealed with the permission of Potter LJ from the order of Judge Kershaw QC on 17 December 1998 in the Mercantile List of the Liverpool District Registry whereby he dismissed Gerson's claim for damages for conversion against the defendants, Michael Wilkinson and State Securities Ltd (State). The facts are set out in the judgment of Clarke LJ.

Sir Roy Goode QC and *Peter J Goodbody* (instructed by *Hill Dickinson*, Liverpool) for Gerson.

Paul Chaisty (instructed by *Apfel Carter*, Lytham St Annes) for Mr Wilkinson.

Michael Lerego QC and *Linden Ife* (instructed by *Lester Aldridge*, Bournemouth) for State.

Cur adv vult

31 July 2000. The following judgments were delivered.

CLARKE LJ (giving the first judgment at the invitation of Pill LJ).

Introduction

1. This is an appeal by the claimant (Gerson) from an order of Judge Kershaw QC made on 17 December 1998 in the Mercantile List of the Liverpool District Registry in which he dismissed Gerson's claim for damages for conversion against both defendants (Wilkinson and State). The dispute relates to the ownership of various items of heavy plant and machinery. Gerson and State are both finance companies who both purchased the same equipment from a company called Emshelf IX Ltd (Emshelf).

2. On 10 March 1995 Emshelf sold equipment to Gerson for about £425,000 under a sale and leaseback agreement under which Emshelf remained in physical possession of it. I shall call that equipment 'the goods'. Subsequently, without the authority of Gerson, on 19 August 1996 Emshelf sold part of the same equipment to State, also under a sale and leaseback agreement. I shall call that

equipment 'the schedule 3 goods' because it is identified in schedule 3 of the statement of claim and has been so described in the course of the argument. All the goods including the schedule 3 goods remained in the physical possession of Emshelf. The judge held that the effect of that transaction was that State became the owner of the schedule 3 goods by reason of s 24 of the Sale of Goods Act 1979. Gerson challenges that conclusion on this appeal. There was no suggestion at the trial that State was aware that Emshelf did or might not own the schedule 3 goods.

3. Emshelf did not maintain the payments due under the lease from Gerson. As a result, on 25 February 1997 Gerson terminated the lease. No one suggests that it was not entitled to do so. The judge held that on 28 February 1997 Gerson sold the goods for £319,000 to Sagebush (1997) Ltd (Sagebush), which was represented at that time by Mr Nigel Smith. Gerson challenges that finding, which is essentially a finding of fact. The judge further held that property in the goods passed to Sagebush when the contract was made. Gerson challenges that conclusion too, saying that if (contrary to its case) a contract was made on 28 February, the property in the goods was only to pass to Sagebush on payment and that, it being common ground that Sagebush did not at any stage pay for the goods, the property in them never passed to Sagebush.

4. The judge further held that if Sagebush agreed to buy the goods from Gerson but, contrary to that conclusion, property in the goods did not pass to Sagebush under the contract, Sagebush nevertheless obtained possession of the goods under the contract with the consent of Gerson as the seller and subsequently passed a good title to Wilkinson by reason of s 25 of the 1979 Act. Gerson challenges both those conclusions. It submits that Sagebush was at no stage in possession of the goods, whether under a contract of sale with Gerson or at all and that, even if it was, it was not in possession of the goods with Gerson's consent.

5. On 4 March 1997 State terminated the lease with Emshelf for non-payment of instalments due under it and at about the same time it sold the schedule 3 goods to Sagebush, which in turn sold all the goods to Wilkinson on various dates between 3 and 12 March. There is no suggestion Wilkinson was other than an entirely innocent buyer.

6. It is not necessary to spell out in detail the precise arrangements to which Wilkinson was a party for this reason. It is I think agreed that if Sagebush bought all the goods from Gerson and the property in them passed to Sagebush, the sale or sales of the goods to Wilkinson passed the property to him. It is further agreed that if there was a contract between Gerson and Sagebush and, if Sagebush obtained possession of the goods under that contract with the consent of Gerson, the subsequent sales to Wilkinson had the effect of passing the property to him under s 25 of the 1979 Act. On the other hand, if Wilkinson did not obtain a good title by one of those routes, it is, as I understand it, common ground that, if State obtained a good title to the schedule 3 goods, that title was passed to Wilkinson through Sagebush. In that event Wilkinson would be liable to Gerson for conversion in respect of the goods other than the schedule 3 goods.

7. The issues in the appeal may be considered under three headings, namely s 24 of the 1979 Act, the contract between Gerson and Sagebush and s 25 of the 1979 Act. I shall consider them in turn.

Section 24 of the Sale of Goods Act 1979

8. Section 24 of the 1979 Act provides, so far as relevant:

> 'Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person ... of the goods or documents of title under any sale ... to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.'

State's case is that Emshelf was a person who sold goods and continued in possession of goods because it sold goods to Gerson and retained possession of them and that Emshelf later delivered the goods to State under a contract of sale with State, who received them in good faith without notice of the sale to Gerson.

9. It is not in dispute that Emshelf sold the goods to Gerson and remained in possession of them under the sale and leaseback agreement. Nor is it in dispute that, on the evidence available at the trial, if State received the goods, it did so in good faith and without notice of the sale to Gerson. The issue between the parties is whether Emshelf delivered the goods to State under a sale. This is a crucial point because, subject to an application on the part of Gerson to adduce further evidence, to which I shall return in due course, it is common ground that if Emshelf did deliver the schedule 3 goods to State under a sale, State obtained good title to them and subsequently passed it to Wilkinson, with the consequence that neither State nor Wilkinson converted those goods.

10. Before considering the meaning of delivery in s 24 I should note that State at one time said that it would contend that there was a relevant transfer within the meaning of the section, but Mr Lerego QC abandoned that suggestion on behalf of State in the course of the argument. As to delivery, Sir Roy Goode QC expressly accepted on behalf of Gerson, at least for purpose of this appeal, that delivery in s 24 includes constructive delivery and that it is not confined to physical delivery. In my view (albeit expressed obiter because neither point was argued) both concessions were correctly made. They accord with the decision of the High Court of Australia in *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236, which I followed at first instance in *Forsythe International (UK) Ltd v Silver Shipping Co Ltd, The Saetta* [1994] 1 All ER 851, [1994] 1 WLR 1334.

11. It is thus common ground for the purposes of this appeal that delivery can be constructive, although delivery under the section requires a voluntary act by the person in possession because by s 61(1) of the 1979 Act, unless the context or subject matter otherwise requires, 'delivery' means 'voluntary transfer from one person to another'. That was an essential part of the decision in *The Saetta*, which I understood to be accepted by both Sir Roy and Mr Lerego. Whether there was constructive delivery here depends upon what is meant by constructive delivery and whether there was such delivery on the facts.

12. In his work *Chalmers' Sale of Goods Act 1893* (5th edn), which was published in 1902, Chalmers said this:

> 'Delivery may be actual or constructive. Delivery is constructive when it is effected without any change in the actual possession of the thing delivered, as in the case of delivery by attornment or symbolic delivery. Delivery by attornment may take place in three classes of cases. First, the seller may be in possession of the goods, but after sale he may attorn to the buyer, and continue to hold the goods as his bailee. Secondly, the goods may be in the possession of the buyer before sale, but after sale he may hold them on his own account. Thirdly, the goods may be in the possession of a third person,

> as bailee for the seller. After sale such third person may attorn to the buyer and continue to hold them as his bailee.'

That passage was discussed in both *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236 at 245 and *Forsythe International (UK) Ltd v Silver Shipping Co Ltd, The Saetta* [1994] 1 All ER 851 at 863, [1994] 1 WLR 1334 at 1346. In the *Gamer's Motor Centre* case the question for decision was whether there was a change in the character of the relevant possession which amounted to a constructive delivery to a third party, namely Natwest. In *The Saetta* one of the questions was essentially the same, although the facts were of course different.

13. Both Sir Roy and Mr Lerego submitted that the instant case is on all fours with the *Gamer's Motor Centre* case and indeed *The Saetta*. However, in my judgment it is not. In both those cases the constructive possession being considered was the kind of possession envisaged by s 1(2) of the Factors Act 1889, which provides so far as relevant:

> 'For the purposes of this Act ... (2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf.'

In *The Saetta* I held, consistently with the *Gamer's Motor Centre* case, that possession within the meaning of s 1(2) of the 1889 Act would also be possession within the meaning of s 24 of the 1979 Act and that on the facts the charterers were in possession of bunkers after the determination of a charterparty because from that time the owners were holding them subject to the charterers' control or on their behalf: see [1994] 1 All ER 851 at 861, [1994] 1 WLR 1334 at 1344 and the discussion of the relevance of the 1889 Act [1994] 1 All ER 851 at 862, [1994] 1 WLR 1334 at 1344–1345.

14. There was considerable debate during the course of the first part of the argument in this appeal as to whether on the facts of the *Gamer's Motor Centre* case the dealer was holding the cars on behalf of and subject to the control of Natwest. Sir Roy submitted that it was whereas Mr Lerego submitted that it was not. Before the end of the argument it was ascertained that the dealer was indeed holding the cars on behalf of and subject to the control of Natwest because the report of the case in the Court of Appeal of the Supreme Court of New South Wales in [1985] 3 NSWLR 475 shows that the contract between the dealer and Natwest (then Lombard) included an express provision that Lombank or its authorised agents 'may at any time take possession of any unit without notice'. When that report came to light Mr Lerego properly conceded that Natwest was in constructive possession of the cars which were in the actual custody of the dealer because of the control exercised by Natwest under the contract.

15. Mr Lerego submitted that the majority of the High Court did not put their decision on that basis because none of the judges referred to the clause, but in my judgment that was the basis of the decision: see for example 163 CLR 236 at 263 per Dawson J. In these circumstances I do not think that it is necessary to consider the facts of either the *Gamer's Motor Centre* case or *The Saetta* in any detail. They were both cases where A was held to be in possession of property in the actual custody of B because of the nature and extent of the control which A exerted over the property. The instant case is not such a case, at any rate after the leaseback by State to Emshelf. Thereafter Emshelf was holding the schedule 3

goods in its own right as lessee of State. State had no control over the goods at that time. It was not in the same position as Natwest in the *Gamer's Motor Centre* case or of the charterers in *The Saetta*.

16. As I see it the analysis here is somewhat different. The way in which State puts its case can be summarised as follows, by reference (at least in part) to a helpful note supplied by Mr Lerego. (i) Emshelf sold the schedule 3 goods to State, which leased them back to Emshelf under a contract of hire, which is a form of bailment. (ii) State could not lease the schedule 3 goods to Emshelf unless it both owned them and was entitled to possession of them. (iii) State's ownership of the goods was expressly recognised by cl 4 of the lease. (iv) State's right to possession and thus to transfer possession to Emshelf was either an express term of the lease or was an implied term of it by reason of s 7 of the Supply of Goods and Services Act 1982. (v) State could only discharge its obligation to transfer possession of the schedule 3 goods to Emshelf under the lease if there was a delivery, albeit constructive, by Emshelf to State. Mr Lerego submits that constructive delivery of that kind is recognised by both the textbooks and the authorities.

17. I accept Mr Lerego's analysis of the facts. The precise contractual position is not entirely clear but it is sufficient to enable reasonably firm conclusions to be reached on the critical questions. It is common ground that the sale of the schedule 3 goods by Emshelf to State and the leaseback by State to Emshelf were both part of one transaction. Thus the sale would not have taken place without the leaseback and the leaseback could not of course have occurred without the sale.

18. There is no clear evidence of the sale, which is evidenced only by an invoice dated 19 August 1996 and the agreement by way of leaseback which is signed by both parties and dated 28 August 1996. The invoice simply states that the buyer is State and that the seller is Emshelf and sets out the nature of the goods and the price, which was £168,025 inclusive of VAT. State only paid the price on signature by Emshelf of the lease. The lease is between Emshelf as lessee and State as lessor. On the first page of the lease there are set out the period of hire and the rent and in a box just above the signatures of two directors on behalf of Emshelf, Emshelf stated:

> 'We wish to hire the goods for the purpose of a business carried on by us and request you to buy the goods from the supplier named above for this purpose. We did not rely on your judgment but relied on our own judgment in selecting the goods. We understand we are responsible for taking delivery of the goods on the date of this Agreement. We shall accept delivery of the goods at the address shown above and we shall carefully examine and test the goods before accepting them and establish that they are suitable for our purposes.'

Mr Lerego points to the fact that Emshelf was promising to take delivery of the schedule 3 goods. I accept his submission that such delivery could only be taken from State and, moreover, that State would only have the right to deliver them to Emshelf if Emshelf had (at least notionally, symbolically or constructively) delivered them to State.

19. There are other terms of the lease which confirm that view. Thus the agreement is expressed to be a leasing agreement and expressly provides for a hiring which by cl 1a is expressed to commence on the date that the lease is

signed. Clause 2 sets out the lessee's responsibilities in detail and includes, for example, in cl 2h a term that the leasee shall:

> 'Not assign sub-let pledge mortgage charge or sell the goods or any part thereof nor abandon or part with possession or the control of the goods or any part thereof or the benefit of this agreement or attempt to do such things nor allow any other person or persons to obtain any lean or charge upon the goods or allow to be done any other thing which in State Securities opinion may prejudice or jeopardise its rights of ownership thereto.'

Clause 4 provides:

> '... the goods shall all times remain the property of State Securities and nothing herein contained or otherwise communicated to the leasee in writing or orally shall be construed to imply that ownership of the goods will or may pass under any circumstances to the Lessee RISK IN THE GOODS WILL PASS TO THE LEASEE ON THE DATE OF THIS AGREEMENT.'

The agreement contains a number of provisions which are typical in a lease.

20. In my judgment the lease is consistent only with ownership of the schedule 3 goods by State and with a right of possession in State sufficient to transfer possession to Emshelf under the lease. That is explicit or implicit in the terms of the lease. In any event s 7(1) of the 1982 Act provides:

> 'In a contract for the hire of goods there is an implied condition on the part of the bailor that in the case of a bailment he has a right to transfer possession of the goods by way of hire for the period of the bailment and in the case of an agreement to bail he will have such a right at the time of the bailment.'

By s 11(1) that implied term can be negatived or varied by express agreement, or by the course of dealing between the parties or by such usage as binds both parties to the contract. However, no such express agreement, course of dealing or usage has been suggested in this case. It follows that State had a right to transfer possession to Emshelf.

21. The question is whether in these circumstances there was constructive delivery of the schedule 3 goods by Emshelf to State so that State could deliver them to Emshelf under the lease. Mr Lerego submits that there was just such a constructive or (as it is sometimes put) symbolic delivery and relies upon statements both in textbooks and in the authorities.

22. As to the textbooks, he relies in the first place upon Pollock and Wright *An Essay on Possession in the Common Law* (1888). In s 7 of ch II beginning at p 71 *Pollock and Wright* discuss 'Delivery of goods by attornment'. At pp 72–73 they say this:

> 'The authorities both on acceptance and actual receipt within the Statute of Frauds and on the rights of unpaid vendors show that in several ways there may be a change of possession without any change of the actual custody. Such a change of possession is commonly spoken of as constructive delivery. 1. A seller in possession may assent to hold the thing sold on account of the buyer. When he begins so to hold it, this has the same effect as a physical delivery to the buyer or his servant, and is an actual receipt by the buyer; and this whether the vendor's custody is in the character of a bailee for reward or of a borrower. The important thing is his recognition of the purchaser's right to possess as owner, and his continuing to hold the goods either as the

purchaser's servant or as his bailee with a possession derived from that right. On the other hand, acts of the buyer which treat the seller as his agent or bailee are evidence of receipt and acceptance as against the buyer: though payment of warehouse rent, for example, to an unpaid vendor retaining the custody of the goods is far from conclusive to show that he has lost possession and his lien. Accordingly as the seller holds as servant or bailee, the transaction amounts to simple delivery, or to deliver to the buyer immediately followed by redelivery to the seller as bailee. 2. Possession may be delivered, while the goods are in the custody of a third person, by the agreement of the seller and buyer, with the assent of that person, that they shall be held in the name or on account of the buyer. This is described by the modern authorities as an "agreement of attornment." 3. Lastly, it is a possible though not very common case that the buyer is in possession of the goods as the seller's bailee.'

23. Mr Lerego submits that the facts here are essentially those contemplated in para 1 of that extract. He also relies upon the following statement in *Bowstead and Reynolds on Agency* (16th edn, 1996) pp 496–497, para 8-170:

'*Attornment.* An attornment in respect of goods occurs where the possessor of goods, whether himself the transferor or the bailee of the transferor, acknowledges that he holds, and possesses, for another. There is authority that such an attornment creates a fresh bailment by means of a constructive delivery and redelivery.'

24. As to the authorities, Mr Lerego relies in particular upon *Marvin v Wallace* (1856) 6 El & Bl 726, 25 LJQB 369, which is cited by *Pollock and Wright* and upon *Dublin City Distillery Ltd v Doherty* [1914] AC 823 at 852, which is the first authority cited by *Bowstead* in the above passage.

25. In *Marvin*'s case the question was whether the buyer of a horse had received it for the purposes of compliance with s 17 of the Statute of Frauds 1677. The seller sold the horse to the buyer and then, after that contract had been made, asked the buyer if he could borrow it for a time. The buyer said that he could, provided that he took care of it. As I read the facts, the loan was to be for a specific period, so that it was not a bailment at will. The horse remained in the physical possession of the seller. The question was whether the buyer had received the horse. It was held that he had. Coleridge J said (25 LJQB 369 at 370):

'The 17th section of the Statute of Frauds requires an actual receipt of the goods, which implies a delivery of the goods on the one hand and an acceptance of the goods on the other hand. It is admitted that, if for one minute they are in the actual visible possession of the vendee, as vendee, it would be sufficient; also, it must be admitted, that if they were in the possession of a third party, for and on behalf of the vendee, the statute would be satisfied. But it is contended that, unless some act was done entirely unambiguous, indicating a change of possession, the question as to the intention of the vendee to accept cannot arise. The jury have found that the bargain for the purchase of the horse was complete, and then the vendor asked the vendee as a favour to lend the horse to him for a certain time and special purpose: the vendee said, "Yes, I will lend him to you, if you will take care of him"; and in consequence of that the vendor retained apparent possession of the horse and made use of it as bailee, and at the end of the time agreed upon returned it to the vendee. It appears to me that the statute has

> been satisfied. Try the case on the first point, whether there has been a sufficient delivery. *Elmore* v. *Stone* furnishes an answer: there the horse was passed from one stable of the vendor to another stable of a different character. Though the vendor had as much possession of the horse when in the one as in the other, the character in which he held it was changed. Here, though the defendant had the same apparent possession of the horse, the evidence shews that the character of the possession was entirely changed. He ceased to hold it as owner, and continued to hold it only as bailee. As to the question, whether the right of lien has been retained by the vendor, it is only a consequence of the other point. If the bargain is complete, and the possession has passed, the right of lien is gone; and if not, it is retained. I think, therefore, that question cannot be used as a test of the character of the possession.'

Erle J, Crompton J and Lord Campbell CJ gave judgments to similar effect.

26. The crucial point for present purposes is that the court treated the horse as having been delivered to the buyer. The delivery occurred because the buyer loaned the horse to the seller and the seller acknowledged that he was holding the horse, not as seller, but as bailee. Erle J put it in this way (25 LJQB 369 at 371):

> 'There must be an actual contract of purchase and sale; and then, if the buyer exercises any act of ownership, though by words only, inconsistent with any other supposition than that he intended to assume dominion over the chattel as owner, he has accepted and actually received it within the meaning of the statute. Applying that doctrine to the facts of this case, according to the finding of the jury, the defendant, as owner in possession of the horse, permitted the plaintiff to take and ride it for two or three journies. That is a decided transmutation of possession, and so the plaintiff's lien was gone, and the requirement of the Statute of Frauds complied with.'

27. The passage from the *Dublin City Distillery* case relied upon by *Bowstead* is in the speech of Lord Parker ([1914] AC 823 at 852):

> 'The respondent contends that these documents operate by way of pledge. It is quite certain that at common law a pledge cannot be created unless possession of the goods the subject of the pledge be delivered to the pledgee. When the goods in question are in the actual possession of the pledger, possession of them is, as a rule, given to the pledgee by actual delivery of the goods themselves. There are, however, cases in which possession may pass to the pledgee without actual delivery, for example, whenever there is some agreement between the parties the effect of which is to change the possession of the pledger from a possession on his own account as owner into possession as bailee for the pledgee: see *Meyerstein* v. *Barber* ((1866) LR 2 CP 38). Such an agreement operates as a delivery of the goods to the pledgee and a redelivery of the goods by the pledgee to the pledger as bailee for the purposes mentioned in the agreement. A mere book entry cannot, however, have this effect.'

28. In my judgment the legal position is as set out by both *Pollock and Wright* and *Bowstead*. Thus, where a seller in possession of the goods sold acknowledges that he is holding the goods on account of the buyer in circumstances where (as *Pollock and Wright* put it at p 72) he recognises the purchaser's right to possess as owner and his continuing to hold the goods thereafter as the bailee with a

possession derived from that right, then (as *Pollock and Wright* put it at p 73) the transaction amounts to delivery to the buyer immediately followed by redelivery to the seller as bailee and that is so whether the seller's custody is 'in the character of a bailee for reward or of a borrower'. There is a change of the character of the seller's possession when he holds the goods for the buyer and, indeed, when he subsequently becomes, say, the bailee from the buyer for reward.

29. Mr Lerego submits that an application of those principles establishes a delivery by Emshelf to State and a redelivery by State to Emshelf. Sir Roy Goode, on the other hand, submits that the facts of this case are distinguishable from those in *Marvin's* case because in that case the contract of sale was made before the horse was loaned to the seller whereas here the sale and leaseback were all part of one agreement. He further submits that there was no acknowledgment here by Emshelf of State's right of possession of the schedule 3 goods and no sufficient voluntary act of delivery by Emshelf to State. As he put it in argument, there was no time at which State could instruct Emshelf what to do with the goods and thus no time at which State could decide whether or not to lease the goods to Emshelf. For example, State could not at any stage have instructed Emshelf to deliver the goods to it or to a third party on its behalf.

30. It is true that there was no identifiable moment at which State could have given those instructions. However, I prefer the submissions of Mr Lerego to those of Sir Roy on this point. I do not think that it is necessary to identify a moment at which the goods were delivered to State by Emshelf. The effect of the sale and leaseback arrangement was that the goods must be taken to have been delivered to State because State could not otherwise have leased them back to Emshelf. Although on the facts of *Marvin's* case the loan arrangement was made after the contract of sale, I do not think that in principle it would or should have made any difference if the sale agreement and the bailment had been contained in the same contract. I can see no reason why it should be held that there was a delivery and redelivery in the one case and not in the other.

31. Equally it seems to me that there was here an acknowledgment by Emshelf that it held the goods on behalf of State in the lease itself. I have already set out the relevant facts. The terms of the lease are consistent only with such an acknowledgment, since (as I have already stated) State would not otherwise have been able to lease the goods back to Emshelf. The principles set out above therefore seem to me to establish that there was a delivery and a redelivery on the facts here.

32. Sir Roy submits that there was no voluntary act of transfer and that State's case fails for that reason, as the owners' case failed in *The Saetta*. However, it seems to me that the making of the agreement for sale and the entering into of the lease was a sufficient voluntary act on the part of Emshelf to satisfy the requirement in s 61(1) of the 1979 Act that in order to amount to 'delivery' there must be a voluntary transfer of possession from one person to another.

33. Finally Sir Roy submits I think that the effect of the above analysis is to hold that State had possession in circumstances in which it would not have possession under s 1(2) of the 1889 Act. He further submits that if it would not have possession under that Act it should not be held to have received the goods within the meaning of s 24 of the 1979 Act. It is true that there are a number of cases in which it has been held that for many purposes the 1889 Act and the Sale of Goods Act 1893 and its replacements should be treated as a code: see for example the discussion in *Forsythe International (UK) Ltd v Silver Shipping Co Ltd, The Saetta* [1994] 1 All ER 851 at 862, [1994] 1 WLR 1334 at 1344–1345.

34. I am, however, unable to accept the submission that unless State's possession was possession within the meaning of s 1(2) of the 1889 Act it cannot have received the goods within the meaning of s 24 of the 1979 Act. While such possession is sufficient to amount to receipt, the buyer can in my opinion receive the goods in the way which I have described. It seems to me that such receipt probably amounts to possession by State within the meaning of s 1(2) because, in order to lease them from State, Emshelf must have held the goods for State or on its behalf, albeit symbolically. However, if that is wrong, there was nevertheless a delivery and redelivery of the goods sufficient to amount to receipt of them by State.

35. Although the Factors Acts and the Sale of Goods Acts can for some purposes be regarded as part of a code, the definition in s 1(2) was not incorporated into the 1893 Act. As Mr Lerego pointed out, s 1(2) is expressed to be 'for the purposes of this Act', that is the 1889 Act. Moreover, while the provisions of s 1(2) were not expressly incorporated into the Sale of Goods Acts, the provisions of s 1(1) were. Thus s 26 of what is now the 1979 Act defines 'mercantile agent' in the same terms as s 1(1) of the 1889 Act. In these circumstances I do not think that the question whether a buyer has received goods within the meaning of s 24 depends wholly upon whether he is in possession of the goods within the meaning of s 1(2) of the 1889 Act.

36. Finally, it seems to me that the conclusions set out above make sense in modern conditions. This and other cases show that purchase of goods is commonly financed by sale and leaseback arrangements such as those entered into by both Gerson and State in the instant case. It seems to me that it makes commercial sense to hold that such arrangements involve a transfer of constructive possession to the finance company who buys the goods and leases them back, such that the innocent finance company can take advantage of the provisions of s 24 of the 1979 Act. The distinctions suggested on behalf of Gerson seem to me to be too narrow to make commercial sense.

37. For all these reasons I would hold that, on the evidence before the judge, Emshelf delivered the schedule 3 goods to State under a sale and that State received them in good faith and without notice of the sale from Emshelf to Gerson. It follows that State acquired good title to the schedule 3 goods under s 24 of the 1979 Act and that it is not liable for conversion. I would dismiss the appeal on this point.

Contract between Gerson and Sagebush

38. The judge held that Gerson sold all the goods to Sagebush on 28 February 1997. He held that Gerson offered to sell the goods by a fax dated 27 February and that the offer was accepted by a reply fax of the next day. Those faxes must of course be considered in their context but, before considering the surrounding circumstances, it is appropriate to quote the faxes. The fax of 27 February was sent by Mr Gerson of Gerson to Mr Smith of Sagebush. It was in these terms:

> 'I have spoken to Ken Grieg and am satisfied that they have no objection to a sale of the equipment leased to Emshelf even if the sale price appears to represent an apparent undervalue. Accordingly I am willing to make an outright sale for £319,000 plus VAT. This figure is made up of £269,000 (259,000 plus £10,000 interest as per termination statement) plus £50,000 (retention of 5% of sale proceeds under sales agency agreement under original lease based on estimated true market value of £1m).'

Sagebush replied by fax on the next day in these terms:

> 'With reference to our various telephone consultations and your penultimate fax of yesterday. Please supply an invoice in the sum of £319,000 plus VAT to Sagebush (1997) LTD in consideration of all that plant and equipment which was the subject of your terminated lease agreement with Elmshelf LTD. Many thanks for your assistance in this matter.'

39. The context in which those faxes came to be sent may be summarised as follows. As the judge explained, by the beginning of 1997 the payments due from Emshelf under the lease with Gerson were seriously in arrears. Mr Gerson had a meeting with Mr Joseph Hayes, whom he believed to be an adviser to and spokesman for Mr Greig, who was both a director of Emshelf and one of the guarantors of Emshelf's obligations under the lease. Mr Gerson also believed Mr Hayes to be a shadow director of Emshelf. Mr Hayes told Mr Gerson that there was an investor on the horizon who was interested in taking over Mr Greig's companies and investing money in them. Gerson terminated the lease on 25 February 1997. Very soon after that Mr Smith telephoned Mr Gerson and introduced himself. Mr Gerson checked with Mr Greig and Ms Bean (who was also a director of Emshelf and the other guarantor of its obligations under the lease) whether Mr Smith was the person intending to put money into Emshelf and obtained their approval to a sale to Mr Smith or Sagebush Ltd.

40. It was in these circumstances that Mr Gerson sent the fax of 27 February to Mr Smith which I have quoted above. The goods were thought to be worth much more than the £319,000 plus VAT which Mr Gerson proposed to Mr Smith, but the amount outstanding on the lease, inclusive of all charges and VAT, as at 25 February was £314,574·39. It was at least partly because of the potential difference between those figures and the figure of £1m which the goods were said to be worth that Mr Gerson obtained the consent of Mr Greig and Ms Bean first to discuss with Mr Smith of Sagebush Ltd the details of the lease and of the goods and then to make an arrangement with Mr Smith.

41. There is no evidence that there was any more extensive conversation between Mr Gerson and Mr Smith than as found by the judge and as described above. Thus Mr Gerson did not enquire of Mr Smith as to his or Sagebush's financial position. Nor did he carry out any investigation as to their creditworthiness. Moreover, he did not know whether Mr Smith had seen the goods and he did not provide him with a schedule of them. He had never done business with Mr Smith before.

42. In these circumstances Sir Roy Goode submits that it is almost inconceivable that Mr Gerson, as an experienced businessman, would have made an offer to sell the goods outright to Mr Smith on such terms that there would be a binding contract between them. He also says that Mr Gerson would certainly not have done so on the basis that property in the goods would pass to Mr Smith or his company immediately on acceptance and before the goods were paid for. Sir Roy further submits that it is equally inconceivable that Mr Smith would have agreed to buy and pay for the goods before he had made appropriate financial arrangements. Finally he submits that it is permissible to take these factors into account in deciding whether the faxes relied upon establish a contract between the parties.

43. I accept Sir Roy's submission that it is permissible to take account of the probabilities in deciding that question. I further accept his submissions as to the

position of Mr Gerson. It does seem to me to be most unlikely that when he sent his fax of 27 February he intended that an acceptance of it would lead to a binding contract, but, even if that is wrong, it is, in my judgment inconceivable that he intended that the property in the goods should pass by an acceptance of it. The position of Mr Smith is less clear. It is I suppose possible that he would have been willing to buy the goods without having finance in place because of the perceived difference between the price and the true value of the goods, but it seems more likely that he would have wanted to make financial arrangements to enable him to pay for them before committing himself or his company to do so.

44. All of course depends upon the true construction of the two faxes, together in principle with what was said in the telephone conversations and, perhaps, the last fax sent on 27 February. Such a fax is referred to by inference in the fax of 28 February quoted above because of the reference in it to 'your penultimate fax of yesterday'. Mr Gerson gave oral evidence but Mr Smith did not. Mr Gerson said in evidence that he had no knowledge of another fax sent on 27 February and that he did not know what document was being referred to. Also he gave no evidence about the telephone conversations which were also referred to in the fax. We do not of course know what Mr Smith might have said if he had been called.

45. If the problem is approached as one of offer and acceptance, the first question is whether the fax of 27 February is an offer which was capable of acceptance. In the light of the considerations outlined above, I would not hold that it was an offer which was intended to be accepted. It simply says that 'I am willing to make an outright sale for £319,000 plus VAT'. It is not couched in the terms of an offer and seems to me to be consistent with being an invitation to treat. However, I recognise that it is capable of being regarded as an offer, in which case the next question is whether the fax of the next day was an acceptance. This is not an easy question to answer without any knowledge of the contents of either the telephone conversations or the other fax referred to in the reply fax.

46. The reply fax is not couched in terms of acceptance, but merely asks for an invoice. Also it was sent by Sagebush (1997) Ltd and I am not sure that until then Gerson had any knowledge of such a company. However that may be, the fax can to my mind only be construed as an acceptance if the request for an invoice is an unequivocal acceptance of Gerson's offer to sell for £319,000 plus VAT and that it is a promise to pay that sum for whatever plant and equipment was the subject of the lease. I do not think that it is. It seems to me to be consistent simply with a request for an invoice setting out the relevant plant and equipment so that Sagebush could make financial arrangements to pay it, no doubt on the basis that if such arrangements were made the deal would become firm.

47. The contrary view is that the request for an invoice is consistent only with a promise to pay it. I do not think that the mere request for an invoice without any other evidence of agreement, whether by telephone or otherwise, amounts to an unequivocal acceptance. By way of example, I note that it is by no means clear that the invoice dated 19 August 1986 from State to Emshelf is evidence of a binding agreement between them. On the contrary it appears to me to be probable that, notwithstanding the invoice, there was no binding agreement of sale and leaseback between Emshelf and State until the lease was signed on 28 August. In these circumstances, if the reply fax is construed in its context and in the light of the surrounding circumstances which I described earlier, I do not think that it can fairly be regarded as an acceptance of an offer to sell the goods

for £319,000 plus VAT. I have thus far reached that view on the basis of the events prior to receipt by Gerson of the reply fax.

48. If, contrary to that view, the effect of the reply fax was to bring into existence a binding contract for the sale and purchase of the goods for £319,000 plus VAT, the next question is when the parties intended the property in the goods to pass. The judge held that there was an agreement on 28 February and that the property passed when the contract was made. By s 17(1) of the 1979 Act, where there is a contract for the sale of specific or ascertained goods, the property passes when the parties intended it to pass and, by s 17(2), for the purposes of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. However, s 18 provides:

> 'Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.
>
> *Rule 1.*—Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.'

49. On the assumption that a contract was made on 28 February, the question is thus when the parties intended the property to pass taking account of the circumstances set out in s 17(2) and whether a different intention appears from that set out in s 18, r 1. In my judgment a different intention does appear. It appears from all the circumstances of the case, even if attention is confined to events before the receipt by Gerson of the reply fax of 28 February. It is to my mind inconceivable that Gerson intended to pass the property to Sagebush before it was paid. Moreover I do not think that Mr Smith can have thought otherwise. It is noteworthy in this regard that neither of the faxes contains a provision as to when delivery should take place. That seems to me to be a pointer to the absence of a contract, but if there was a contract, it is a strong pointer to the parties' intentions as to when property was to pass. No one would have contemplated that immediately after sending the fax of 28 February Sagebush was entitled to delivery of the goods without paying for them.

50. Assuming that it is permissible to take account of subsequent events in order to determine what the intentions of the parties were on 28 February (which, although it is not necessary to decide the point for the purposes of deciding this appeal, to my mind it is), my conclusion is the same. Indeed, it is strengthened. Immediately after receipt of the reply fax Mr Rolls of Gerson faxed Mr Smith at Sagebush as follows:

> 'Emshelf IX Limited, Further to your fax of earlier this afternoon please find attached a copy of our invoice to yourselves for the sale of the plant and equipment formally subject to our lease agreement with the above. The original invoice will be in the post for you tonight.'

The invoice stated 'Sale of second hand plant as declared in the attached schedule. As seen and approved for the agreed sum' of £319,000 plus VAT of £55,825·00 making a total of £374,825·00. Underneath was written 'Title to this equipment will pass only upon payment of this invoice'. Attached to the fax and the invoice were several pages on which the goods were set out in a schedule.

51. It is plain from that invoice, which was sent almost immediately after receipt of the reply fax, that it was Gerson's intention that property in the goods should not pass until payment, as I would have expected. It is inconceivable that that was not also his intention both when he sent the fax of the day before and when he received the reply fax. It is in my opinion almost certain that that was also the intention and understanding of Mr Smith, not only because that is what one would expect, but because subsequently, after the dispute arose, he produced an invoice which had been doctored to remove the statement that title would pass only on payment. The judge held that that had been achieved by what he called skilful use of the photocopier. In the absence of any explanation from Mr Smith it is a reasonable inference from that conduct that Mr Smith knew perfectly well that title was not to pass until payment.

52. On the same day, after receipt of the invoice, Mr Smith telephoned to ask for Gerson's bank details and Gerson faxed the details to him immediately. According to the uncontroverted evidence of Mr Gerson there were thereafter a number of telephone conversations between himself and Mr Smith during which Mr Smith promised payment, but it never came. Mr Gerson denied that he demanded payment, but simply said that payment was promised. He said that if Mr Smith had paid there would be nothing to agree, which is plainly correct because the price had been agreed in the exchange of faxes and, if Sagebush had paid the price, there would have been nothing further to agree and Sagebush would in that event have become entitled to take possession of the goods. I shall return to my reasons for this view below.

53. The next written communication between the parties which we have seen was dated 18 March 1997 in which Gerson faxed Mr Smith at Sagebush asking him to 'contact us with regard to the settling of invoice L10590 for sale of plant to your company'. On the same day Mr Gerson faxed Mr Greig and Ms Bean in these terms:

> 'At the end of February Nigel Smith of Sagebush asked us to send an invoice for the equipment leased to Emshelf at an agreed figure. We understood that payment would be made promptly but over a fortnight has elapsed and payment has not been received. It is our intention to withdraw the offer to sell to Mr Smith and collect the equipment and dispose of it elsewhere. Do you know what Mr Smith's intentions are?'

The first of those faxes might suggest that an agreement for sale had been made, but the second refers to withdrawal of the offer and is thus consistent with the conclusion that no sale had been agreed.

54. On 20 March Mr Gerson sent a similar fax and recorded delivery letter to Mr Smith at Sagebush in these terms:

> 'Some three weeks have elapsed since you originally asked for an invoice and details of our Bank account and you subsequently promised payment on several occasions including the definite assurance of payment to our Bank account yesterday. Payment was not received and therefore the offer of sale of the plant and equipment formerly leased to Emshelf is now withdrawn and we have made arrangements with ... Savills ... to make arrangements to recover the plant and equipment and dispose of our interest in it by auction.'

Mr Gerson said in evidence that he in fact instructed agents on the same day and it was also on the same day that he issued a credit note addressed to Sagebush in the sum of £374,825 in respect of 'Cancellation of Invoice ... sale aborted'.

55. Mr Gerson subsequently arranged to meet Mr Smith on 26 March. Before the meeting he sent Mr Smith a fax asking him for a complete list of the equipment showing its present location. The meeting was held, but achieved nothing. Mr Smith did not tell Mr Gerson that he had sold the goods to Mr Wilkinson. There followed some later correspondence between solicitors, but it is not necessary to refer to it for the purposes of this appeal.

56. The judge referred to the fact that Mr Gerson maintained in evidence that there had been no sale by Gerson to Sagebush. The judge had earlier said that he had had the advantage of seeing Mr Gerson give evidence and that he had formed a very favourable impression of him. In the present context he said that he was sure that Mr Gerson honestly believed that there had been no sale to Sagebush. However, he correctly said that what matters is not his subjective intention or his belief, but an objective assessment of what was said and done. I entirely agree and, for that reason, have not set out Mr Gerson's evidence about what he subjectively thought the faxes meant. The judge referred to s 17 of the 1979 Act. He held that a contract was made on receipt of the reply fax on 28 February and that the retention of title wording was post-contractual. He then set out the arguments advanced before him by Mr Goodbody on behalf of Gerson, which were substantially to the same effect as those advanced by Sir Roy before us to which I have referred, but held that r 1 in s 18 of the 1979 Act applied because no contrary intention appeared.

57. It is apparent that the view formed by the judge did not depend upon the view he formed of the oral evidence. In these circumstances this court is, in my judgment, in as good a position as the judge to determine whether a contract was made, if so on what terms and what the intentions of the parties were as to when property was intended to pass. I have considered each of those questions and, for the reasons which I have tried to give, I have reached a different conclusion from that of the judge. I would hold that no contract was made by the sending and receipt of the reply fax on 28 February. Alternatively, if, contrary to that view, a contract was made, the parties did not intend the property to pass until payment, which never occurred. It follows (on either view) that Sagebush did not at any stage obtain a good title to the goods as a result of a contract with Gerson and that Mr Wilkinson did not do so either.

58. I said earlier that it seemed to me that if Sagebush had paid for the goods, Sagebush would have become entitled to possession of them. Indeed Mr Gerson accepted in cross-examination that if Mr Smith had paid the money the goods would have been his (or strictly Sagebush's). There are a number of possible routes to that conclusion. The first is that, although there was no contract based on the reply fax on 28 February, Gerson subsequently made a counter-offer when it sent the invoice together with the detailed schedule of the goods. The counter-offer was on terms that the property would pass on payment, it being implicit that on payment Sagebush would be entitled to delivery of the goods. It is to my mind at least arguable that that counter-offer was accepted when Mr Smith telephoned and asked for Gerson's banking details. However, I do not decide the appeal on that basis because it is not an analysis which was espoused by any of the parties.

59. A second route is also based upon the conclusion that the invoice and fax were a counter-offer. On this view (which on balance is my preferred view), although the counter-offer was not in fact accepted, it would have been by payment. A third route is that to which I have already referred, namely that there was a contract but the parties intended the property to pass on payment, so that property would have passed on payment and Sagebush would have been entitled

to delivery. Whatever the correct analysis, for the reasons I have given I would hold that Sagebush did not obtain title to the goods by contract.

Section 25(1) of the 1979 Act

60. Section 25(1) is concerned with the case of a buyer in possession after sale. It provides, so far as relevant, as follows:

> 'Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods ... the delivery ... by that person ... of the goods ... under any sale ... to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery ... were a mercantile agent in possession of the goods ... with the consent of the owner.'

61. Mr Wilkinson relies upon s 25(1) to give him title to the goods if the true position is that there was a contract between Gerson and Sagebush but property did not pass to Sagebush under it. It follows that if my conclusion that there was no contract between them is correct, the section will not avail him because Sagebush was not a person who had bought or agreed to buy the goods. However, the section becomes potentially relevant if the true position is that there was a contract between Gerson and Sagebush but property did not pass under it. I shall therefore consider its application on that hypothesis.

62. In order to satisfy s 25(1) Wilkinson has to show that Sagebush obtained possession of the goods with the consent of the seller, namely Gerson. The judge considered Wilkinson's reliance on this section very briefly indeed at the end of his judgment and said that he would if necessary have held that Wilkinson had a good title under s 25(1). Unfortunately the judge does not expressly consider the question whether Sagebush ever obtained possession of the goods with the consent of Gerson. I do not blame the judge in any way for that because, on his view of the facts, the question did not arise, but it does mean that we must consider the question afresh.

63. The sale or sales by Sagebush to Wilkinson took place between 3 and 12 March 1997. It follows that in order to succeed under this head Wilkinson must show that Sagebush was in possession of the relevant goods before the relevant sale. His difficulty is that no one from Sagebush gave evidence. That is, Mr Smith did not give evidence, although the trial was adjourned for a time to enable him to do so. In the event he did not. This makes it very difficult for Wilkinson to establish that Sagebush was ever in possession with Gerson's consent. Although Mr Chaisty said everything that could have been said in support of that conclusion, in my judgment, even if Sagebush was in possession of the goods at any relevant time, there is no evidence that it was in possession of them with the consent of Gerson.

64. All the evidence is to the contrary. Mr Gerson was cross-examined at some length on this topic. His evidence was not in any way shaken. Thus he denied that he was aware that after 28 February Mr Smith or Sagebush had any control over the goods. So far as he was aware, the goods remained in the possession of Emshelf, which had had the possession of them under the lease. He denied that he was content to allow Mr Smith to exert such control over them as he thought fit. There is, in my judgment, no basis upon which that evidence could be rejected. Such other evidence as there is supports Mr Gerson's evidence. For example, the fax of 18 March quoted above shows, in my judgment, that

Mr Gerson regarded the goods as in the possession of Emshelf throughout. He was there telling Mr Greig and Ms Bean that he would collect the equipment, as I read it, from Emshelf, and dispose of it elsewhere. He also asked them whether they knew what Mr Smith's intentions were.

65. It is plain from the retention of title provision on the invoice that Mr Gerson's position throughout was that title would not pass to Sagebush until it had paid. In these circumstances I can see no reason why Mr Gerson might have permitted Sagebush to take possession of the goods and every reason why it should not. Reliance was placed upon the fax of 26 March to which I referred earlier in which Mr Gerson asked Mr Smith for a complete list showing the present location of the goods. When asked about it, he said that he knew by then that Mr Smith was working in the business, that is the business of Emshelf. As he put it in cross-examination, he did not know that when he prepared the invoice. At that time Mr Smith described himself as being interested in taking over the business and therefore in buying the equipment. He said that he discovered that Mr Smith was working in the business after he sent the fax of 18 March referred to above, but not before.

66. There is, in my judgment, no evidence that at any relevant time Mr Gerson consented to Sagebush having possession of the goods. His evidence was firmly to the opposite effect and there is no indication that the judge intended to disbelieve anything that Mr Gerson said in evidence. On the contrary, as I indicated earlier, he expressly held that Mr Gerson was an impressive witness. In any event, I can see nothing in the remaining evidence which would justify a conclusion that Gerson consented to Sagebush being in possession of the goods at all, let alone before they were delivered to Wilkinson. It follows that, even if (contrary to my view) there was a contract between Gerson and Sagebush for the sale of the goods, Wilkinson has not established a good title to them under s 25(1) of the 1979 Act.

Conclusion

67. It follows that I would allow Gerson's appeal against Wilkinson in so far as he relies upon a contract between Gerson and Sagebush or upon s 25(1) of the 1979 Act, but, on the basis of the evidence before the judge and before us, I would dismiss the appeal by Gerson against State and hold that State and therefore Wilkinson had good title to the schedule 3 goods. It also follows that I would hold that Wilkinson (albeit wholly innocently) converted the goods other than the schedule 3 goods.

Further evidence

68. In the course of the argument Gerson sought permission to adduce further evidence in order to enable it to allege or consider alleging that State cannot satisfy that part of s 24 of the 1979 Act which requires that it show that it received the schedule 3 goods in good faith and without notice of the previous sale from Gerson to Emshelf. We indicated that we would give our decision at the same time as giving our judgment on the appeal.

69. Mr Goodbody, who argued this part of the case on behalf of Gerson, correctly accepts that in principle Gerson must satisfy the tests in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, namely that the evidence could not have been obtained with reasonable diligence for use at the trial, that the evidence would, if given, probably have an important influence on the result of the case, although it need not be decisive and that the evidence must be such as is

presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible. Mr Goodbody submits, in the alternative, that even if those conditions are not satisfied, the court should admit the evidence on the basis that it is material which has come to light only after the trial.

70. In reality the application is not so much that this court should admit the evidence and decide the appeal on the basis of it, but that because of the new evidence it should give Gerson an opportunity to investigate the matter further and remit the matter to the judge for a consideration of the question whether State had knowledge of Gerson's prior interest in the schedule 3 goods. It may be noted, however, that Gerson has not yet applied for permission to amend the statement of claim to make such an allegation.

71. There are two classes of evidence relied upon which I shall briefly consider in turn. The first can be dealt with shortly. It relates to documents found in a file obtained from a Mr Patrick Ormerod, who trades or traded as UK Finance & Leasing. He apparently acted as a broker in a number of deals either set up or proposed to be set up between State and Emshelf. However, Gerson accepts that Mr Ormerod would not have been acting as the agent of State for any purpose material to this application. Gerson relies upon the fact that the file, which was disclosed to Gerson by State on 26 May 2000 (and thus long after the trial), suggests that Mr Ormerod was aware of a previous sale and leaseback between Emshelf and Gerson and that he was aware of it before the sale and leaseback agreement between Emshelf and State.

72. State denies that it knew of any previous agreement between Emshelf and Gerson relating to the schedule 3 goods. Mr Antony Roestenburg, who is a solicitor employed by State, says in a statement that he has spoken to Mr Ormerod and indeed to a Mr David Prosser of State, both of whom say that they were aware that a sale and leaseback transaction was done in respect of some equipment, but not aware that it extended to the schedule 3 equipment proposed to State. There is nothing in Mr Ormerod's file to contradict that statement. Indeed there is nothing in the file which supports the conclusion that State was aware that the goods had already been sold to Gerson. Moreover, I accept Mr Lerego's submission that it is most unlikely that it did because, if it had, it would surely not have entered into the sale and leaseback agreement with Emshelf.

73. In all these circumstances, the second *Ladd v Marshall* condition is not satisfied. It is not shown that the material in the Ormerod file would probably have an important influence on the result of the case. I would not therefore grant the application on this ground.

74. The other class of evidence is somewhat different. The fact that Emshelf had sold the same goods twice to two different finance companies was the subject of a police investigation, although Gerson's solicitors were not aware of that fact until they were told of it in January 2000 by Mr Gerson. It is not clear when Mr Gerson first knew. Nor is it clear what enquiries had been made by Gerson before the trial to check the position with the police. In the early part of this year Mr Jonathan Berkson, of Gerson's solicitors, contacted both DC Nesbitt and State's solicitors. He asked the latter to disclose any documents which State should have disclosed before the trial. They disclosed a document which they said had just come to light, although it later turned out that it had been disclosed before the trial.

75. Mr Berkson obtained a statement from DC Nesbitt, who says that he interviewed Mr Roestenburg on 29 September 1999 (which was of course long

after the trial) and that during the interview he was shown a copy of State's file in connection with its dealings with Emshelf. He says that he saw in the file an internal memorandum on a light green A5 sheet of paper which, from memory, he thought was dated about March 1995. It was not the document referred to above. DC Nesbitt did not take or retain a copy of the document, but in his statement, which is dated 22 February 2000, he said that the gist of the memorandum was to refer to a sale and leaseback already in place in connection with a hive-down agreement with regard to items owned by Emshelf. He interpreted it to mean that Mr Prosser was recording that there was a sale and leaseback agreement already in place over the equipment which was subject to the hive-down agreement and was seeking a decision whether or not further funds should be made available to Emshelf in respect of the equipment. DC Nesbitt says that he showed the document to Mr Roestenburg, who said that he did not know that it was there.

76. In his statement Mr Roestenburg says that DC Nesbitt's recollection of the document which he describes is entirely consistent with the contents of the document referred to above, which we have seen and which is dated 29 March 1995. If that is indeed the document which DC Nesbitt had in mind, I agree with Mr Roestenburg that it does not have the meaning ascribed to it by DC Nesbitt. However, DC Nesbitt says that it is not that document. Mr Roestenburg denies that there is any other document.

77. Mr Roestenburg further says (as I said earlier) that it is inconceivable that he or any of the relevant personnel would have agreed to finance a sale and leaseback transaction on goods which were already the subject of a sale and leaseback arrangement with another company. As to the suggestion that he had said that he did not know the memorandum was there, Mr Roestenburg says that he was shown a number of documents by DC Nesbitt as he went through them. He recalls DC Nesbitt showing him the document dated 29 March 1995 and saying that it showed that State knew about the goods. He says that he may have said that he did not know about that and that he then took the memorandum and said that it did not show that State was aware of the double finance. Mr Roestenburg also explains in his statement how he came to make a change to a draft statement prepared for him by DC Nesbitt.

78. It is not, as I understand it, suggested by Mr Goodbody that if the memorandum was indeed the memorandum dated 29 March 1995, it supports the case that State knew about the double finance. It could scarcely be so suggested because it was available before the trial and no allegation of knowledge was made. Indeed, although Gerson formally denied absence of knowledge in the pleadings, it at no time asserted relevant knowledge at the trial, which was of course the time to do so. It is not clear what, if any, steps were taken before the trial by Gerson or its advisers to investigate State's knowledge.

79. However that may be, if evidence has come to light which satisfied the second and third criteria in *Ladd v Marshall* it would or might be appropriate to remit the matter to the judge for trial on the question of knowledge. However, I have reached the conclusion that the evidence of DC Nesbitt is not sufficient to lead to the conclusion that it would probably have an important influence on the result of the case. He did not retain a copy of the memorandum to which he refers, so that his evidence will depend entirely upon his recollection. It was only one of very many documents that he was considering. His evidence has to be set against that of Mr Roestenburg.

80. His evidence strongly suggests that DC Nesbitt is mistaken and that he is remembering the document of 29 March 1995 and is mistaken as to its meaning. There is no reason on the face of it not to believe the evidence of State's solicitor, Mr Roestenburg, when he says that he did have a conversation with DC Nesbitt in which it was suggested that State knew about the other finance, but that it related to the 29 March memorandum. In all the circumstances, given the unlikelihood of State financing goods which it knew had already been financed under a sale and leaseback arrangement, the chances of a court rejecting Mr Roestenburg's evidence in favour of DC Nesbitt's recollection of a document which is not available are remote indeed.

81. In these circumstance I would hold that the requirements of *Ladd v Marshall* are not satisfied and, in so far as this is an application to adduce further evidence, I would refuse it. I would only add that I do not think that in all the circumstances it would be appropriate to remit the matter to the judge simply in order to allow Gerson to investigate the matter further, when the results of such an investigation are wholly speculative. The general principle is that there must be an end to litigation. It would not be proportionate, fair or just to allow the matter to proceed further. I would therefore also refuse this application, in so far as it is an application to remit the matter to permit further investigation.

BENNETT J.

82. I have read in draft the judgment of Clarke LJ. I agree that the appeal of the claimants should be dismissed in the case of State, but allowed in part in the case of Wilkinson for the reasons which he gives, subject to one point, which relates to the question whether there was a contract made between the claimants and Sagebush (1997) Ltd in February/March 1997. In my judgment there was, for the reasons that I set out below.

83. On 27 February 1997 the claimants sent a fax in the terms to be found at p 97 of bundle A offering to make an outright sale of the equipment for £319,000 plus VAT. On 28 February Sagebush replied asking for an invoice to be sent in that amount. The equipment was identified by reference to the terminated lease with Emshelf Ltd. The same day the claimants sent an invoice for that amount plus VAT. Sagebush immediately telephoned the claimants asking for their bank details which were immediately supplied. In my judgment nothing remained to be done in the creation of a contract.

84. If the course of dealing between the parties as I have set out has to be analysed into offer and acceptance, then in my judgment the claimants' fax of 27 February was their invitation to treat, Sagebush made their offer on 28 February. The invoice of the claimants was not an acceptance because of the inclusion of the words 'Title in this equipment will pass only upon payment of this invoice'. However, the only possible conclusion from Sagebush then asking for the claimants' bank details is that Sagebush were happy to conclude a contract on that basis. Sagebush thus accepted the claimants' counter-offer.

85. The judge found that there was a concluded contract when Sagebush sent its reply asking for the invoice and thus 'the retention of title wording on the invoice was post-contractual'. With respect to the judge I cannot accept that. It seems to me highly unlikely that either Mr Gerson, on behalf of the claimants, or Mr Smith, on behalf of Sagebush, would have made a deal, as found by the judge, in which the title in the goods passed before payment. Mr Smith did not give evidence. If he had, he could not have truthfully denied that title was not to pass until Sagebush had paid for the equipment. In my judgment such is

demonstrated by the lengths he went to delete the retention of title words from Sagebush's copy of the invoice (see p 29 of the judge's judgment). Further, the fact that the invoice contained a retention of title clause would suggest that Mr Gerson, a highly experienced businessman, would not have entered into a contract under which his company would have been so obviously at risk, i e title passing before payment.

86. If I am wrong and a contract was entered into solely by reason of the fax of 27 February and Sagebush's reply of 28 February asking for an invoice, then I agree that the parties intended the title only to pass on payment. Payment was never made and so title never passed.

87. I also agree that Gerson's application to adduce further evidence and to remit the matter to the trial judge should be refused for the reasons given by Clarke LJ.

PILL LJ.

88. I agree in the result and address only two points, the effect of s 24 of the Sale of Goods Act 1979 upon a commercial sale and leaseback and the alleged contract of February 1997 between Michael Gerson and Sagebush.

89. On the first point, I agree that the question is whether there was a constructive delivery of the schedule 3 goods by Emshelf to State, upon the sale to State and leaseback to Emshelf. Constructive delivery is an artificial concept which may apply in a number of situations. The law permits a change of possession without any change of the actual custody upon the principle known as constructive delivery (Pollock and Wright *An Essay on Possession in the Common Law* (1888)). In this case actual custody has remained with Emshelf.

90. Mr Lerego submits that the focus must be upon the sale to State, and not upon what happened afterwards. When considering whether a constructive delivery occurred upon that sale, the precise nature of the lessee's subsequent position is irrelevant. The character of his possession has changed because, on a sale and leaseback, the lessee now holds upon a lease. Because there has been a change in the character of possession by Emshelf, there had been a constructive delivery to State.

91. I see the force of Sir Roy Goode QC's attempts to make the concept of constructive delivery less artificial by supplying a rationale based on the further concept that a delivery can be taken to have occurred only when there has been an assumption of control by the constructive possessor. That would include an acknowledgement by the person with custody of the goods that he holds at the direction or disposal of the person to whom delivery is said to have occurred. The submission was refined to one that, for s 24 purposes, there must at least have been a moment of time when the purported constructive possessor could say that the goods were being held for him. A sale and leaseback in the present form did not satisfy that requirement. Emshelf were holding for their own purposes under a lease.

92. I agree with Clarke LJ that the authorities do not establish that proposition. I agree with Clarke LJ's conclusion, at para 30 of his judgment, that the change in the character of possession upon the sale and leaseback in this case is sufficient to establish that a constructive delivery has been made. I express no view as to whether it makes commercial sense to allow innocent finance companies to take advantage of s 24 of the 1979 Act when they conduct a sale and leaseback. However, I do see force in the submission that application of the principle advocated by Sir Roy Goode would produce further artificiality and fine

distinctions in sales and leasebacks. What would in substance be no different an arrangement could be dressed up so as to achieve the sought-after moment in time.

93. As to the existence of a contract between Michael Gerson and Sagebush, I agree with the conclusion of Bennett J, whose judgment I have had the opportunity of reading in draft, that there was. However, I also agree with him, and with Clarke LJ, that on the evidence the circumstances were such that the parties did not intend that property would be transferred when the contract was made and property was not transferred. Even if the contract was made upon the exchange of faxes, and that was Mr Chaisty's primary submission, I would reach the same conclusion that the parties did not intend the property to be transferred when the contract was made.

94. I agree with the order proposed by Clarke LJ.

Appeal allowed in part.

Gillian Crew Barrister.

Brocklesby v Armitage & Guest (a firm)

COURT OF APPEAL, CIVIL DIVISION

MORRITT LJ AND WILSON J

9 JULY 1999

Limitation of action – Concealment of right of action – Breach of duty – Defendant solicitors raising limitation defence in action for negligence – Claimant relying on statutory provision postponing limitation period where defendant had concealed from claimant any fact relevant to his right of action – Statute providing that deliberate breach of duty amounting to concealment if claimant unlikely to discover it for some time – Whether person committing deliberate act of concealment required to be aware of its legal consequences – Limitation Act 1980, s 32(1)(b), (2).

In January 1989 the claimant, B, purchased a property from a company with the aid of a building society loan. Three months later B agreed to transfer the property back to the company in consideration for the latter obtaining his release from his obligations to the building society. The defendant solicitors were instructed to act for both parties in that transaction. Although B executed the transfer, the solicitors took no steps to procure his release from his obligations to the building society. B did not become aware of that until mid-1992 when the building society informed him that the transaction had not been completed. Shortly afterwards, the building society sued B for the balance of the loan, and the proceedings were eventually compromised on terms that B would make a payment of £25,000 to the building society. In 1997 B brought an action for negligence against the solicitors in connection with the 1989 transaction, seeking recovery of the sum paid to the building society and his costs of defending the society's proceedings. The solicitors contended that his claim was statute-barred under the Limitation Act 1980, and B subsequently sought leave to serve a reply out of time, alleging that the solicitors had been aware in 1989 that the sale was not proceeding, that in failing to bring that to his attention the solicitors had known or 'ought to have known' that he would wrongly believe that they had taken all steps necessary to complete the sale and that accordingly the fact that the solicitors were in breach of duty had been concealed from him. In so alleging, B sought to rely on s 32(1)(b)[a] of the 1980 Act. Under that provision, which applied where any fact relevant to the plaintiff's right of action had been deliberately concealed from him by the defendant, the limitation period did not begin to run until the plaintiff had discovered the concealment or could have discovered it with reasonable diligence. Section 32(2) provided that, for the purposes of sub-s (1), deliberate commission of a breach of duty in circumstances in which it was unlikely to be discovered for some time amounted to deliberate concealment of the facts involved in that breach of duty. The judge held that B's reply was deficient since, inter alia, it contained no allegation that the solicitors had deliberately chosen not to inform B that the sale was not proceeding. He therefore gave B one month to serve a reply with the necessary particulars, in default of which the action would be struck out. On B's appeal, the solicitors contended that s 32(1) and (2) required not only that the act in question should be

a Section 32(1) is set out, so far as material, at p 177 *d e*, post

deliberate, but also that the person committing it should know that the act involved the legal consequence of the breach of duty.

Held – Where a claimant sought to extend the limitation period under s 32(1)(b) of the 1980 Act, it was not necessary to demonstrate that the fact relevant to his right of action had been deliberately concealed in any sense greater than that the commission of the act had been deliberate (ie intentional) and that it involved a breach of duty whether or not the actor appreciated that legal consequence. Generally speaking, if a person knew of and intended an act, it was immaterial that he was unaware of its legal consequences. If, therefore, Parliament had intended in the case of deliberate concealment under s 32(1)(b), as amplified by sub-s (2), that there should be both (i) deliberate commission of an act in the sense of knowingly and intentionally committing it and (ii) knowledge that such commission gave rise to a particular legal consequence, it would have spelt that out in clearer words than were to be found in sub-ss (1) or (2). In the instant case, the particulars given were adequate save for the inclusion of the words 'or ought to have known'. Those words were not adequate since there was no indication that constructive knowledge was sufficient, in so far as knowledge was required. Save for that, the particulars were quite adequate for setting out a case sufficiently pleaded for the purposes of giving leave to serve a reply out of the time. Accordingly, the appeal would be allowed (see p 180 *h* to p 181 *g*, post).

Notes

For postponement of the limitation period by deliberate concealment, see 28 *Halsbury's Laws* (4th edn reissue) paras 1125–1127.

For the Limitation Act 1980, s 32, see 24 *Halsbury's Statutes* (4th edn) (1998 reissue) 733.

Cases referred to in judgments

King v Victor Parsons & Co (a firm) [1973] 1 All ER 206, [1973] 1 WLR 29, CA.

Sheldon v R H M Outhwaite (Underwriting Agencies) Ltd [1995] 2 All ER 558, [1996] AC 102, [1995] 2 WLR 570, HL.

Cases also cited or referred to in skeleton arguments

Beaman v ARTS Ltd [1949] 1 All ER 465, [1949] 1 KB 550, CA.

Costa v Georghiou [1984] CA Transcript 186.

Kitchen v Royal Air Forces Association [1958] 2 All ER 241, [1958] 1 WLR 563, CA.

Lawrance v Lord Norreys (1890) 15 App Cas 210, [1886–90] All ER Rep 858, HL.

Paragon Finance plc v D B Thakerar & Co (a firm), *Paragon Finance plc v Thimbley & Co (a firm)* [1999] 1 All ER 400, CA.

Riddell v The Earl of Strathmore (1887) 3 TLR 329, CA.

Tunbridge v Buss Murton & Co (a firm) [1997] TLR 189.

Appeal

The claimant, James Brocklesby, appealed with permission of Morritt LJ granted on 20 March 1998 from the decision of Judge Howarth, sitting as a judge of the High Court on 23 February 1998, giving him one month to serve a reply with necessary particulars of the alleged concealment by the defendant firm of solicitors, Armitage & Guest, of facts relevant to his right of action against them for negligence, in default of which the action would be struck out as

statute-barred under the Limitation Act 1980. The facts are set out in the judgment of Morritt LJ. *a*

Matthew Caswell (instructed by *Lester Morrill*, Leeds) for Mr Brocklesby.
Spike Charlwood (instructed by *Beachcroft Wansbroughs*, Leeds) for the solicitors.

9 July 1999. The following judgments were delivered. *b*

MORRITT LJ. This is the appeal of the claimant, Mr Brocklesby, brought with my leave from the order of Judge Howarth, sitting as an additional judge of the Chancery Division, made on 23 February 1998. By that order, in effect, the judge required Mr Brocklesby to give further particulars of the reply he sought to serve out of time containing certain additional allegations of fact relevant to the question whether his claim was barred by the Limitation Act 1980. The judge thought that if those additional facts were not alleged then the claim that the 1980 Act did not apply was hopeless and that leave to serve the reply out of time should not be given. *c*

The defendants, Armitage & Guest, are a firm of solicitors practising in Wakefield in Yorkshire. Mr Brocklesby and a Mr Henry Tranter were their clients. A company called Levelaction Ltd was a company controlled by Mr Tranter in which Mr Brocklesby held one share. *d*

Levelaction owned commercial premises at 22A Bond Street and 9 Croft Street in Dewsbury, West Yorkshire. On 20 January 1989 Levelaction sold that property to Mr Brocklesby for £155,400 which Mr Brocklesby borrowed from the Alliance and Leicester Building Society on the security of the property. The loan was repayable by instalments over 25 years. The solicitors acted for all three parties, that is to say the seller, the buyer and the building society. *e*

In April 1989, due to the illness of Mr Brocklesby, Mr Tranter acting for Levelaction and Mr Brocklesby agreed that Levelaction would repurchase the property in consideration of Levelaction obtaining the release of Mr Brocklesby from his obligations to the building society. For the purpose of effecting that transaction, on 17 April the solicitors were instructed to act for both Mr Brocklesby and Levelaction. The appropriate contract and transfer was executed by Mr Brocklesby. Mr Brocklesby went out of possession of the property and stopped paying the instalments due to the building society. But, as it subsequently transpired, no steps were taken by the solicitors to procure Mr Brocklesby's release from his obligations to the building society. *f* *g*

On 5 November 1990 Levelaction was put into compulsory liquidation and at that point, if not before, ceased to make the instalment payments to the building society. *h*

In mid-1992 the building society notified Mr Brocklesby of the default of Levelaction and at that stage it came to Mr Brocklesby's attention that the contract of repurchase had not been completed and that he had not been released from his obligations to the building society.

In September 1992 the building society sold the property charged to it as security for the loan to Mr Brocklesby for some £368,000 and sued Mr Brocklesby for the balance due of £212,895. *j*

In February 1996 that action was compromised on terms that Mr Brocklesby pay the building society £25,000. There was no order for costs but Mr Brocklesby's costs of the action were some £24,941.

On 6 June 1997 Mr Brocklesby commenced these proceedings against the solicitors, claiming negligence on their part in failing to procure the release of Mr Brocklesby from his obligations to the building society in 1989 when they should have done. He seeks to recover from them damages by reference to his payment to the building society of £25,000 and his costs in resisting their claim of £24,941 together with interest on both those sums.

On 16 July 1997 the solicitors served a defence to the effect that Mr Brocklesby was not their client in respect of the resale; they were never advised as to the price of the resale; that they told Mr Tranter that the sale could not be completed without the consent of the building society but were not instructed by him on behalf of Levelaction or Mr Brocklesby and were not instructed by Mr Brocklesby otherwise to approach the building society.

Of more importance for present purposes is the defence put forward in para 1 of their defence that the claim of Mr Brocklesby arose more than six years before the issue of the writ and was therefore barred by ss 2 and 5 of the 1980 Act. On the same day the solicitors issued a summons to strike out the statement of claim under RSC Ord 18, r 19 as being frivolous or vexatious or an abuse of the process of the court.

In response to that application Mr Brocklesby swore an affidavit on 17 September 1997, claiming that the facts and matters to which he deposed brought the case within the provisions of s 32(1)(b) of the 1980 Act so that time did not begin to run until mid-1992 when the building society told him that the sale as alleged by him had not been completed. He relied, amongst other things, on the contents of a statement made to the police by the partner in the solicitors concerned, a Mr Nugent, in February 1990. The relevant part of that statement reads as follows:

> 'I refer to a note on file dated 17th April 1989 ... The note explains that I was to prepare a contract and transfer for signature by Brocklesby transferring 21 Bond Street back to the limited company, and that the company had always paid the mortgage payments on behalf of Mr Brocklesby. The note explains that I was attending upon Mr Tranter who took the documents away for Mr Brocklesby's signature and later returned them. This was the first intimation I had received that Levelaction had continued to have an indirect [interest] in the property after completion. As far as I can recollect I was instructed by Brocklesby and Tranter to transfer this property back to Levelaction in April 1989 ... and then I started to raise the necessary paperwork. I believe this was to be a straight transfer with no funds being exchanged. This transfer subsequently fell through, and the property remains in the ownership of James Brocklesby, who had become increasingly ill after completion of the purchase, with the result that I was never instructed further to prepare leases further for tenants.'

On 27 October 1997 the district judge dismissed the solicitors' application. He considered that there was a clear case of negligence. He found that the defence of limitation was not plain and obvious and refused to strike out the claim. Thereafter, on 4 November 1997, but without leave Mr Brocklesby served a reply.

The matter came before Judge Howarth on 23 February 1998. He set out the facts of the case and the provisions of s 32 of the 1980 Act. He noted that Mr Brocklesby needed leave to serve his reply out of time but he held that the reply so lacked the necessary particulars that he would not grant such leave.

Having indicated that that was his prima facie view during the morning session, the reply was redrafted by counsel over the midday adjournment so as to add at the end of para 3 certain particulars. The reply so redrafted and giving effect to the somewhat confusing referential form is as follows:

> '2. The Plaintiff denies that his claim is statute barred as alleged in paragraph 1 of the Defence or at all. 3. The breaches of which the Plaintiff complains and pleaded in paragraph 9 of the Statement of Claim were deliberately committed by the Defendants in circumstances in which they were unlikely to be discovered, and in fact not discovered by the Plaintiff, until about the middle of 1992 as pleaded and particularised in paragraph 8 of the Statement of Claim.'

I interpolate to read para 8 of the statement of claim in which particulars under 'A. Particulars' are contained. It reads:

> 'In fact the ... sale-back was not completed.
>
> A. PARTICULARS
>
> (a) No step was taken to discharge the Plaintiff's mortgage or otherwise procure his release from his personal covenant as mortgagor. (b) Instead, Levelaction kept up the instalment payments due under the Plaintiff's mortgage until in or about 5 November 1990 when it was ordered to be wound up by the High Court upon the petition of the Secretary of State for Trade & Industry. (c) The Plaintiff had no knowledge of the matters hereinbefore particularised until in or about the middle of 1992 when he received notice of a claim by Alliance & Leicester that there had been a serious default in keeping up the instalment payments. (d) Alliance & Leicester took possession of the property and sold the same in or about September 1992 for £368,000 leaving a shortfall of £212,895·51 for which Alliance & Leicester sued the Plaintiff.'

Reverting to para 3 of the amended reply it continues as follows:

> 'PARTICULARS
>
> (a) Paragraph 9 and Particulars B of the Statement of Claim are repeated.'

Paragraph 9 of the statement of claim and particulars B are as follows:

> 'The Defendants are in breach of the said contractual term and of their duty of care as aforesaid.
>
> B. PARTICULARS
>
> (a) Particulars A are repeated [and those I have already read out]. (b) The Defendants failed to take any step to procure the release of the Plaintiff from his liability under the mortgage. (c) The Defendants having received the completed Contract and Transfer failed to do anything relating to them. (d) The Defendants failed and neglected to inform the Plaintiff of the matters next hereinbefore particularised.'

Then reverting to the reply, particulars (b), it continues:

> 'In or about April 1989 the Defendants knew that the sale by the Plaintiff to Levelaction was not proceeding. The Plaintiff is unable to specify a more precise date pending discovery. In support of his contention that the

a defendants acquired such knowledge as aforesaid the Plaintiff (i) relies on the statement of Mr John Christopher Anthony Nugent constituting exhibit "JB2" to the Plaintiff's affidavit dated 17 September 1997; (ii) will invite the court to infer the same from the fact that the Defendants took no further step in the matter after in or about April 1989. (c) In not informing the Plaintiff that the sale was not proceeding, the Defendants knew or ought to have known b (the knowledge to be inferred from the facts pleaded) that the Plaintiff would or might be likely to wrongly believe and continue to believe (as was a fact) that the Defendants had taken all steps necessary to complete the sale. (d) By reason of the matters aforesaid the fact that the Defendants were in breach was concealed from the Plaintiff.'

c The judge considered that notwithstanding those amendments the reply remained deficient in two respects, namely, first, particulars of the allegation of knowledge that the sale was not proceeding as alleged in para 3(b) and, second, the lack of any allegation properly particularised that the solicitors deliberately chose not to inform Mr Brocklesby that the sale was not proceeding. By his order, made on 23 February 1998, he gave Mr Brocklesby until 23 March 1998 to serve a reply d with the necessary particulars in default of which the action would be struck out.

The terms of s 32 of the 1980 Act so far as relevant provide:

'(1) ... where in the case of any action for which a period of limitation is prescribed by this Act, either—(a) the action is based upon the fraud of the defendant; or (b) any fact relevant to the plaintiff's right of action has been e deliberately concealed from him by the defendant; or (c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it ...

f (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.'

Mr Brocklesby relies on para (b) of s 32(1) of the 1980 Act as expanded by sub-s (2). g He contends that there were three breaches of duty, that is the failure to take steps to procure Mr Brocklesby's release from the obligations to the building society; the failure to do anything with the executed contract/transfer; and the failure to inform Mr Brocklesby of either of the first or second breaches of duty. He suggests that each of them was deliberate in the sense of being intentional and h each was committed in circumstances where, by their nature, they were unlikely to be discovered for some time.

In respect of s 32(1)(b) of the 1980 Act in the case of *Sheldon v R H M Outhwaite (Underwriting Agencies) Ltd* [1995] 2 All ER 558 at 567–568, [1996] AC 102 at 145 Lord Browne-Wilkinson commenting on the provisions of s 32(1)(b) said:

j 'Even if, contrary to my view, it is legitimate to look at the legislative history, the immediate predecessor of s 32 of the 1980 Act is not s 26 of the 1939 Act but s 7 of the Limitation Amendment Act 1980, an Act which was not drawn to the attention of the Court of Appeal but surfaced for the first time during the argument before your Lordships. The Limitation Amendment Act 1980 inter alia substituted what is now s 32(1)(b) of the consolidating 1980 Act for the old s 26 of the 1939 Act, i e in an amending Act all references

> to concealment by fraud were deleted and there was substituted the concept of deliberate concealment of relevant facts. This was done deliberately because of the confused effect and misleading terminology of the old equitable doctrine of concealed fraud. In my judgment it is inconsistent with the plain Parliamentary intention lying behind the amendment of the 1939 Act to continue to construe the 1980 Act as if it were still a statutory enactment of the equitable doctrine of concealed fraud. The 1980 Act is not. Section 26(1)(b) is a statutory provision setting out the circumstances in which the ordinary time limits will not apply and contains no reference to the old concealed fraud doctrine.'

That last reference to s 26(1)(b) must I think be a reference to s 32(1)(b) of the current 1980 Act.

Mr Brocklesby contends that the judge misapplied the new provisions. He relies in particular on the passage in the transcript of the learned judge's judgment where he said:

> 'Of course, as with all other matters going to a party's intention if there is an allegation that the concealment of certain facts was "deliberate", the court at trial, if the case goes on along that basis, will be presented with certain facts and invited to draw an inference that the defendant did, in fact, deliberately conceal, to use the words of the 1980 Act, deliberately conceal facts relevant to the plaintiff's right of action.'

A little later he continued:

> '... he could expect to be cross-examined along the lines of: "In the statement of claim or the reply or further and better particulars, as the case may be, there are these facts that are referred to, facts which are not in dispute, or facts which can be established independently in some other way. In the light of those facts, the natural inference will be that you did, in fact, deliberately make a conscious decision and conceal these facts from your client, the plaintiff." The court will then be left to decide in the light of the totality of the evidence and on a balance of probabilities whether the concealment had been deliberate or not.'

He submits that in those passages the judge betrayed an error of law in that it is a misreading of s 32(2) of the 1980 Act which does not require deliberate concealment to be established, rather deliberate commission of a breach of duty. The words used by the judge would approximate to fraud but only deliberate commission of breach of duty is required by para (b) of s 32(1) and concealment by fraud or an action based on fraud is what comes within para (a). Mr Brocklesby contended that para 3 of the reply is an adequate pleading of both the necessary deliberate commission and also of the circumstances in which it was unlikely to come to light for a period of time.

Mr Charlwood in his excellent argument took issue with Mr Caswell as to whether or not the word deliberate when used in sub-s (1) of s 32 of the 1980 Act as an adjective, when used in sub-s (1)(b) as an adverb and in sub-s (2) as an adjective required not only that the act in question should be deliberate but that the person committing it should know that the act he so commits involves the legal consequence of the breach of duty. He contends that if that is the correct construction of the 1980 Act nowhere in the reply is there any sufficient allegation, let alone any adequate particulars of knowledge in the defendants'

solicitors that the breach of duty alleged to have been committed was indeed a breach of duty and they deliberately committed it as such. On it being suggested to him that such an important point of construction was not appropriate to striking out proceedings, he then submitted by reference to the note to RSC Ord 18, r 19 in the White Book (1999, at 18/19/6) that in cases where the argument is not prolonged, but the consequence of a conclusion on the point of law will decide the case one way or another, the court is in effect bound to decide the point because it is not fact sensitive and is one which will be conclusive of the proceedings at least one way. I was not originally attracted by that proposition, but I think in the light of his submissions on the proper construction of s 32(1)(b) of the 1980 Act it is one to which I ought to accede. Accordingly, I proceed to consider the questions of the proper construction of s 32 of that Act.

Mr Charlwood took us to para 2.9 of the Law Reform Committee's 21st Report, *Final Report on Limitation of Actions* (Cmnd 6923). In that paragraph the authors of the report quoted the then provision contained in s 26 of the Limitation Act 1939 which provided:

> 'Where, in the case of any action for which a period of limitation is prescribed by this Act, either—(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or (b) the right of action is concealed by the fraud of any such person as aforesaid, or (c) the action is for relief from the consequences of a mistake the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it ...'

In para 2.10 the committee pointed out that it was unnecessary to refer in detail to the equitable doctrine as it existed prior to 1939, save to point out that there could be no fraud unless the defendant had been aware of the facts alleged to have been concealed. Even then, be it noted, awareness was required of the facts alleged to have been concealed, not that their concealment involved the legal consequence of a breach of duty.

In para 2.11 the committee referred to the judgment of Lord Denning MR in *King v Victor Parsons & Co (a firm)* [1973] 1 All ER 206, [1973] 1 WLR 29. They then considered in para 2.21 and following the possible approaches to the issue of concealed fraud. In para 2.23 they said:

> 'It is evident from the judgment of Lord Denning, M.R., quoted above [that is to say in *King v Victor Parsons & Co*], that both the title and the wording of section 26 are misleading in that it:—(i) is not limited to fraud in the common law sense; (ii) embraces recklessness; and (iii) is not limited to cases of active concealment.'

In para 2.24 the committee suggested a reformulation which would, if adopted, have gone as follows:

> '26.(1) Subject to subsection (2) below, where, in the case of any action for which a period of limitation is prescribed by this Act—(a) the action is based on the fraud of the defendant or his agent or any person through whom he claims or his agent; or (b) the action is for relief from the consequences of a mistake; or (c) the action is based on a deliberate or reckless breach of duty (whether or not arising under a contract); or (d) the right of action is concealed by the dishonest conduct of any such person as is mentioned in

paragraph (a); the period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake ...'

For my part, I do not find any assistance in the provisions of that report. It is plain from the terms of s 32 of the 1980 Act that Parliament did not adopt the suggested formulation proposed by the Law Reform Committee. It is equally plain that the formulation that they did adopt has a less stringent test for deliberate concealment as now provided for in s 32(1)(b) of the 1980 Act than that which would have prevailed had the Law Reform Committee's proposal been adopted. Likewise, as indicated by Lord Browne-Wilkinson in the passage to which I referred to earlier, it is not helpful to refer to the earlier cases on the equitable doctrine of concealed fraud. But even if it were, and even if I were to accept the submission of Mr Charlwood, that one should look at the judgment of Lord Denning MR in *King v Victor Parsons & Co*, one receives no further enlightenment. I quote from the passage to which counsel referred, omitting immaterial words from para 14(vii) of his skeleton argument:

'The word "fraud" [in s 26(b) of the 1939 Act] here is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or his agent such that it would be "against conscience" for him to avail himself of the lapse of time. The cases show that, if a man *knowingly* commits a wrong ... or a breach of contract ... in such circumstances that it is unlikely to be found out for many a long day, he cannot rely upon the Statute of Limitations as a bar to the claim ... In order to show that he "concealed" the right of action "by fraud", it is not necessary to show that he took active steps to conceal his wrong-doing or his breach of contract. It is sufficient that he *knowingly* committed it and did not tell the owner anything about it ... If the defendant was, however, quite unaware that he was committing a wrong or a breach of contract ... then he could avail himself of the Statute of Limitations.' (See [1973] 1 All ER 206 at 209–210, [1973] 1 WLR 29 at 33–34; Lord Denning MR's emphasis.)

It seems to me that that passage also leaves open the question of whether in addition to knowledge and intention to do the act it is necessary that the actor should also know and appreciate and intend that the act is and should be a breach of contract or other duty.

When one turns to the terms of s 32 of the 1980 Act itself, under sub-s (1) there is a clear contrast between the action based on fraud and para (b), the concealment of any fact relevant to the plaintiff's right of action being deliberate. The requirement is that the fact relevant to the cause of action has been deliberately concealed from him by the defendant. But sub-s (2) amplifies what is meant by deliberate concealment and requires that for the purposes of sub-s (1) deliberate commission of a breach of duty, etc, amounts to deliberate concealment of the facts involved in the breach of duty. Generally speaking, and I do not say that there may not be exceptions, the civil law and, so far as I know, the criminal law, does not require that a person should know the legal consequences of the act which he commits. Generally speaking, if he knows of the act and he intends the act, but is unaware of the legal consequences, his unawareness is immaterial for it is trite law that ignorance of the law is no defence. It appears to me that had Parliament intended in the case of a deliberate concealment under s 32(1)(b) of the 1980 Act, as amplified by sub-s (2), that there should be both deliberate commission of an act in the sense of knowingly and intentionally committing the

act and also knowledge that such commission gave rise to a particular legal consequence, then it required clearer words to spell that out than are to be found in sub-ss (2) or (1).

Accordingly, the conclusion I reach is that it is not necessary for the purpose of extending the limitation period pursuant to s 32(1)(b) to the 1980 Act to demonstrate that the fact relevant to the claimant's right of action has been deliberately concealed in any sense greater than that the commission of the act was deliberate in the sense of being intentional and that that act or omission, as the case may be, did involve a breach of duty whether or not the actor appreciated that legal consequence. Accordingly, for my part, I would not accept the extremely lucid and well argued submission made by Mr Charlwood.

Given that conclusion on the question of law, the question then arises whether the particulars given in the amended reply are adequate. For my part, with one exception, I think they are. The exception arises from the inclusion of the words in para 3(c) 'or ought to have known'. It seems to me that when one is considering the question of deliberateness or knowledge the words 'ought to have known' are not adequate because there is no indication that constructive knowledge, in so far as knowledge is required, is sufficient. But that apart, it seems to me that the particulars as contained in the amended reply are quite adequate for the purpose of setting out a case sufficiently pleaded for the purposes of giving leave to serve a reply out of time.

I take the view that we are entitled to interfere with the exercise of the judge's discretion, first, because in the passage of his judgment from which I quoted earlier it seems to me that he misunderstood the import of the section. Secondly, because there is a point of law involved which I have attempted to explain and resolve. But, in addition to that, I am concerned that the judge imposed too high a standard of particularity for the reply to be served at the stage which the action had reached. Discovery of documents has not yet taken place. Most of the relevant facts were inevitably in the knowledge of the solicitors rather than Mr Brocklesby. There was no imminent trial such that an insufficiently particularised pleading might be embarrassing. In my view, quite enough had been alleged to warrant Mr Brocklesby being given the leave that he sought. It may be that in the light of what is disclosed on discovery he will be able to supplement the particulars already given but without such supplementation I do not consider that his case as pleaded is so thin that the court is justified in, in effect, striking it out.

For those reasons, I would allow the appeal.

WILSON J. I agree.

Appeal allowed.

Kate O'Hanlon Barrister.

Liverpool Roman Catholic Archdiocese Trustees Incorporated v Goldberg

CHANCERY DIVISION
LADDIE J
21, 22, 30 JUNE 2000

Limitation of action – Concealment of right of action – Breach of duty – Claimant bringing action for professional negligence more than six years after alleged breach of duty – Defendant raising limitation defence – Claimant contending that concealment of breach of duty prevented time from running but not alleging that defendant dishonest or aware of breach of duty – Whether limitation provisions on concealment applying only to wrongful concealment of facts – Limitation Act 1980, s 32.

In 1997 the claimant charity brought proceedings against G, a well-known tax specialist, for allegedly negligent advice given in 1989, 1992 and subsequently. G contended, inter alia, that the proceedings were barred by the Limitation Act 1980 in so far as they were based on the advice given in 1989, and he therefore applied for summary judgment in respect of that part of the claim. The charity responded by, inter alia, seeking to amend its pleadings to rely on s 32[a] of the 1980 Act. Section 32(1)(b) provided that where the defendant had deliberately concealed from the plaintiff any fact relevant to the latter's right of action, the limitation period did not begin to run until the plaintiff had discovered the concealment or could have discovered it with reasonable diligence. Section 32(2) provided that, for the purposes of sub-s (1), deliberate commission of a breach of duty in circumstances in which it was unlikely to be discovered for some time amounted to deliberate concealment of facts involved in that breach of duty. The charity did not plead that G had concealed any specific fact, but instead alleged that the 1989 advice was intentional, that it therefore constituted the deliberate commission of a breach of duty within the meaning of s 32(2), that it had been unlikely that the breach would be discovered for some time and that it had not in fact been discovered by the charity within the six years prior to the issue of the writ. It contended that those circumstances were sufficient to stop the limitation period running, even though it accepted that G had behaved honestly and had not known that he had committed the alleged breach of duty. In response, G contended that s 32 applied only where the defendant had been guilty of wrongfully concealing facts.

Held – On the true construction of s 32 of the 1980 Act, any intentional act which amounted to a breach of duty also amounted to a deliberate commission of a breach of duty triggering s 32(2). Thus it was immaterial that, in the instant case, the charity conceded that G had not known that he was committing the alleged breach of duty. G's advice had been given intentionally, and, on the assumption that it amounted to a breach of duty, that breach had been committed deliberately within the meaning of the section. Moreover, s 32(2) treated intentional commission of a breach of duty, which was unlikely to be discovered,

a Section 32, so far as material, is set out at p 187 *h* to p 188 *a*, post

in the same way as if it were a deliberate concealment of the facts which were necessary to maintain the action for breach of duty. Thus, even if all the facts were known to a claimant, the intentional commission of the breach of duty, in circumstances where the breach was unlikely to be discovered, resulted in the creation of a legal fiction, namely that the facts were unknown. In the instant case, the proposed amendment contained the necessary allegations of intention and concealment, and therefore raised an arguable response to the limitation defence. Accordingly, the charity would be given permission to amend, while G's application for summary judgment would be dismissed (see p 190 *j* to p 191 a c *d j* to p 192 *a*, post).

Brocklesby v Armitage & Guest (a firm) [2001] 1 All ER 172 applied.

Sheldon v R H M Outhwaite (Underwriting Agencies) Ltd [1995] 2 All ER 558 considered.

Notes

For postponement of the limitation period by deliberate concealment, see 28 *Halsbury's Laws* (4th edn reissue) paras 1125–1127.

For the Limitation Act 1980, s 32, see 24 *Halsbury's Statutes* (4th edn) (1998 reissue) 733.

Cases referred to in judgment

Brocklesby v Armitage & Guest (a firm) [2001] 1 All ER 172, CA.

Sheldon v R H M Outhwaite (Underwriting Agencies) Ltd [1995] 2 All ER 558, [1996] AC 102, [1995] 2 WLR 570, HL.

Swain v Hillman [2001] 1 All ER 91, CA.

Cases also cited or referred to in skeleton arguments

Bovis Lend Lease Ltd (formerly Bovis Construction Ltd) v Braehead Glasgow Ltd (formerly Braehead Park Retail Ltd) (2000) 71 Con LR 208.

Cave v Robinson, Jarvis & Rolfe (17 February 2000, unreported), QBD.

Pension (H F) Trustees Ltd v Ellison [1999] PNLR 894.

Perry v Moysey [1998] PNLR 657.

Applications

The defendant, David Goldberg QC, applied pursuant to CPR Pt 24 for summary judgment in respect of part of a claim for professional negligence brought against him by the claimant, Liverpool Roman Catholic Archdiocese Trustees Incorporated (the Archdiocese), on the grounds that it was time-barred by the Limitation Act 1980. The Archdiocese applied for permission to amend its reply so it could rely on s 32 of the 1980 Act. The facts are set out in the judgment.

Andrew Simmonds QC (instructed by *Linklaters*) for Mr Goldberg.

Michael Briggs QC and *Giles Goodfellow* (instructed by *McCormicks*, Leeds) for the Archdiocese.

Cur adv vult

30 June 2000. The following judgment was delivered.

LADDIE J.

1. Two applications are before the court in this action. They both relate to limitation periods. In one, the defendant applies for summary judgment pursuant to CPR Pt 24 in relation to his limitation defences against some of the claims made by the claimant. In the other, the claimant applies to amend its reply so as to raise additional grounds which are said to defeat the limitation defences. The nature of the defences and the responses to them will be set out below. First I should set out the basic history of the dispute between the parties. Although there are issues of fact in relation to which significant disputes exist, save where I indicate otherwise, the matters set out below are either agreed or not contested for the purpose of these applications. In large part they are derived from the skeleton arguments supplied by Mr Briggs QC for the claimant and Mr Simmonds QC for the defendant.

2. The claimant is the corporate trustee of the Roman Catholic Archdiocese of Liverpool (the Archdiocese). It is a registered charity. The defendant, Mr David Goldberg QC, is a well-known specialist in the field of taxation. The Archdiocese is suing Mr Goldberg for damages for alleged negligence arising out of advice given by him during the period between November 1989 and January 1995. The principal head of damages claimed is a proportion of a sum of £2,225,000 paid by the Archdiocese to the Inland Revenue in early 1997. The Archdiocese has quantified that head of claim at between £1,466,803 and £471,063 depending on which (if any) of its allegations of negligence are successful. In essence, the Archdiocese says that it was obliged to pay more tax than would have been the case had it not received and acted upon negligent advice.

3. The dispute has its origins in the activities of the 130 or so clubs or community centres which operate under the auspices of the Archdiocese. The clubs have for many years sold alcoholic drinks to their parishioners. The profits from these sales increased from about 1986 onwards as a result of bulk discount agreements negotiated between the Archdiocese and certain brewers. At the time no tax was paid on these profits and the Archdiocese became concerned to know whether a tax liability existed. In November 1989 Mr Goldberg was asked to advise, in essence, whether the Archdiocese was entitled to benefit from the charitable exemption (under s 505(1)(e) Income and Corporation Taxes Act 1988) from liability for income tax on the clubs' profits and whether any steps should be taken to re-organise the clubs' trading activities for that purpose.

4. Under the 1988 Act, a charity could obtain exemption from tax on trading profits 'if the profits are applied solely to the purposes of the charity and ... the trade is exercised in the course of the actual carrying out of a primary purpose of the charity'. If, therefore, it could be said that the profit on sales of alcoholic beverages was made in the course of carrying out of one of the primary charitable purposes of the Archdiocese, then the exemption could be claimed. This was not the only possible method of avoiding or minimising the tax liability. It would have been possible to hive off the profitable activities into a separate entity. The profits made by the entity would then be liable to tax. However that could be reduced or eliminated if all those profits were covenanted up to the Archdiocese. This alternative mechanism would have involved a certain amount of reorganisation and would not address the issue of tax liability for profits made in previous years.

5. In November 1989, Mr Goldberg advised the Archdiocese both orally and in writing inter alia that the exemption applied to these profits and that it was neither necessary nor prudent to restructure its activities. It is said that the defendant advised that it was not necessary to claim the exemption. In reliance upon that advice, the Archdiocese did not restructure its activities and did not disclose the profits to the Inland Revenue. In March 1992, the Archdiocese became aware of the Inland Revenue making enquiries into the tax treatment of the Catholic clubs. It went back to Mr Goldberg for further advice. In June 1992, Mr Goldberg confirmed his advice concerning the exemption and again advised against restructuring its activities. The Archdiocese asserts that in reliance upon that advice, it did not restructure.

6. The Inland Revenue did not accept that the charitable exemption applied. The Archdiocese continued to seek, and Mr Goldberg continued to give, advice as to whether the exemption applied, the manner in which negotiations with the Inland Revenue should be conducted and possible alternative arguments which could be put forward on the Archdiocese's behalf. Assessments to tax were raised by the Inland Revenue in February 1993. In October 1993 the clubs' activities were re-organised by transferring the benefit of the brewery discount agreements to a separate trading company, Associated Church Clubs Ltd, which has subsequently covenanted up to the Archdiocese an amount equal to the trading profits for each accounting period. As to the future, the Archdiocese no longer needed to rely on the exemption argument since the tax was saved by virtue of the covenant from Associated Church Clubs Ltd. However, the liability to tax for previous years was unresolved.

7. Unbeknown to the defendant until recent disclosure in this action, from the spring of 1993 onwards the Archdiocese was given advice by others that Mr Goldberg's advice on the exemption was probably wrong and that it might have a claim against him in negligence. It was also advised that any such claim would be subject to a six-year limitation period. The Archdiocese appears to have decided to keep the possibility of a claim as a fall-back position. Instead of seeking other advice it continued to use Mr Goldberg for advice on how to negotiate with the Inland Revenue. Based on that advice and following extended negotiations, the Archdiocese and the Inland Revenue struck a deal in late 1996 (implemented in early 1997) under which £2,225,000 was paid in satisfaction of any liability for income tax, interest and penalties in respect of all the years from 1986/1987 to 1993/1994 inclusive.

8. The Archdiocese now alleges that the advice given by the defendant in 1989, June 1992 and post-June 1992 was inter alia wrong about the entitlement to the exemption, negligently optimistic and, in relation to the advice given post-June 1992, negligently optimistic about the likely outcome of the Inland Revenue investigation. It commenced proceedings for negligence and breach of duty in respect of the three periods of advice given by the defendant. The writ was issued on 22 September 1997 and it follows that that date is the crucial one for calculating any limitation period.

9. The allegations of negligence and loss are hotly contested. Mr Goldberg maintains that the advice given was and is correct and that even now there has been no finding or ruling that the exemption did not apply. Because the Archdiocese came to a settlement with the Inland Revenue, the accuracy of Mr Goldberg's advice has not been determined. Furthermore it appears that it was Mr Goldberg's advice, including his views on the applicability of the exemption

under the 1988 Act, which were major factors in the Inland Revenue's decision to agree a very substantial discount in the tax to be paid by the Archdiocese in respect of past profits even though, on the Archdiocese's case, the advice was wrong and the Inland Revenue must have known it to be so. However Mr Simmonds accepts that the issues relating to negligence and loss cannot be resolved in his client's favour at this stage on an application for summary judgment. On the other hand, in relation to the allegations of negligence in November 1989 only, Mr Goldberg has raised a limitation defence. In its amended statement of claim and reply the Archdiocese has raised a number of arguments in response to this. Further, by the proposed amended reply, the Archdiocese wishes to put forward an additional counter to the limitation plea. Mr Goldberg says that these responses are bound to fail, that permission to amend the reply should be refused and that judgment should accordingly be given for him in relation to the alleged negligence and breach of duty in 1989.

The approach to adopt on this application

10. There is no dispute between the parties as to the proper approach to adopt to the defendant's application for summary judgment under CPR Pt 24. Under the rule, summary judgment should be granted if there is 'no real prospect' of the other side succeeding on the issue. In *Swain v Hillman* [2001] 1 All ER 91 at 92 (per Lord Woolf MR) the Court of Appeal said that a 'real prospect' of success is to be contrasted with a 'fanciful' prospect. So here, if the Archdiocese's response to the limitation defence can be categorised as having no real prospect of success or as being fanciful, then the court should find for Mr Goldberg on that defence at this stage and should strike out the claims relating to the 1989 advice. If the issue can only be determined after the resolution of a bona fide and credible dispute as to facts, it cannot be dismissed as fanciful. For the same reasons and in the same way, if the proposed amendments to the reply raise a response which can be categorised as having no real prospect of success or as being fanciful, permission to amend should be refused.

The limitation issues

11. Since the writ was issued on 22 September 1997, prima facie any claim based upon advice given before 22 September 1991 is statute barred. The Archdiocese has four responses. First it relies on sub-ss 14A(4)(b) and (5) of the Limitation Act 1980 as amended by the Latent Damage Act 1986. The combined effect of these is that an alternative three-year limitation period applies from the date on which a claimant has the knowledge required for bringing an action for damages in respect of the damage caused by the alleged negligence. Since, according to the Archdiocese, it did not have the relevant knowledge until after 22 September 1994, the writ was issued within this three-year period and there is no limitation defence. Second it is alleged that by November 1994, Mr Goldberg knew or should have known that his 1989 advice was negligent and that the Archdiocese had and would suffer loss accordingly. Mr Goldberg therefore knew or should have known that the Archdiocese might be able to recover its loss by suing him. There was therefore a conflict of interest between Mr Goldberg and his client. He should have advised the Archdiocese to take independent legal advice. Negligently, he failed to do so and is liable for the loss which flows from such independent legal advice not having been taken. Third, it is said that if the defendant had not given negligent advice in 1992, the Archdiocese would

have become aware of the errors and omissions in the 1989 advice. It would then have realised that it needed to take independent advice. If that had happened, it would have commenced the current proceedings within the primary six-year limitation period. Fourth, by the proposed amendment to the reply and in the light of the recent Court of Appeal decision, *Brocklesby v Armitage & Guest (a firm)* [2001] 1 All ER 172, the Archdiocese seeks to rely upon s 32 of the 1980 Act as explained below. It will be appreciated that the second and third of these responses do not directly raise limitation issues. Instead they seek to ensure that the damage allegedly caused by the 1989 advice is recovered indirectly through the alleged negligent advice given in 1992 and subsequently.

12. Assuming for the purpose of this application that Mr Goldberg has been negligent, if any of these four responses survives this application, then all the facts and arguments relating to the 1989 advice will become issues at the trial. Success for the Archdiocese on any one will therefore render the outcome of Mr Goldberg's current application in relation to the others more or less irrelevant. Mr Briggs invites me to consider the proposed amendment to the reply first.

The proposed amended reply

13. The proposed amendment to the reply covers the 1989 advice, the 1992 advice and the post-1992 advice. For present purposes it is sufficient to consider only the first of these since this is crucial to the limitation arguments and if it is sufficiently arguable to justify the grant of permission to amend, the same must apply to the other proposed amendments. It consists of an amendment of para 5.1 of the reply and is as follows:

> '5.1 None of the causes of action brought by the Plaintiff is time-barred. The Plaintiff will rely upon Section 32(1)(b) and (2) of the Limitation Act 1980 ("the Act").
>
> PARTICULARS UNDER SECTION 32 OF THE ACT
>
> (a) The acts and omissions pleaded in paragraph 14 of the Statement of Claim [ie in relation to the 1989 advice] constituted the deliberate commission of a breach of duty within the meaning of Section 32(2) of the Act in that they were intentional. For the avoidance of doubt it is not alleged that the Defendant knew that he was thereby committing a breach of duty. (b) The breach of duty was unlikely to be discovered for some time. (c) The concealment was not in fact discovered (nor could it with reasonable diligence have been discovered), by the Plaintiff more than 6 years before the Issue of the Writ herein. As at 22nd September 1991 the Plaintiff had no inkling that the Inland Revenue might claim that the Exemption might not apply, such a claim first being intimated in March 1992.'

14. In so far as material to this case, s 32 of the 1980 Act is as follows:

> '(1) ... where in the case of any action for which a period of limitation is prescribed by this Act ... (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant ... the period of limitation shall not begin to run until the plaintiff has discovered the ... concealment ... or could with reasonable diligence have discovered it ...
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for

some time amounts to deliberate concealment of the facts involved in that breach of duty.' a

15. The parties' respective arguments may be summarised as follows. Mr Simmonds says that the underlying flavour or sentiment of s 32 of the 1980 Act is that impropriety by the defendant suspends the onset of the limitation period. If a defendant wrongfully conceals facts, then it is fair that limitation b should not run unless and until the facts he has suppressed come to light. He says that this view is consistent with the House of Lords decision, *Sheldon v R H M Outhwaite (Underwriting Agencies) Ltd* [1995] 2 All ER 558, [1996] AC 102. If that is correct, the plea cannot run here because it is rightly conceded by the Archdiocese that Mr Goldberg behaved honestly. He was not trying to hide the clues to his own wrongdoing. On the contrary, he believed and believes that he c has nothing to hide because his advice was correct. Second, Mr Simmonds says that although s 32(2) of the 1980 Act may be categorised as a deeming provision, it is still necessary to show that facts have been concealed. Here, no facts have been concealed. All that has happened is that the inaccuracy of the 1989 advice, assuming it to be so, was not disclosed to the Archdiocese. This, however, is a d matter of law not fact. Consistent with these submissions, Mr Simmonds points out that the proposed amendment to the reply does not specify any particular facts which are alleged to have been concealed. It could not have done so.

16. Mr Briggs accepts that he has not pleaded any specific facts as having been concealed. He says that s 32 of the 1980 Act does not require his clients to so allege. He says that all that needs to be proved is that Mr Goldberg intentionally e did something which amounted to a breach of duty and that it was unlikely that such breach would be discovered for some time. If that is proved then commencement of the period of limitation is postponed to the time at which the breach of duty was, or could with reasonable diligence have been, discovered. Here there is no suggestion that the alleged breach of duty was or could reasonably f have been discovered more than six years before the issue of the writ. The proceedings have therefore been commenced within the limitation period.

17. The difference between the parties can be illustrated by way of an example. A firm of solicitors of unimpeachable reputation is instructed by the vendor of a property to draw a conveyance which secures to him a right of g pre-emption exercisable on the occurrence of an identified event in the future. In purported compliance with those instructions, a conveyance is drawn up and executed. In fact it is negligently drafted and it does not create the desired right of pre-emption. The identified event occurs some ten years later and it is only at that time that the vendor learns of the defect. Mr Briggs says that there is no limitation defence in such a case. Although the vendor knows all the facts, has h had the conveyance in his hand at all times and would have learnt of the defects in it had he sought independent advice from a competent conveyancer, nevertheless the conveyance was drawn up by the solicitor intentionally. The breach of duty is concealed in the sense that it was unlikely to be discovered. In the circumstances s 32(2) of the 1980 Act applies. He argues that there is nothing surprising or unfair j in such an outcome. As far as the client is concerned, although his right of action accrued when the conveyance was drawn up, it was as concealed from him as if the concealment was of a fact upon which any claim could be based. As a practical matter, it was as concealed as if it were a defect in the foundations of a building. Mr Simmonds says the limitation period is not postponed and, by the tenth

anniversary, the claim is statute barred. All the facts have been known to the vendor from the date of the conveyance. The only thing he has not been aware of is the negligence in drafting. That is an issue of law, not fact.

18. In the light of Mr Simmonds' arguments, a convenient starting point is *Sheldon*'s case. Mr Simmonds relies in particular on two passages in the speech of Lord Browne-Wilkinson:

> '... the mischief aimed at [by s 32(1)(b)of the 1980 Act] ... [is] to ensure that the Act does not operate to bar the claim of a plaintiff whose ignorance of the relevant facts is due to the improper actions of the defendant.' (See [1995] 2 All ER 558 at 565, [1996] AC 102 at 142.)

And:

> 'If the defendant then deliberately takes a step to conceal the relevant facts (a step which is by ordinary standards morally unconscionable, if not necessarily legally fraudulent) it does not seem to me absurd that a plaintiff, who has been prevented by the dishonourable conduct of the defendant from learning of the facts on the basis of which to found his action, should be afforded the full six-year period from the date of the discovery of such concealment to bring his action.' (See [1995] 2 All ER 558 at 567, [1996] AC 102 at 144.)

Mr Simmonds says that these passages show that what must be concealed are facts and that the defendant's concealment must be dishonourable. Neither of those features are or could be alleged here.

19. It seems to me that these passages must be read in context. In *Sheldon*'s case the claimants were Lloyd's names who were suing the manager of their syndicate. They alleged breach of contract, negligence and breach of fiduciary duty in respect of certain of the defendant's activities in and before 1982. The writ was issued in 1992 and, prima facie, was statute barred. However the claimants alleged that in 1984, that is to say at least two years *after* the actions of which complaint was made, the defendant concealed facts relevant to the cause of action and those facts did not surface until less than six years before the writ. The case was not concerned with the meaning of deliberate concealment in s 32 of the 1980 Act nor with the effect of s 32(2) of that Act. It was only concerned with what Lord Keith of Kinkel described as a short point, namely:

> '... whether or not the plaintiffs can rely, for the purposes of s 32 of the 1980 Act, upon deliberate concealment by the defendants of matters relevant to the plaintiffs' cause of action which occurred after the accrual of the cause of action.' (See [1995] 2 All ER 558 at 561, [1996] AC 102 at 138.)

20. Therefore the passages from Lord Browne-Wilkinson's speech do not determine whether s 32(2) of the 1980 Act covers the concealment of anything other than facts. That issue was not before the House of Lords. Further, although Lord Browne-Wilkinson illustrated the argument in favour of 'intervening concealment' by reference to cases in which the defendant had acted dishonourably, there is nothing to suggest that he had turned his mind to whether that was an invariable pre-requisite to the application of the section. That was not in issue either. On the contrary, a need to demonstrate dishonesty might be said to be a

feature of the old equitable principles of concealed fraud but, as Lord Browne-Wilkinson pointed out:

> '... it is inconsistent with the plain Parliamentary intention lying behind the amendment of the 1939 Act to continue to construe the 1980 Act as if it were still a statutory enactment of the equitable doctrine of concealed fraud.' (See [1995] 2 All ER 558 at 568, [1996] AC 102 at 145.)

21. It seems to me that central to the point I have to decide here is the Court of Appeal decision in *Brocklesby*'s case. The relevant facts in that case were as follows. The claimant owned a property which he had purchased with the aid of a mortgage. He wanted to sell it to a company in which he had an interest in consideration of his release from his liability under the mortgage. The defendant solicitors were instructed to draw up the necessary documentation and to secure the release. The purchase took place in 1989 but, unbeknown to the claimant, the defendant had failed to secure his release from liability. Subsequently, the purchaser was put into liquidation and the mortgagee sued the claimant in respect of his continuing liabilities under the mortgage. That litigation was compromised in 1996. In mid-1997 the claimant commenced proceedings for negligence against the defendant. The claimant argued that he was within the limitation period as a result of the application of s 32 of the 1980 Act. Whether s 32(2) of that Act extended to cases of concealment of matters of law rather than fact was not raised but the court did consider what was meant by the words 'deliberate concealment' in the section. Having considered *Sheldon*'s case, Morritt LJ said:

> 'It appears to me that had Parliament intended in the case of a deliberate concealment under s 32(1)(b) of the 1980 Act, as amplified by sub-s (2), that there should be both deliberate commission of an act in the sense of knowingly and intentionally committing the act and also knowledge that such commission gave rise to a particular legal consequence, then it required clearer words to spell that out than are to be found in sub-ss (2) or (1). Accordingly, the conclusion I reach is that it is not necessary for the purpose of extending the limitation period pursuant to s 32(1)(b) of the 1980 Act to demonstrate that the fact relevant to the claimant's right of action has been deliberately concealed in any sense greater than that the commission of the act was deliberate in the sense of being intentional and that that act or omission, as the case may be, did involve a breach of duty whether or not the actor appreciated that legal consequence.' (See [2001] 1 All ER 172 at 180–181.)

22. So, for the purpose of s 32 of the 1980 Act, concealment is to be treated as deliberate if it is the result of doing an intentional act. What, then, is the impact of this decision on s 32(2) of the 1980 Act? It will be appreciated that the latter uses the word 'deliberate' twice; 'deliberate commission of a breach of duty' and 'deliberate concealment of the facts involved in the breach of duty'. There is no reason why the common word 'deliberate' should have different meanings in the two locations in the same subsection. If that had been the legislative intent it would have been made clear. It follows that 'deliberate commission of a breach of duty' should be read consistently with *Brocklesby*'s case. Any intentional act which amounts to a breach of duty amounts to a deliberate commission of a breach of duty and triggers s 32(2) of the 1980 Act. The fact that in the proposed

amendment to the reply, the Archdiocese concedes that Mr Goldberg did not know he was committing a breach of duty does not, therefore, exclude operation of the section. Mr Goldberg's advice was given intentionally. On the assumption, which I have to make for the purpose of this application, namely that it amounted to a breach of duty, that breach was committed deliberately within the meaning of the section.

23. That leaves Mr Simmonds' second and major argument, that s 32(2) of the 1980 Act still requires there to be concealment of facts rather than law. However on this issue, it appears to me that the language of the legislation is clear and does not support Mr Simmonds' submissions.

24. Section 32(1)(b) of the 1980 Act prevents the limitation period from running if there has been an intentional action which has resulted in any fact relevant to the cause of action being rendered invisible to the claimant. It seems to me that the purpose of s 32(2) of that Act is to treat breaches of duty which are 'deliberate' (in the *Brocklesby* sense), in the same way. That is to say, it deems intentional commission of a breach of duty which is unlikely to be discovered in the same way as if it were a deliberate concealment of the facts which are necessary to maintain the action for breach of duty. Thus even if all the facts are known to the claimant, the intentional commission of the breach of duty in circumstances where that breach is unlikely to be discovered, results in the creation of a legal fiction, namely that the facts are unknown.

25. This conclusion is reinforced by considering the concepts of 'concealment' and 'discovery' in s 32 of the 1980 Act. It appears to me that they are inextricably linked to each other. Consider first s 32(1)(b) of that Act. This provides that the limitation period does not run if 'any fact ... has been ... concealed'. The period of suspension lasts until the claimant 'has discovered the ... concealment ... or could ... have discovered it'. So, commencement of the limitation period is postponed because something, namely a relevant fact, has been concealed. It continues to be postponed until that same thing, that is to say the relevant fact, has been or could have been revealed. The same analysis applies to s 32(2) of the 1980 Act. It applies to the commission of a breach of duty 'in circumstances in which it is unlikely to be discovered'. The 'it' here must be a reference back to the breach of duty. It is the breach of duty which is unlikely to be discovered. It must also be the breach of duty which is concealed. Thus concealment of the breach of duty would result in postponement of the limitation period until the breach of duty is discovered. However, if Mr Simmonds were right, commencement of the limitation period would be postponed if the breach of duty were concealed, but limitation would start to run as soon as the facts were discovered. The factor justifying postponement of the limitation period would be unrelated to the factor removing the postponement. In my view that would be illogical and is not what the section means. Furthermore, if Mr Simmonds' submission were right, there would be little purpose in s 32(2) of the 1980 Act. If the latter is only triggered if and to the extent that facts are concealed, then it appears merely to duplicate, in less clear language, the effect of s 32(1)(b) of the 1980 Act.

26. Accordingly I accept Mr Briggs' analysis of the conveyancing example given in para 17 above.

27. Since the proposed amendment to the reply contains the necessary allegations of intention and concealment, it raises a response to the limitation defence which is arguable. In the circumstances, permission to amend must be

given. In the light of this finding it is neither necessary nor useful to consider the other arguments advanced on behalf of Mr Goldberg against the Archdiocese's other responses to his limitation defence. This application fails. a

Order accordingly.

Gillian Daly Barrister.

Practice Note

COURT OF APPEAL
LORD WOOLF CJ
11 JANUARY 2001

Judgment – Preparation of judgments – Numbering of approved judgments – Paragraph numbering – Neutral citation

LORD WOOLF CJ gave the following direction at the sitting of the court.

This practice direction is made with the concurrence of the Master of the Rolls, the Vice-Chancellor and the President of the Family Division. It represents the next stage in the process of modernising the arrangements for the preparation, distribution and citation of judgments given in every division of the High Court, whether in London or in courts outside London.

Form of judgments

1.1 With effect from 11 January 2001, all judgments in every division of the High Court and the Court of Appeal will be prepared for delivery, or issued as approved judgments, with single spacing, paragraph numbering (in the margins) but no page numbers. In courts with more than one judge, the paragraph numbering will continue sequentially through each judgment, and will not start again at the beginning of the second judgment. Indented paragraphs will not be given a number.

1.2 The main reason for these changes is to facilitate the publication of judgments on the World Wide Web and their subsequent use by the increasing numbers of those who have access to the Web. The changes should also assist those who use and wish to search judgments stored on electronic databases.

1.3 It is desirable in the interests of consistency that all judgments prepared for delivery, (or issued as approved judgments) in county courts, should also contain paragraph numbering (in the margins).

Neutral citation of judgments

2.1 With effect from 11 January 2001 a form of neutral citation will be introduced in both divisions of the Court of Appeal and in the Administrative Court. A unique number will be given by the official shorthand writers to each approved judgment issued out of these courts. The judgments will be numbered in the following way:

Court of Appeal (Civil Division)	[2000] EWCA Civ 1, 2, 3 etc
Court of Appeal (Criminal Division)	[2000] EWCA Crim 1, 2, 3 etc
High Court (Administrative Court)	[2000] EWHC Admin 1, 2, 3 etc.

2.2 Under these new arrangements, para 59 in *Smith v Jones,* the tenth numbered judgment of the year in the Civil Division of the Court of Appeal, would be cited: *Smith v Jones* [2001] EWCA Civ 10 at [59].

2.3 The neutral citation will be the official number attributed to the judgment by the court and must always be used on at least one occasion when the judgment is cited in a later judgment. Once the judgment is reported, the neutral citation will appear in front of the familiar citation from the law report series. Thus: *Smith v Jones* [2001] EWCA Civ 10 at [30], [2001] QB 124, [2001] 2 All ER 364, etc. The

paragraph number must be the number allotted by the court in all future versions of the judgment.

2.4 If a judgment is cited on more than one occasion in a later judgment, it will be of the greatest assistance if only one abbreviation (if desired) is used. Thus *Smith v Jones* [2001] EWCA Civ 10 could be abbreviated on subsequent occasions to *Smith v Jones*, or *Smith*'s case, but preferably not both (in the same judgment).

2.5 If it is desired to cite more than one paragraph of a judgment each numbered paragraph should be enclosed with a square bracket. Thus: *Smith v Jones* [2001] EWCA Civ 10 at [30]–[35], or *Smith v Jones* [2001] EWCA Civ 10 at [30], [35], and [40]–[43].

2.6 The neutral citation arrangements will be extended to include other parts of the High Court as soon as the necessary administrative arrangements can be made.

2.7 The Administrative Court citation will be given to all judgments in the Administrative Court, whether they are delivered by a Divisional Court or by a single judge.

Citation of judgments in court

3.1 For the avoidance of doubt, it should be emphasised that both the High Court and the Court of Appeal require that where a case has been reported in the official law reports published by the Incorporated Council of Law Reporting for England and Wales it must be cited from that source. Other series of reports may only be used when a case is not reported in the law reports.

3.2 It will in future be permissible to cite a judgment reported in a series of reports, including those of the Incorporated Council of Law Reporting, by means of a copy of a reproduction of the judgment in electronic form that has been authorised by the publisher of the relevant series, provided that (1) the report is presented to the court in an easily legible form (a 12-point font is preferred but a 10 or 11-point font is acceptable) and (2) the advocate presenting the report is satisfied that it has not been reproduced in a garbled form from the data source. In any case of doubt the court will rely on the printed text of the report (unless the editor of the report has certified that an electronic version is more accurate because it corrects an error contained in an earlier printed text of the report).

Concluding comments

4.1 The changes described in this Practice Direction follow what is becoming accepted international practice. They are intended to make it easier to distribute, store and search judgments, and less expensive and time-consuming to reproduce them for use in court. Brooke LJ is still responsible for advising the Judges' Council on these matters, and any comments on these new arrangements, or suggestions about ways in which they could be improved still further, should be addressed to him at the Royal Courts of Justice, WC2A 2LL.

Kate O'Hanlon Barrister.

R v Secretary of State for the Environment, Transport and the Regions and another, ex parte Spath Holme Ltd

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD COOKE OF THORNDON, LORD HOPE OF CRAIGHEAD AND LORD HUTTON

9, 10 OCTOBER, 7 DECEMBER 2000

Rent restriction – Rent – Determination of fair rent – Ministers making order capping increase in rents of regulated tenancies – Whether order ultra vires enabling legislation – Landlord and Tenant Act 1985, s 31 – Rent Acts (Maximum Fair Rent) Order 1999.

Statute – Construction – Hansard – Reference to proceedings in Parliament as an aid to construction – Whether reference to Hansard permissible in determining scope of statutory power.

As a result of judicial decisions on the proper method of assessing fair rent under the Rent Act 1977, regulated tenants faced higher rent rises than had previously been anticipated. In order to cushion the blow, the Secretary of State for the Environment, Transport and the Regions and the Secretary of State for Wales (the ministers) made the Rent Acts (Maximum Fair Rent) Order 1999 which provided a mechanism for capping the increase. That order was purportedly introduced under s 31[a] of the Landlord and Tenant Act 1985 which reserved a power to restrict or prevent increases of rent for dwellings that would otherwise have taken place. The 1985 Act was a consolidating statute, concerned primarily with the maintainence of fairness between landlord and tenant in relation to the letting of dwellings. Section 31 itself consolidated s 11 of the Housing Rents and Subsidies Act 1975. The latter provision had replaced a temporary power, not confined to dwelling houses, conferred by the Counter-Inflation (Temporary Provisions) Act 1972 and re-enacted in the Counter-Inflation Act 1973, two Acts which had been expressly and exclusively directed to countering general inflation in the economy. In judicial review proceedings, a landlord challenged the vires of the 1999 order, contending, inter alia, that it was clear from the legislative history and parliamentary statements that the reserve power had been conferred solely for the purpose of countering general inflation in the economy, not for the purpose of alleviating the perceived hardship caused to tenants by rent increases. That contention was accepted by the Court of Appeal which quashed the order. The ministers appealed to the House of Lords.

Held – (1) The 1999 order was not ultra vires s 31 of the 1985 Act. Although it was appropriate (Lord Hope dubitante and Lord Hutton dissenting) to consider s 11 of the 1975 Act when construing s 31, the s 11 power had not been conferred solely for the purpose of restricting rents where they represented a significant cause of general inflation. In contrast to the 1972 and 1973 Acts, the 1975 Act had not been expressly and exclusively directed to countering inflation, and it had not

a Section 31 is set out at p 200 *h* to p 201 *b*, post

provided that the powers exercisable under it should cease to be exercisable after the expiration of a specified period of time. If, when inflation was at its most threatening, Parliament had thought it desirable to impose a strict time-limit on the exercise of ministerial powers, it was difficult to see any reason why, in 1975, that safeguard should have been thought unnecessary if inflation alone could justify exercise of the powers. Moreover, if Parliament had intended in 1975 to restrain the exercise of the s 11 power save for the purpose of countering inflation, it was to be expected that the section would have been drafted, in the context of the 1975 Act, so as to make much more specific reference to that limitation. Further, s 11 had not simply consolidated any earlier enactment. It followed that the scope of s 11 of the 1975 Act, and thus of s 31 of the 1985 Act, had not been limited in the way for which the landlord contended. Rather, it had conferred a reserve power, to be exercised by the minister if he reasonably judged it necessary or desirable to protect tenants from hardship caused by increased or excessive rents (see p 208 *e*, p 210 *b c f* to *h*, p 215 *j*, p 219 *e g*, p 220 *b c*, p 222 *c d*, p 223 *g h*, p 225 *b c j* to p 226 *h* and p 231 *f g*, post); *Maunsell v Olins* [1975] 1 All ER 16 and *Farrell v Alexander* [1976] 2 All ER 721 considered.

(2) That conclusion was not affected by statements made in Parliament during the passage of the 1975 Act. A distinction was to be drawn (Lord Nicholls and Lord Cooke dissenting) between a ministerial statement on the meaning of a statutory expression and one relating to the scope of a statutory power. The latter (per Lord Bingham and Lord Hope) would be properly admissible only if it consisted of a categorical assurance by the minister to Parliament that the power would not be used in a given situation, such that Parliament could be taken to have legislated on that basis. Ministers had given no categorical assurance that s 11 would not be invoked save to counter excessive inflation, there was therefore no clear and unequivocal statement in support of the landlord's interpretation and, in any event, (Lord Nicholls and Lord Cooke dissenting) neither the meaning nor the effect of that provision was ambiguous or obscure or such as to give rise to absurdity. It followed that in the instant case reference to Hansard was impermissible. Alternatively, (per Lord Nicholls) such reference was not useful as an external aid in support of the landlord's interpretation or (per Lord Cooke) did not justify that interpretation. Nor was there any other basis for impugning the lawfulness of the order. Accordingly, the appeal would be allowed (see p 202 *d*, p 211 *j* to p 212 *a d e h* to p 213 *a*, p 215 *h j*, p 219 *d e g*, p 220 *g*, p 222 *c d*, p 223 *g h*, p 224 *d*, p 225 *g* , p 226 j to p 228 a, p 230 *d*, p 233 *c* and p 234 *b*, post); *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 considered.

Decision of the Court of Appeal [2000] 1 All ER 884 reversed.

Notes

For rent under regulated tenancies, see 27(1) *Halsbury's Laws* (4th edn reissue) paras 738–753, and for reference to proceedings in Parliament as an aid to construction and for the interpretation of legislation made under powers, see 44(1) *Halsbury's Laws* (4th edn reissue) para 1421, 1522.

For the Landlord and Tenant Act 1985, s 38, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 376.

Cases referred to in opinions

A-G v HRH Prince Ernest Augustus of Hanover [1957] 1 All ER 49, [1957] AC 436, [1957] 2 WLR 1, HL.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.
Beswick v Beswick [1967] 2 All ER 1197, [1968] AC 58, [1967] 3 WLR 932, HL.
Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810, [1975] AC 591, [1975] 2 WLR 513, HL.
Brind v Secretary of State for the Home Dept [1991] 1 All ER 720, [1991] 1 AC 696, [1991] 2 WLR 588, HL.
Britnell v Secretary of State for Social Security [1991] 2 All ER 726, [1991] 1 WLR 198, HL.
Curtis v London Rent Assessment Committee [1997] 4 All ER 842, [1999] QB 92, [1998] 3 WLR 1427, CA.
DPP v Schildkamp [1969] 3 All ER 1640, [1971] AC 1, [1970] 2 WLR 279, HL.
Farrell v Alexander [1976] 2 All ER 721, [1977] AC 59, [1976] 3 WLR 145, HL.
Fothergill v Monarch Airlines Ltd [1980] 2 All ER 696, [1981] AC 251, [1980] 3 WLR 209, HL.
Hammersmith and Fulham London BC v Secretary of State for the Environment [1990] 3 All ER 589, [1991] 1 AC 521, [1990] 3 WLR 898, HL.
Hensher (George) Ltd v Restawile Upholstery (Lancs) Ltd [1974] 2 All ER 420, [1976] AC 64, [1964] 2 WLR 700, HL.
Heydon's Case (1584) 3 Co Rep 7a, 76 ER 637.
IRC v Joiner [1975] 3 All ER 1050, [1975] 1 WLR 1701, HL.
Johnson v Moreton [1978] 3 All ER 37, [1980] AC 37, [1978] 3 WLR 538, HL.
Julius v Bishop of Oxford (1880) 5 App Cas 214, [1874–80] All ER Rep 43, HL.
McKiernon v Secretary of State for Social Security [1989] CA Transcript 1017; sub nom *McKiernon v Chief Adjudication Officer* (1989) Times, 1 November, CA.
Malone v UK (1984) 7 EHRR 14, ECt HR.
Marac Life Assurance Ltd v IR Comr [1986] 1 NZLR 694, NZ CA.
Maunsell v Olins [1975] 1 All ER 16, [1975] AC 373, [1975] 3 WLR 835, HL.
Mellacher v Austria (1989) 12 EHRR 391, ECt HR.
Padfield v Minister of Agriculture, Fisheries and Food [1968] 1 All ER 694, [1968] AC 997, [1968] 2 WLR 924, HL.
Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.
Silver v UK (1983) 5 EHRR 347, ECt HR.
Spath Holme Ltd v Chairman of the Greater Manchester and Lancashire Rent Assessment Committee [1995] 2 EGLR 80, CA.
Sunday Times v UK (1979) 2 EHRR 245, ECt HR.
Tower Hamlets London BC v Chetnik Developments Ltd [1988] 1 All ER 961, [1988] AC 858, [1988] 2 WLR 654, HL.
Warner v Metropolitan Police Comr [1968] 2 All ER 356, [1969] 2 AC 256, [1968] 2 WLR 1303, HL.
Westminster Bank Ltd v Minister of Housing and Local Government [1970] 1 All ER 734, [1971] AC 508, [1970] 2 WLR 645, HL.

Appeal

The Secretary of State for the Environment, Transport and the Regions and the Secretary of State for Wales (the ministers) appealed with permission of the Appeal Committee of the House of Lords given on 10 July 2000 from the order of the Court of Appeal (Stuart-Smith, Aldous and Mance LJJ) on 20 January 2000 ([2000] 1 All ER 884, [2000] 3 WLR 141) quashing the Rent Acts (Maximum Fair Rent) Order 1999 on an application for judicial review brought by the respondent,

Spath Holme Ltd. The facts are set out in the opinion of Lord Bingham of Cornhill. *a*

Kenneth Parker QC, John Male QC and *Philip Sales* (instructed by the *Treasury Solicitor*) for the ministers.

James Bonney QC and *Johnathan Gavaghan* (instructed by *Willan Bootland White*, Manchester) for Spath Holme. *b*

Their Lordships took time for consideration.

7 December 2000. The following opinions were delivered.

LORD BINGHAM OF CORNHILL. My Lords, on 11 and 8 January 1999 the Secretary of State for the Environment, Transport and the Regions and the Secretary of State for Wales (to whom I shall together refer as the ministers) made the Rent Acts (Maximum Fair Rent) Order 1999, SI 1999/6, which applied to England and Wales. They did so in the exercise of powers expressed to be conferred on them by s 31 of the Landlord and Tenant Act 1985 (the 1985 Act). Spath Holme Ltd, a landlord, sought to challenge the order, contending (among other things) that s 31 of the 1985 Act did not give the ministers power to make it. Permission to apply for judicial review was refused by the single judge, but granted by the Court of Appeal which, at a further hearing ([2000] 1 All ER 884, [2000] 3 WLR 141), accepted Spath Holme's contention and quashed the order. The main question in this appeal to the House is whether the Court of Appeal was right to hold that s 31 of the 1985 Act gave the ministers no power to make the order. *c d e*

THE FACTS

In paras 3 to 13 of its judgment ([2000] 1 All ER 884 at 887–889, [2000] 3 WLR 141 at 144–147) the Court of Appeal has helpfully summarised the facts in clear and uncontentious terms. A further account of the statutory history and certain decisions of the courts is given by the Court of Appeal in *Curtis v London Rent Assessment Committee* [1997] 4 All ER 842, [1999] QB 92. I give here a brief account of the context in which the present problem arises. *f*

During the last century England and Wales suffered from a persistent shortage of housing. The demand, in particular for private rented accommodation, was greater than the supply. This enabled some private landlords to exploit the scarcity of what they had to let by exacting exorbitant rents and letting on terms disadvantageous to the tenant. A series of statutes, beginning in 1915, sought to address this problem, by controlling the rents which could be charged and affording security of tenure to tenants. This control, beneficial though it was in many ways, tended by its very effectiveness to exacerbate the problem: the financial return to the landlord was at times so modest that there was very little incentive to let accommodation to private tenants, with the result that the supply of accommodation available for private letting tended to shrink. Thus statutes were passed with the object of giving landlords a return sufficient to induce them to make accommodation available. *g h j*

The Rent Act 1965 was intended to revitalise the market in privately rented accommodation by introducing a new regime of what were called fair rents. These provisions were consolidated in the Rent Act 1968, extended in the Rent Act 1974 and consolidated in the Rent Act 1977, which remains in force. Section 70 of

that Act governs the assessment of fair rents, which are to be open market rents adjusted to discount for scarcity and to disregard certain matters specified in s 70(3). While the statute does not in terms refer to open market rents, that has been held by the Court of Appeal to be the proper starting point in the process of assessing and registering a fair rent under the 1977 Act (see *Spath Holme Ltd v Chairman of the Greater Manchester and Lancashire Rent Assessment Committee* [1995] 2 EGLR 80, and *Curtis'* case).

In giving effect to this statutory regime, rent officers and rent assessment committees faced the practical difficulty that there was no open market in unregulated privately rented property with which comparison could be made. The years following 1965 were also years of very high inflation. The result was that rents set by rent officers and rent assessment committees did not keep up with inflation, to the benefit of tenants but to the obvious disadvantage of landlords. So the problem which Parliament had sought to address in 1965 once more became acute, and the market in privately rented accommodation declined. By the Housing Act 1988 it was again sought to stimulate a free market in such accommodation by providing for assured and assured shorthold tenancies, which (subject to a limited safeguard for some tenants) provided for rents to be negotiated and agreed between landlord and tenant. Regulated tenancies under the 1977 Act continued to exist, but no new regulated tenancies were to come into existence.

The 1988 Act had its desired effect of tempting private landlords back into the market. But it also had another effect, important for present purposes, of giving rise to rents negotiated between landlord and tenant in the market. Whereas rent officers and rent assessment committees had previously relied on other registered fair rents as the basis of comparison when setting new fair rents, there was now available a range of comparators, drawn from the market, on which they could rely (subject to making the adjustments required by statute) instead of the less factual basis of previously registered fair rents. In most areas, rent officers and rent assessment committees took advantage of this new basis of comparison in undertaking their statutory task, but in some areas (notably London and the North West) they were reluctant to do so. In these areas the gap between registered fair rents and open market rents increased, to the point where the former were at a level about half the latter, even in the absence of scarcity. In the two judgments already mentioned the Court of Appeal clearly laid down the correct approach to the assessing of fair rents, and at last even the rent officers and rent assessment committees who had previously been reluctant to do so gave effect to the basis of assessment prescribed by the 1977 Act. This had the unfortunate side effect that tenants whose rents had previously been registered at levels well below the adjusted open market level at which they should have been set suffered very sharp and unexpected increases in the rent payable.

The Minister for London and Construction made a statement on this subject in the House of Commons in January 1998, expressing the government's concern about the disproportionate increases which some regulated tenants had suffered, and a consultation paper was issued in May 1998 (*Limiting Fair Rent Increases: A Consultation Paper*: Department of the Environment, Transport and the Regions) outlining the options which had been identified and the action which the government provisionally favoured. The options were: (i) to do nothing and allow rent officers to continue to set fair rents in accordance with s 70 of the 1977 Act; (ii) to provide for a phasing of the rent increases over a period of two to three

years; or (iii) to apply a maximum limit linked to the retail price index to increases in rents which had already been registered, but excluding lettings where a substantial increase in rent was attributable to repairs or improvements carried out by the landlord. The consultation paper made plain the government's provisional preference for the third of these options, which would be given effect by exercising the reserve power in s 31 of the 1985 Act.

Not surprisingly, tenants and tenants' associations supported the third option, while seeking a maximum percentage increase smaller than the government had proposed. Landlords and their associations favoured the first, or failing that, the second option. They opposed the third. This was understandable: since the cap was not to apply to rents registered for the first time, the third option if adopted would have the consequence that landlords who had previously been receiving a registered rent lower than it should have been if the rent had been assessed on the correct basis, and who had thereby been subsidising their tenants, were liable to suffer further loss through denial of the full increase to which adoption of the correct, adjusted market value, basis of assessment would have entitled them.

Following public consultation, the government adopted the third option, subject to a reduction in the maximum percentage increase as sought by tenants. The order was accordingly made by the ministers, 'in exercise of the powers conferred upon them' by s 31 of the 1985 Act. It contained a formula set out in art 2 of the order, the effect of which is best summarised. On the first application for registration after the order had come into effect, the permitted increase in a registered fair rent would be 5%, if the retail price index had increased by 5% over the two year period since the last registration, plus 7·5%. Thereafter any subsequent increase over a two year period would be 5% plus the difference in the retail price index. The order would only apply where there was an existing registered rent when the order came into effect, and it would not apply where, because of repairs or improvements carried out by the landlord, the fair rent exceeded by at least 15% the previous registered rent. Article 3 of the order and the schedule provided that the 1977 Act should be modified by inserting a new paragraph (para 9B) into Sch 11 of the 1977 Act. That is the schedule which governs applications for the assessment and registration of fair rents by rent officers and rent assessment committees. The new paragraph provides:

> '... (a) the rent officer, in considering what rent ought to be registered, shall consider whether that article [art 2] applies; and (b) where a matter is referred to them, the committee shall consider whether that article applies and, where it does apply, they shall not, subject to paragraph (5) of that article, confirm or determine a rent for the dwelling-house that exceeds the maximum fair rent calculated in accordance with that article.'

Section 31 of the 1985 Act, relied on as the source of power to make the order, is headed 'Miscellaneous' and has a sidenote 'Reserve power to limit rents'. The section reads:

> '(1) The Secretary of State may by order provide for—(a) restricting or preventing increases of rent for dwellings which would otherwise take place, or (b) restricting the amount of rent which would otherwise be payable on new lettings of dwellings; and may so provide either generally or in relation to any specified description of dwelling.
>
> (2) An order may contain supplementary or incidental provisions, including provisions excluding, adapting or modifying any provision made by or under

an enactment (whenever passed) relating to rent or the recovery of overpaid rent.

(3) In this section—"new letting" includes any grant of a tenancy, whether or not the premises were previously let, and any grant of a licence; "rent" includes a sum payable under a licence, but does not include a sum attributable to rates or, in the case of dwellings of local authorities or new town corporations, to the use of furniture, or the provision of services; and for the purposes of this section an increase in rent takes place at the beginning of the rental period for which the increased rent is payable.

(4) An order under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.'

THE MAIN ISSUE

At issue in this appeal is the scope of the order-making power conferred by s 31 of the 1985 Act: to what (if any) limits is that power subject?

Mr Bonney QC for Spath Holme rightly reminded us that no statute confers an unfettered discretion on any minister. Such a discretion must be exercised so as to promote and not to defeat or frustrate the object of the legislation in question. Counsel relied on *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694 at 699, [1968] AC 997 at 1030 where Lord Reid said:

> 'Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.'

Counsel also referred us to the endorsement by Lord Bridge of Harwich, with the concurrence of the other members of the committee, of a passage under the heading 'No unfettered discretion in public law' in Professor Sir William Wade's *Administrative Law* (5th edn, 1982) pp 355–356 in *Tower Hamlets London BC v Chetnik Developments Ltd* [1988] 1 All ER 961 at 965–966, [1988] AC 858 at 872, to observations of Lord Bridge in *Hammersmith and Fulham London BC v Secretary of State for the Environment* [1990] 3 All ER 589 at 636–637, [1991] 1 AC 521 at 597, and to the opinion of Lord Ackner in *Brind v Secretary of State for the Home Dept* [1991] 1 All ER 720 at 734, [1991] 1 AC 696 at 761. The soundness of these principles is not in doubt. The object is to ascertain the statutory purpose or object which the draftsman had in mind when conferring on ministers the powers set out in s 31 of the 1985 Act.

The starting point must be s 31 of the 1985 Act, quoted above. The 1985 Act consolidated provisions of the law of landlord and tenant formerly found in the Housing Acts and the Landlord and Tenant Act 1962, with amendments to give effect to recommendations of the Law Commission. It contained a series of provisions giving tenants the right to be told the identity and address of their landlord and the identity and address of the directors of a corporate landlord, imposing on landlords a duty to give notice to tenants of an assignment, requiring

the provision of rent books for certain tenants and prescribing particulars to be contained in rent books, creating offences for breach of some of these provisions by landlords, implying terms in some lettings that premises should be fit for human habitation, extending the implied term of fitness to certain agricultural occupancies, implying covenants by the landlord to repair in certain specified lettings and regulating the service charges recoverable by landlords. Section 31 of the 1985 Act was followed by a section (s 32) which, in sub-s (3), provided:

> 'Section 31 (reserve power to limit rents) does not apply to a dwelling forming part of a property subject to a tenancy to which Part II of the Landlord and Tenant Act 1954 applies; but without prejudice to the application of that section in relation to a sub-tenancy of a part of the premises comprised in such a tenancy.'

There followed statutory definitions and formal provisions. All the provisions of the 1985 Act were directed to the relationship which exists between landlords and tenants, and all were intended to strengthen the rights of the tenant and protect the tenant against various forms of potential disadvantage or exploitation. But, because the 1985 Act covered a number of aspects of the landlord-tenant relationship, one cannot discern any very specific unifying scheme in the legislation. I do not find, studying the language of s 31, that it is in any way ambiguous or obscure, or such as to lead to absurdity if given its full apparent effect. But Mr Bonney is correct in his submission that the language is, on its face, very broad. It applies to lettings of dwellings of every kind, no matter who is the landlord or what the nature of the tenancy (subject only to the exception in s 32(3) of the 1985 Act); it places no limit on the restrictions which the minister may impose on rental payments; it provides only for annulment on negative resolution; and it gives no indication of the circumstances in which Parliament contemplated that the order-making power should be exercisable. One learns only, from the sidenote and the reference in s 32(3), that this is a reserve power, which indicates that it is not a power to be exercised very readily or routinely.

Mr Bonney submitted that, faced with language of this breadth, the courts should apply certain presumptions. The first of these is that, since Parliament does not lightly delegate to the executive the power to amend primary legislation, such a provision should be narrowly and strictly construed and any doubt resolved in favour of the narrower rather than the broader interpretation. He placed reliance on *McKiernon v Secretary of State for Social Security* [1989] CA Transcript 1017; sub nom *McKiernon v Chief Adjudication Officer* (1989) Times, 1 November where Lord Donaldson of Lymington MR said (at 10B of the transcript):

> 'Subordinate legislation, at any rate when subject to the negative resolution procedure, represents the will of the executive exercised within limits fixed by primary legislation. Whether subject to the negative or affirmative resolution procedure, it is subject to much briefer, if any, examination by Parliament and cannot be amended. The duty of the courts being to give effect to the will of Parliament, it is, in my judgment, legitimate to take account of the fact that a delegation to the executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the executive or upon whether it has been exercised, it should be resolved by a restrictive approach.'

This principle was endorsed by this House in *Britnell v Secretary of State for Social Security* [1991] 2 All ER 726 at 731–732, [1991] 1 WLR 198 at 204. Recognition of Parliament's primary law-making role in my view requires such an approach. But it is an approach which is only appropriate where there is a genuine doubt about the effect of the statutory provision in question. Here, the language used seems on its face to leave little room for doubt about the scope of the power in s 31(2) of the 1985 Act.

The second presumption relied on is that Parliament does not intend to take away or prevent the exercise of any property right without compensation unless clear and unambiguous words are used. Counsel for Spath Holme relied on *Westminster Bank Ltd v Minister of Housing and Local Government* [1970] 1 All ER 734 at 738–739, [1971] AC 508 at 529, where Lord Reid accepted that if there was any reasonable doubt the subject should be given the benefit of it. This presumption (it was submitted) was fortified by the presumption that Parliament would intend to legislate in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the convention), and in particular art 1 of the First Protocol:

> '*Protection of property*
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

Counsel submitted that s 31 of the 1985 Act left the imposition of any restriction so completely to the discretion of the minister that the conditions for exercise of the power were not 'provided for by law'. In support of this submission he referred the House to *Sunday Times v UK* (1979) 2 EHRR 245 at 270–273, *Silver v UK* (1983) 5 EHRR 347 at 371–373, and *Malone v UK* (1984) 7 EHRR 14 at 39–41. I have no doubt that clear and unambiguous words should be used if the citizen is to be deprived of his property without compensation and any reasonable doubt should be resolved in his favour. But a power to restrict or prevent increases of rent which would otherwise take place or restrict the amount of rent which would otherwise be payable on a new letting must of necessity deprive the landlord of rent which he would, but for the minister's order, receive. The words used are capable of no other construction. As to the convention, Mr Kenneth Parker QC for the ministers pointed out that the presumption in question is a weak one (see Lester and Pannick *Human Rights Law and Practice* (1999) p 251 (para 4.19.14), Clayton and Tomlinson *The Law of Human Rights* (2000) p 1317 (para 18.73)). Any measure restricting rents, or prices or charges of any kind, must have the effect of depriving the recipient of what he would otherwise receive, but the European Court of Human Rights has respected the need for national authorities to strike a balance between the rights of individuals and the general interest of the community. This would appear to be such an instance. As for the requirement that the condition of any restriction be provided for by law, it seems clear that one must look not at the empowering condition, which until exercised has no effect on the rights of the citizen, but at the terms of any order made under it. In this

case Spath Holme's complaint is not so much that the terms of the order are unclear as that they are all too clear.

Mr Bonney relied on other features of s 31 of the 1985 Act as showing that the section could not be understood to give a general power to ministers to restrict rents so as to protect tenants against perceived hardship. He pointed out that the Prices and Incomes Act 1968, the Rent (Control of Increases) Act 1969, the Housing Act 1969, the Housing Rents and Subsidies Act 1975 in s 7, and the 1977 Act (in s 55 and Sch 8) had made provision for the phasing of rent increases over a period in certain cases, and this was the recognised statutory means of addressing tenant hardship. He contrasted the rule-making power in s 74 of the 1977 Act, which provided for approval by affirmative resolution although dealing with procedure only, with the power in s 31 of the 1985 Act which on the ministers' construction contained much more far-reaching powers but was only subject to annulment by negative resolution. He described the provisions of Sch 11 to the 1977 Act as 'entrenched' and suggested that Parliament could not have intended to empower a minister to modify this carefully defined regime. These considerations, among others, led the Court of Appeal to consider that the effect of s 31 of the 1985 Act was unclear, and are considered further below. But the phasing provisions only applied to certain classes of tenancy, and in any event deferred the rent increase without restricting it; plainly Parliament considered that an additional power was necessary. The contrast between the procedure in s 31(4) of the 1985 Act and s 74 of the 1977 Act could be explained by apprehension that exercise of the reserve power in s 31 might call for urgent action. Whether Sch 11 to the 1977 Act was 'entrenched' in the sense that it could not be modified by ministerial order is considered below.

While I am not persuaded by Mr Bonney that s 31 of the 1985 Act is ambiguous or unclear, or that it should receive any construction not based on what appears to be its clear meaning, I am left with a sense of unease springing from the lack of a specific purpose unifying the provisions of the 1985 Act and the difficulty of placing it in context and understanding why, in 1985, Parliament chose to legislate in the terms of s 31 even as part of a statutory consolidation. The question thus arises whether the courts are entitled to trace s 31 back to its original source in search of a clearer indication of the draftsman's intention and the factual context in which the provision was originally enacted. Mr Parker pressed for a negative answer to this question. He relied on the speech of Lord Simon of Glaisdale (on behalf of Lord Diplock and himself) in *Maunsell v Olins* [1975] 1 All ER 16 at 26–27, [1975] AC 373 at 392–393 where he said:

> 'Consolidation is not nowadays limited to mere re-enactment. Under a procedure recommended by the Law Commissions in 1965 under the Law Commissions Act of that year, even substantial amendments may be made in the pre-existing law, where such are deemed by the Law Commissions to be desirable in order to secure satisfactory consolidation. Such amendments are subject to full and traditional parliamentary control. But, even short of this, by the Consolidation of Enactments (Procedure) Act 1949, ss 1(1) and 2, a consolidation Act may embody such corrections and minor improvements as are confined to, and may be judged expedient with a view to—"resolving ambiguities, removing doubts, bringing obsolete provisions into conformity with modern practice, or removing unnecessary provisions or anomalies which are not of substantial importance, and amendments designed to facilitate improvement in the form or manner in which the law is stated

a [including] any transitional provisions which may be necessary in consequence of such amendments ..." Moreover, the very purpose of consolidation is to enact a compendious code standing on its own and making it unnecessary to scrutinize the consolidated legislation (which is, indeed, repealed in a schedule to the consolidation Act). For all these reasons it is, in our respectful submission, an incorrect approach to the construction of a consolidation Act b (even one limited to re-enactment) to try to interpret it by reference to the repealed statutes which are consolidated. It has been generally accepted in the past that there is a presumption that Parliament does not intend by a consolidation Act to alter the pre-existing law (see Maxwell Interpretation of Statutes (12th Edn, 1969), pp 20–25; and *Beswick v Beswick* ([1967] 2 All ER 1197 at 1202, [1968] AC 58 at 73)). How far this rule may need modification c in the case of some types of consolidation under the 1949 Act or of consolidation under the 1965 procedure, and how the courts should inform themselves of the manner in which Parliament has proceeded, may have to be considered in some future case. But in any event such a presumption has no scope for operation where the actual words of the consolidation Act are d not, as a matter of legal language, capable of bearing more than one meaning. The docked tail must not be allowed to wag the dog. It is only where the actual words used in the consolidation Act are ambiguous (in the sense of being fairly susceptible of bearing more than one meaning in their context and register) that recourse may be had to any difference in phraseology of the corresponding provision in the repealed enactment as an aid to their e construction. Even in such a case the corresponding provision of the repealed enactment is capable of being an aid to the construction of the consolidation Act only if its own wording is unambiguous and its sole meaning is one of those which the words in the consolidation Act can fairly bear.'

f Lord Simon and Lord Diplock went on to warn against a simplistic approach to construction based on an assumption that the draftsman has sought to remedy one mischief only (or, in other words, that an Act has only one statutory objective). They said ([1975] 1 All ER 16 at 27, [1975] AC 373 at 393):

'For a court of construction to constrain statutory language which has a g primary natural meaning appropriate in its context so as to give it an artificial meaning which is appropriate only to remedy the mischief which is conceived to have occasioned the statutory provision is to proceed unsupported by principle, inconsonant with authority and oblivious of the actual practice of parliamentary draftsmen. Once a mischief has been drawn to the attention h of the draftsman he will consider whether any concomitant mischiefs should be dealt with as a necessary corollary.'

Reliance was also placed on the speech of Lord Wilberforce in *Farrell v Alexander* [1976] 2 All ER 721 at 725–726, [1977] AC 59 at 72–73 where he said:

j 'I would agree and endorse the principle that it is quite wrong that, in every case where a consolidation Act is under consideration, one should automatically look back through the history of its various provisions, and the cases decided upon them, and minutely trace the language from Act to Act—a process which, incidentally, has led to an argument of four days' length in this House.'

Mr Bonney relied on other authorities. We were referred to *DPP v Schildkamp* [1969] 3 All ER 1640, [1971] AC 1, where the issue turned on the construction of a section of the Companies Act 1948. Lord Upjohn said:

> 'The argument of counsel for the Crown was straightforward. Reading sub-s. (3) he submits truly that its terms are perfectly clear and simple. There is no ambiguity; the subsection clearly applies so as to create an offence on the part of a person knowingly carrying on a business—with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, and the circumstance that the company may subsequently have been wound up is quite irrelevant. The subsection plainly applies as a matter of language to the case where there has been no subsequent winding-up. Looking at that subsection alone I agree. Naturally he relies upon the contrast between sub-s. (1) where there is a reference to winding-up and sub-s. (3) where there is not; a point to which I shall return later. But, my Lords, this in my opinion is the wrong approach to the construction of an Act of Parliament. The task of the court is to ascertain the intention of Parliament; one cannot look at a section, still less a subsection, in isolation, to ascertain that intention; one must look at all the admissible surrounding circumstances before starting to construe the Act. The principle was stated by VISCOUNT SIMONDS in *A.-G. v H.R.H. Prince Ernest Augustus of Hanover* ([1957] 1 All ER 49 at 53, [1957] AC 436 at 461): "For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy." So I look to the Companies Act 1948, as a whole and the very first thing that I notice from the long title is that it is a consolidation Act. Therefore, bearing in mind that a consolidation Act is presumed not to alter the law, it becomes material to trace this subsection to its original source.' (See [1969] 3 All ER 1640 at 1652, [1971] AC 1 at 22–23.)

Lord Upjohn then traced a section of the 1948 Act back to its origin in earlier Acts, and observed:

> 'Nevertheless, in my opinion, the problem is essentially a question of construction of the Act of 1928 and not the Act of 1948 for it was the former that created the new concept of making directors liable for the fraudulent trading of a company and the true scope and ambit of that liability whether civil or criminal must be determined by considering the terms of that Act and not of the subsequent consolidation Acts. My Lords, the arguments of counsel for the Crown upon s. 75(3) are, of course, precisely the same as on s. 332(3) but, for the reasons that I have already given, in my opinion are based upon the wrong approach; one must consider the whole of the Act of 1928 before trying to ascertain and determine the true scope of s. 75(3) thereof.' (See [1969] 3 All ER 1640 at 1653, [1971] AC 1 at 23–24.)

Mr Bonney also referred us to Lord Simon's speech in *Farrell v Alexander*, where he said:

'This does not mean that the initial approach to the construction of a "pure" consolidation Act must be via the statutes it has replaced. On the contrary, it is the consolidation Act itself which falls for interpretation. The initial judicial approach is the same as with the interpretation of any other statute. The judge places himself, as the saying goes, in the draftsman's chair. He will ascertain what facts were within the draftsman's knowledge, and what statutory objective he had both generally and as to the particular provision to be construed. The facts available to the draftsman of a consolidation Act will be all those which were available to the draftsmen of the enactments to be consolidated. These facts and (closely related) the statutory objectives will generally be obvious from the statute falling for construction itself; but the court may, in default or by way of supplement or confirmation, have recourse to matters of which judicial notice may be taken or to official reports in the light of which any part of the legislation has been framed ... The judge will then ascertain and tune in to the linguistic register of the statute (see *Maunsell v Olins* ([1975] 1 All ER 16 at 25, 26, [1975] AC 373 at 391, 392)). Having done all this the judge will be in a position to read the statutory language in the primary and most natural sense which it bears in its context. Since the draftsman will himself have endeavoured to express the parliamentary meaning by words used in the primary and most natural sense which they bear in that same context, the court's interpretation of the meaning of the statutory words used should thus coincide with what Parliament meant to say. There is one rare situation in which it is permissible for—indeed, incumbent on—the court to construe a consolidation Act at this primary stage of construction by reference to a consolidated enactment. This is where the purpose of a statutory word or phrase can only be grasped by examination of the social context in which it was first used. *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* ([1974] 2 All ER 420, [1976] AC 64) provides an example. The phrase "work of artistic craftsmanship" in the Copyright Act 1956 could only be properly understood by investigating the social and aesthetic circumstances in which it was first used in the Copyright Act 1911. (The 1956 Act, though not a consolidation Act, was relevantly in pari materia.)' (See [1976] 2 All ER 721 at 734–735, [1977] AC 59 at 83–84.)

Finally, Mr Bonney placed reliance on *Johnson v Moreton* [1978] 3 All ER 37, [1980] AC 37. Lord Hailsham of St Marylebone said:

'This Act is a consolidating Act to which the observations of a majority of your Lordships in *Farrell v Alexander* ([1976] 2 All ER 721 at 725, 733, 746, [1977] AC 59 at 72, 82, 97, per Lord Wilberforce, Lord Simon and Lord Edmund-Davies) clearly apply. Even if I were not bound by these observations I would respectfully agree with them. In my view the whole purpose of consolidation would be defeated if they were not observed and rigidly adhered to or if endeavours were made to split the various components of a consolidation Act apart and construe them by reference to their individual histories. If, in the course of these remarks, I refer to the history of the legislation before and after 1948 it is not in order to construe the words of the Act, which, as will be seen, are in my view unambiguous as they stand, but simply to place them in their proper historical and social context as at 1948.' (See [1978] 3 All ER 37 at 46, [1980] AC 37 at 56–57.)

In the same case Lord Simon said:

'The 1948 Act was a consolidation Act. Any provision in it must therefore be construed in the context of the whole of the Act in which it now stands (*Farrell v Alexander* [1976] 2 All ER 721, [1977] AC 59); though it is legitimate (indeed, incumbent) to investigate the statutory history in so far as that throws light on the objective of a particular provision ([1976] 2 All ER 721 at 735, [1977] AC 59 at 84); the ascertainment of the Parliamentary objective is an important, generally, an essential, part of the process of statutory interpretation.' (See [1978] 3 All ER 37 at 51, [1980] AC 37 at 62.)

From these authorities, it is plain that courts should not routinely investigate the statutory predecessors of provisions in a consolidation statute, particularly where (as in *Maunsell v Olins*, and *Farrell v Alexander*) the issue concerns the construction of a single word or expression. Such a practice would reduce the benefit to be derived from the process of consolidation (although the advantage of gathering scattered, and often amended and reamended, provisions together in a coherent sequence in a single statute should not be underrated). But the overriding aim of the court must always be to give effect to the intention of Parliament as expressed in the words used. If, even in the absence of overt ambiguity, the court finds itself unable, in construing the later provision in isolation, to place itself in the draftsman's chair and interpret the provision in the social and factual context which originally led to its enactment, it seems to me legitimate for the court—even, as Lord Simon said, incumbent on it—to consider the earlier, consolidated, provision in its social and factual context for such help as it may give, the assumption, of course, being (in the absence of amendment) that no change in the law was intended. I agree with the Court of Appeal ([2000] 1 All ER 884, [2000] 3 WLR 141) that it is, in the present case, appropriate to consider the statutory predecessor of s 31 of the 1985 Act.

The 1985 Act did not itself repeal any earlier statutory provision. It was, however, one of three consolidating statutes passed in that year in the housing field, and the repeals, consequential amendments, transitional matters and savings in connection with each of the three were contained in a fourth Act, the Housing (Consequential Provisions) Act 1985, which provided for repeal of the whole of the Housing Rents and Subsidies Act 1975. While the propriety of referring to the provision consolidated in s 31 of the 1985 Act was in issue between the parties to this appeal, it was accepted that the provision which s 31 consolidated was s 11 of the 1975 Act. This section was preceded by a heading 'Rent—general power' and carried a sidenote 'Reserve power to limit rents'. It provided in full:

'**11**.—(1) An order may provide for restricting or preventing increases of rent for dwellings which would otherwise take place, or for restricting the amount of rent which would otherwise be payable on new lettings of dwellings.

(2) The supplemental and incidental provisions that may be made by an order under this section may include provisions excluding, adapting or modifying any provision contained in or having effect under any Act which relates to rent (including this Act and any Act passed after it), and in particular provisions for the recovery of overpaid rent.

(3) An order under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(4) Upon the coming into force of this subsection, the power to make orders under section 11 of the Counter-Inflation Act 1973 (general power to make orders restricting or preventing increases of rent) shall cease to include

power to make orders relating to rent for dwellings; but the coming into force of this subsection shall not affect the validity of anything done, whether before or after the coming into force of this subsection, by virtue of any order under the said section 11.

(5) The Counter-Inflation (Private Sector Residential Rents) (England and Wales) Order 1974 and the Counter-Inflation (Private Sector Residential Rents) (England and Wales) No. 2 Order 1974 are revoked, and the standstill period under the first order (which was extended by Article 3 of the second order) shall terminate on the coming into force of this subsection.

(6) Notwithstanding the revocation of the orders—(a) Article 5 of the first order (recovery of excess rent) shall continue to have effect, for the purposes of both orders, so as to enable a tenant to recover rent at any time during which he would have been able to recover it if the orders had not been revoked, and (b) Article 8 of that order (jurisdiction of the county court) shall continue to have effect, for the purposes of both orders, in respect of any proceedings commenced before the expiry of a period of two years from the date of the revocation.

(7) Paragraphs (a) and (b) of subsection (6) above shall continue to have effect during the periods specified in them, whether or not Part II of the Counter-Inflation Act 1973 (under which the two revoked orders were made) is in effect.

(8) Notwithstanding the revocation of the orders, the rent recoverable under a regulated tenancy of a dwelling-house in respect of a contractual period beginning before but ending after the revocation shall not exceed the amount which, by virtue of the orders, was the counter-inflation limit for the dwelling-house immediately before the revocation.

(9) Section 38(2) of the Interpretation Act 1889 (effect of repeals) shall apply in relation to the orders as it applies to an enactment which is repealed by another Act.

(10) For the purposes of this section an increase in rent takes place at the beginning of the rental period for which an increased rent is payable.

(11) In this section—"dwelling" does not include a dwelling forming part of a property subject to a tenancy to which Part II of the Landlord and Tenant Act 1954 (business tenancies) applies (but without prejudice to the application of this section in relation to a sub-tenancy of any part of the premises comprised in such a tenancy): "local authority" includes a county council; "new letting" includes any grant of a tenancy, or agreement to grant a tenancy, whether or not the premises were previously let, and any grant of a licence; "rent" includes any sum payable under a licence but does not include any sum attributable to rates, or, in the case of dwellings of local authorities or new town corporations, to the use of furniture, or the provision of services.'

This section, as its terms made plain, replaced the power previously conferred by s 11 of the Counter-Inflation Act 1973, which itself replaced the power conferred by s 2(4) of the Counter-Inflation (Temporary Provisions) Act 1972 (the 1972 Act). This context, as Mr Bonney submitted and the Court of Appeal accepted, showed that the power in s 11 of the 1975 Act, and therefore s 31 of the 1985 Act, was conferred, and conferred only, to enable the minister to restrict rents where such represented a significant cause of general inflation. This was the foundation

of Mr Bonney's central argument that the order was ultra vires, since the ministers in making it were not seeking to curb general inflation in the national economy. *a*

It is a matter of historical record that in the early and mid-1970s excessive inflation in the national economy was recognised as a major threat to the economic health and social cohesion of the nation. The 1972 and 1973 Acts to which I have referred were passed to counter that threat, and I think it plain from the terms of s 11 of the 1975 Act that it conferred a power to restrict rents where *b* such represented a significant cause of general inflation. The more difficult, and for present purposes more crucial, question is whether that was the only purpose for which the s 11 power could be lawfully exercised. A number of considerations lead me to conclude that the power could in appropriate circumstances be used for other purposes as well. (1) Whereas the 1972 and 1973 Acts were expressly *c* and exclusively directed to countering inflation, the 1975 Act was not. It repealed, in s 1, provisions of the Housing Finance Act 1972, which had changed the basis on which local authorities and new town corporations had determined their rents, and had led to their increasing such rents. It provided for the payment of subsidies to local authorities and new town corporations. It made provision for the phasing of increases of rent of certain registered regulated tenancies not *d* covered by existing phasing provisions. It amended, in a way favourable to tenants, the basis on which fair rents were to be assessed. It reversed the decontrol of certain tenancies. It permitted increases in the rent of controlled tenancies to reflect the value of repairs effected by the landlord or any superior landlord. The 1975 Act accordingly contained a number of provisions, generally *e* protective of tenants, no doubt reflecting at least a partial change of political priorities consequent upon a change of government. No reference was made to inflation or counter-inflation in the long title of the Act nor in the body of the Act itself, save where reference was made to the short titles of previous Acts and the orders made under those Acts. (2) In marked contrast with the 1972 and 1973 Acts, the 1975 Act did not provide that the powers exercisable under it should *f* cease to be exercisable after the expiration of a specified period of time. If, when inflation was at its most threatening, Parliament thought it desirable to impose a strict time-limit on the exercise of ministerial powers, it is difficult to see any reason why, in 1975, that safeguard should have been thought unnecessary if inflation alone could justify exercise of the powers. (3) If Parliament had intended *g* in 1975 to restrain the exercise of the s 11 power save for the purpose of countering inflation, I would expect the section to have been drafted, in the context of this Act, so as to make much more specific reference to that limitation. (4) Section 11 of the 1975 Act did not simply consolidate any earlier enactment.

I would not therefore hold, differing with respect from the Court of Appeal, *h* that the scope of s 11 of the 1975 Act (and thus of s 31 of the 1985 Act) was or is limited in the way for which Mr Bonney contended. Section 11 of the 1975 Act conferred a reserve power, to be exercised by the minister if he reasonably judged it necessary or desirable to protect tenants from hardship caused by increased or excessive rents. To treat countering inflation as the sole mischief at which s 11 was directed is to fall into the fallacy identified by Lord Simon and Lord Diplock *j* of treating a single identified mischief as the only mischief.

If, contrary to his main submission, the language and context of s 11 of the 1973 Act did not resolve the issue of interpretation in his favour, Mr Bonney submitted that it was appropriate, on the authority of *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, to refer to statements in Parliament which made plain

that the scope of s 11 was intended to be limited in the way for which he contended. Mr Parker, for the ministers, submitted that reference should not be made to Hansard, but also that, if reference were made, it was clear that the scope of s 11 was not intended to be so limited. Thus the threshold question arises whether, in this case, resort to Hansard should be permitted.

In *Pepper v Hart* the House (Lord Mackay of Clashfern LC dissenting) relaxed the general rule which had been understood to preclude reference in the courts of this country to statements made in Parliament for the purpose of construing a statutory provision. In his leading speech, with which all in the majority concurred, Lord Browne-Wilkinson made plain that such reference was permissible only where: (a) legislation was ambiguous or obscure, or led to an absurdity; (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill together, if necessary, with such other parliamentary material as might be necessary to understand such statements and their effect; and (c) the effect of such statements was clear (see [1993] 1 All ER 42 at 61, 64, 69, [1993] AC 593 at 631, 634, 640). In my opinion, each of these conditions is critical to the majority decision. (1) Unless the first of the conditions is strictly insisted upon, the real risk exists, feared by Lord Mackay, that the legal advisers to parties engaged in disputes on statutory construction will be required to comb through Hansard in practically every case (see [1993] 1 All ER 42 at 47, 48, [1993] AC 593 at 614, 616). This would clearly defeat the intention of Lord Bridge that such cases should be rare ([1993] 1 All ER 42 at 49, [1993] AC 593 at 617), and the submission of counsel that such cases should be exceptional ([1993] AC 593 at 597). (2) It is one thing to rely on a statement by a responsible minister or promoter as to the meaning or effect of a provision in a bill thereafter accepted without amendment. It is quite another to rely on a statement made by anyone else, or even by a minister or promoter in the course of what may be lengthy and contentious parliamentary exchanges, particularly if the measure undergoes substantial amendment in the course of its passage through Parliament. (3) Unless parliamentary statements are indeed clear and unequivocal (or, as Lord Reid put it in *Warner v Metropolitan Police Comr* [1968] 2 All ER 356 at 367, [1969] 2 AC 256 at 279, such as 'would almost certainly settle the matter immediately one way or the other'), the court is likely to be drawn into comparing one statement with another, appraising the meaning and effect of what was said and considering what was left unsaid and why. In the course of such an exercise the court would come uncomfortably close to questioning the proceedings in Parliament contrary to art 9 of the Bill of Rights 1689 and might even violate that important constitutional prohibition.

It has been argued that the stringent conditions laid down by the House in *Pepper v Hart* were not satisfied in that very case (see *Bennion on Statutory Interpretation* (3rd edn, 1997) pp 483–485). That is not a view I could accept; there was a difference of judicial opinion when the matter was first argued in the House and there were very clear statements on the point at issue by the responsible minister. But the case turned on a narrow point, the meaning of 'the cost of a benefit' in s 63(2) of the Finance Act 1976. The minister gave what was no doubt taken to be a reliable statement on the meaning of that expression. Here the issue turns not on the meaning of a statutory expression but on the scope of a statutory power. In this context a minister might describe the circumstances in which the government contemplated use of a power, and might be pressed about exercise of the power in other situations which might arise. No doubt the minister would

seek to give helpful answers. But it is most unlikely that he would seek to define the legal effect of the draftsman's language, or to predict all the circumstances in which the power might be used, or to bind any successor administration. Only if a minister were, improbably, to give a categorical assurance to Parliament that a power would not be used in a given situation, such that Parliament could be taken to have legislated on that basis, does it seem to me that a parliamentary statement on the scope of a power would be properly admissible.

I think it important that the conditions laid down by the House in *Pepper v Hart* should be strictly insisted upon. Otherwise, the cost and inconvenience feared by Lord Mackay ([1993] 1 All ER 42 at 48, [1993] AC 593 at 615), whose objections to relaxation of the exclusionary rule were based on considerations of practice not principle, will be realised. The worst of all worlds would be achieved if parties routinely combed through Hansard, and the courts dredged through conflicting statements of parliamentary intention (see [1993] 1 All ER 42 at 61, [1993] AC 593 at 631), only to conclude that the statutory provision called for no further elucidation or that no clear and unequivocal statement by a responsible minister could be derived from Hansard. I would further draw attention to the terms of *Practice Note (Procedure: Reference to Hansard)* [1995] 1 All ER 225, [1995] 1 WLR 192 and *Practice Direction (House of Lords: Petitions for leave to appeal: Supporting documents)* [1993] 1 All ER 573, [1993] 1 WLR 303.

Since, for reasons I have already given, I do not regard the meaning or effect of s 11 of the 1975 Act as ambiguous or obscure or such as to give rise to absurdity, and the unease I felt on reading s 31 of the 1985 Act in isolation has been dispelled by considering s 11 in its social and factual context, I do not for my part find that the first threshold test for resorting to Hansard is met. In this, as in most cases, the statute should be treated as 'the formal and complete intimation to the citizen of a particular rule of the law which he is enjoined, sometimes under penalty, to obey and by which he is both expected and entitled to regulate his conduct' (*Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 at 52, [1993] AC 593 at 619 per Lord Oliver of Aylmerton,). The present case illustrates the dangers of weakening this first threshold test. The House has been referred, as was the Court of Appeal, to a number of statements by several ministers with responsibility for the Bill. Understandably enough, they used different expressions, particularly when responding to points made in debate. Spath Holme have placed particular reliance on statements by ministers linking s 11 of the 1975 Act to inflation and the government's counter-inflation policy. The ministers have placed particular reliance on statements suggesting that the section could be used for other purposes as well. It is hard to judge the significance of these statements without reading the debates to discover what were the points to which ministers were responding. Reading the debates, one finds that the thrust of the Bill was modified and widened during its passage through Parliament. But nowhere did ministers give a categorical assurance that s 11 of the 1975 Act would not be invoked save to counter excessive inflation, and nowhere did ministers attempt to give a comprehensive legal definition of what s 11 meant. In my view, the third threshold test under *Pepper v Hart*, is not satisfied in this case: there was no clear and unequivocal statement to the effect for which Spath Holme contended.

ADDITIONAL POINTS

Before the Court of Appeal and the House Spath Holme relied on a number of additional grounds for impugning the lawfulness of the order. The Court of

Appeal did not accept these arguments, and nor would I. I give my reasons for rejecting them briefly.

Ground 1

This ground rested on the reference in s 31 of the 1985 Act to 'dwellings' and the definition of 'dwelling' in s 38 of the 1985 Act to mean 'a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it ...'

This definition, it was submitted, defined a dwelling in terms of its physical attributes, but the order wrongly restricted rent increases by reference to the characteristics of the tenancy to which the dwelling was subject. The Court of Appeal rejected this approach as too narrow, pointing out that the exclusion in s 32(3) of the 1985 Act was directed to the legal character of the tenancy and not the physical attributes of the dwelling. I agree. There is no reason to constrain the very broad statutory language in the way suggested. The words 'either generally or in relation to any specified description of dwelling' were in my view intended to preclude use of the section to target particular local authorities or landlords.

Ground 2

The order provided, in art 2(1), that where the article applied the amount to be registered as the rent of a dwelling-house under Pt IV of the 1977 Act should not exceed the maximum fair rent calculated in accordance with the formula set out in the article. The amendment made by the schedule to the order modified Sch 11 to the 1977 Act, which governed the process of registration under s 67 of that Act, not the calculation of recoverable rent, a matter governed by Pt III. This, it was submitted, was not permitted by s 31 of the 1985 Act, which related only to the restriction of rent, and effected radical changes which went beyond 'modifying' the 1977 Act.

I cannot accept this argument. The order did not, as was suggested, revoke s 70 of the 1977 Act, which continued to apply where no fair rent had previously been registered and where an increased fair rent did not exceed the maximum laid down by the formula in the order. An order made under the power conferred by s 31(1) of the 1985 Act could properly contain supplementary or incidental provisions, even where these excluded, adapted or modified the 1977 Act. The ministers could no doubt have permitted registration of the fair rent calculated on the modified open market rent basis prescribed by the 1977 Act, while stipulating that no rent in excess of the formula laid down in the order should be payable or recoverable. But this would have called for amendment of s 44(1) of the 1977 Act, and the ministers were in my view entitled to adhere to the rule that the rent recoverable should be the rent registered and no more. I do not think they exceeded their powers in giving effect to this view.

Ground 3

This ground was based on the terms of s 74 of the 1977 Act which gave power to the Secretary of State to make regulations prescribing forms, regulating the procedure to be followed by rent officers and rent assessment committees and 'prescribing anything required or authorised to be prescribed' by Pt IV of that Act. It was provided by sub-s (2) that regulations might contain provisions modifying certain provisions of the 1977 Act, including s 67 and both parts of

Sch 11, but no such regulations were to have effect unless approved by resolution of each House. Other regulations were subject only to annulment. In reliance on these provisions, Spath Holme argued that Sch 11 to the 1977 Act could not be modified in any way save by the affirmative procedure prescribed in s 74 of that Act. It was accordingly not open to the ministers to amend Sch 11 to the 1977 Act under s 31 of the 1985 Act, which provided for annulment by negative resolution and not approval by affirmative resolution.

Again, I cannot accept this argument. The 1985 Act was passed after the 1977 Act. In s 31(2) of the 1985 Act it gave ministers power to exclude, adapt or modify 'any provision made by or under an enactment (whenever passed) relating to rent or the recovery of overpaid rent'. The language could scarcely be broader. Plainly the 1977 Act and Sch 11 to that Act related to rent. An order under s 31 of the 1985 Act could only be made if circumstances arose which justified ministers in making an order under the section. But if they did, Parliament must have intended the ministers' powers to be exercisable subject only to the procedure laid down in s 31(4) of the 1985 Act.

Ground 5

Spath Holme submitted that in making the order the ministers had not taken account of all relevant considerations and had taken account of irrelevant considerations. First, it was argued, ministers had failed to take account of the potent arguments advanced by landlords in opposition to the third option canvassed in the consultation paper of May 1998. Secondly, reliance was placed on certain observations made by ministers, which were said to have betrayed a misconception that the sharp and unexpected increases to which some tenants were subjected had occurred 'despite' the fair rent regime governed by the 1977 Act, whereas in truth they had occurred because that regime had not been correctly implemented in some areas.

I am not persuaded by these arguments. Landlords did indeed have strongly arguable grounds for resisting the government's proposal, but it cannot be said that their interests were ignored. In the annex to the consultation paper the object of the proposed measure was said to be: '... to slow down the rate at which fair rents are increasing for tenants but nevertheless to ensure that there is no disproportionate impact on landlords.'

Under the heading 'Issues of equity or fairness', the question was posed: '... is it fair to landlords to change the fair rent system which was left intact when the Housing Act 1988 was introduced and which they would not have expected to be changed subsequently.'

Having posed the question it cannot be thought that ministers ignored the landlords' answer, disappointed though landlords may be that it was not given greater weight.

Some of the ministerial statements on this subject could have been more felicitously expressed. But the problem of sharp and unexpected rent increases had indeed arisen despite the fair rent regime, since that regime had been in force throughout and the increases would not have occurred had it been faithfully implemented in all areas from the beginning. Ministers did not suggest that the Court of Appeal decisions which had brought the reluctant rent officers and rent assessment committees into line had not given true effect to the fair rent legislation, nor that the general law should be changed. But it was the case that what ministers considered a serious social problem had arisen, even if it should

not have arisen, and their observations are readily understandable in that context. I see nothing to suggest that the ministers had misconceived the source of the problem.

Ground 6

Spath Holme submitted that in making the order the ministers had acted unreasonably, unfairly and disproportionately. A number of complaints were made. The restriction imposed by the order applied across the board, thus giving a benefit to tenants who would have been caused no hardship by the full rental increases as well as those who would. It ignored the relief afforded by housing benefit. It meant that landlords who had already suffered loss through the registration of rents at too low a level were now obliged to give tenants a further subsidy, as a result of errors made by rent officers and rent assessment committees. The interference with registration as well as the rent recoverable was disproportionate. There were figures which showed that the stable door was being locked after the horse had bolted. The order only applied to about half the regulated tenants who had registered rents and made no difference to the remainder. The order breached art 1 of the First Protocol to the convention, as well as arts 13 and 14.

The Court of Appeal considered this submission carefully, and in my opinion were right to reject it. It is an enduring and intractable problem of social policy that those who need relief cannot always be helped without giving relief to those who do not need it. Housing benefit is means tested, and the allocation of public resources is a matter for ministers, not courts. The hardship which the order imposed on landlords was a very relevant consideration, but it was for ministers to judge where the balance between the competing interests of landlords and tenants should be struck. It was not unreasonable to provide that the maximum recoverable rents should be the rents registered. The timing and scope of the order were matters on which the ministers had to form a judgment, and their judgment cannot be stigmatised as perverse. There was no breach of the convention: the European Court of Human Rights has recognised the need for a wide measure of discretion in the implementation of policy in this field, as shown by *Mellacher v Austria* (1989) 12 EHRR 391. Any actions the ministers took, or any failure by the ministers to take action, were bound to be bitterly resented by those who were disadvantaged as a result. That does not mean that the action which the ministers did take in making the order was unreasonable, unfair or disproportionate, disadvantageous to landlords though it certainly was.

ORDER

I would allow the ministers' appeal, quash the order made by the Court of Appeal and dismiss Spath Holme's application for judicial review. In accordance with the terms on which leave to appeal to the House was given, the ministers must pay Spath Holme's costs before the House and the order for costs made in the Court of Appeal will stand.

LORD NICHOLLS OF BIRKENHEAD. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. In agreement with him, I would allow this appeal. The one point on which I part company with him concerns the use of Hansard. On this matter there is a measure of disagreement between your Lordships.

I go back to first principles. The present appeal raises a point of statutory interpretation: what is the ambit of the power conferred on the minister by s 31(1) of the Landlord and Tenant Act 1985? No statutory power is of unlimited scope. The discretion given by Parliament is never absolute or unfettered. Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose: 'the policy and objects of the Act', in the oft-quoted words of Lord Reid in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694 at 699, [1968] AC 997 at 1030. The purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event, whether the purpose is stated expressly or has to be inferred, the exercise is one of statutory interpretation.

Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 at 814, [1975] AC 591 at 613: 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.'

In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides. For instance, an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute. Another, recently enacted, principle is that so far as possible legislation must be read in a way which is compatible with human rights and fundamental freedoms (see s 3 of the Human Rights Act 1998). The principles of interpretation include also certain presumptions. To take a familiar instance, the courts presume that a mental ingredient is an essential element in every statutory offence unless Parliament has indicated a contrary intention expressly or by necessary implication.

Additionally, the courts employ other recognised aids. They may be internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration. Or the aids may be external to the statute, such as its background setting and its legislative history. This extraneous material includes reports of Royal Commissions and advisory committees, reports of the Law Commission (with or without a draft Bill attached), and a statute's legislative antecedents.

Use of non-statutory materials as an aid to interpretation is not a new development. As long ago as 1584 the Barons of the Exchequer enunciated the

so-called mischief rule. In interpreting statutes courts should take into account, among other matters, 'the mischief and defect for which the common law did not provide' (see *Heydon's Case* (1584) 3 Co Rep 7a at 7b, 76 ER 637 at 638). Nowadays the courts look at external aids for more than merely identifying the mischief the statute is intended to cure. In adopting a purposive approach to the interpretation of statutory language, courts seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool.

This is subject to an important caveat. External aids differ significantly from internal aids. Unlike internal aids, external aids are not found within the statute in which Parliament has expressed its intention in the words in question. This difference is of constitutional importance. Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament. This gives rise to a tension between the need for legal certainty, which is one of the fundamental elements of the rule of law, and the need to give effect to the intention of Parliament, from whatever source that (objectively assessed) intention can be gleaned. Lord Diplock drew attention to the importance of this aspect of the rule of law in *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 at 704, [1981] AC 251 at 279–280:

> 'The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely on that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.'

This constitutional consideration does not mean that when deciding whether statutory language is clear and unambiguous and not productive of absurdity, the courts are confined to looking solely at the language in question in its context within the statute. That would impose on the courts much too restrictive an approach. No legislation is enacted in a vacuum. Regard may also be had to extraneous material, such as the setting in which the legislation was enacted. This is a matter of everyday occurrence.

That said, courts should nevertheless approach the use of external aids with circumspection. Judges frequently turn to external aids for confirmation of views reached without their assistance. That is unobjectionable. But the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity. Sometimes external aids may properly operate in this way. In other cases, the requirements of legal certainty might be undermined to an unacceptable extent if the court were to adopt, as the intention to be imputed to Parliament in using the words in question, the meaning suggested by an external aid. Thus, when interpreting statutory language courts have to strike a balance between conflicting considerations.

For some years before 1993 a self-imposed judicial rule precluded use of parliamentary proceedings as an external aid. This exclusionary rule was relaxed by this House in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, so as to permit use of parliamentary materials as an aid to construction where certain conditions are satisfied. One of these conditions is that the legislation must be ambiguous or obscure, or lead to an absurdity (see Lord Browne-Wilkinson [1993] 1 All ER 42 at 69, [1993] AC 593 at 640).

I can see nothing in this formulation or in principle to suggest that the ambiguity or obscurity or absurdity must be of any particular type. The purpose for which a statutory power is conferred is just as much a question of interpretation of the statutory provision as is the meaning of a particular word or phrase. It cannot be right for the courts to look at parliamentary proceedings, if they assist, on the interpretation of a particular word or phrase, but to decline to look at parliamentary proceedings, however much assistance they may give, when deciding, as a matter of interpretation, what was the purpose for which a power was conferred. The point is underlined by noting that, if drawn, this distinction has the consequence that, in the latter type of case, the courts will look at other forms of extraneous material if they assist, such as statements in government white papers, but not at what was said by government ministers in Parliament. This would not be a rational distinction.

Experience has shown that the occasions on which reference to parliamentary proceedings is of assistance are rare. To be of assistance as an external aid, the parliamentary statement relied upon must be clear and unequivocal. Otherwise it is of no real use. Parliamentary statements seldom satisfy this test on the points of interpretation which come before the courts. Increasing awareness of the lack of help provided by parliamentary material will, it is to be hoped, result in counsel being more realistic and more sparing in their references to such material.

As Lord Cooke of Thorndon points out in his speech, this does not mean that the courts will shut out, and not even look at, parliamentary material which one party reasonably contends supports his interpretation of ambiguous legislation. Rather, the courts will consider the material to see whether counsel's contention is well-founded. If the parliamentary statements relied upon are not clear, they are of little or no value and cannot qualify as an external aid in the particular case. They will fail to satisfy the third of Lord Browne-Wilkinson's conditions (see *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 at 69, [1993] AC 593 at 640).

If, however, the statements are clear, and were made by a minister or other promoter of the Bill, they qualify as an external aid. In such a case the statements are a factor the court will take into account in construing legislation which is ambiguous or obscure or productive of absurdity. They are then as much part of the background to the legislation as, say, Government white papers. They are part of the legislative background, *but they are no more than this*. This cannot be emphasised too strongly. Government statements, however they are made and however explicit they may be, cannot control the meaning of an Act of Parliament. As with other extraneous material, it is for the court, when determining what was the intention of Parliament in using the words in question, to decide how much importance, or weight, if any, should be attached to a government statement. The weight will depend on all the circumstances. For instance, the statement might conflict with the principle of interpretation that penal legislation is to be construed strictly.

I turn to the present case. Read by itself, s 31(1) and (2) of the 1985 Act, coupled with its sidenote 'Reserve power to limit rents', suggests that the power thereby conferred is intended to be kept in reserve, available to be used by the minister in unforeseen circumstances when he reasonably considers this is necessary to promote fairness between landlords and tenants of dwellings. But, as so interpreted, the ambit of the power is extremely wide. Indeed, it is the very width of the power, as so interpreted, together with its derivation from the Counter-Inflation Act 1973, that raises questions. One is left in doubt whether, as contended by Spath Holme, there is some narrower interpretation which is to be preferred; for instance, that the power was conferred for use only for counter-inflationary purposes. The legislation is not clear. Thus it satisfies the first precondition for the use of parliamentary materials as an external aid. I have more difficulty over the third precondition (the statement relied upon must be clear). In considering whether a ministerial statement is clear and unequivocal, regard must be had to the circumstances in which it was made. Extempore answers given in the course of vigorous debate in the House or in committee cannot be expected to be as comprehensive and precise as more formal statements. Suffice to say, looking at them overall, the parliamentary statements relied upon in the present case do not contain a clear and unequivocal statement in favour of the interpretation contended for by Spath Holme. That being so, they are not useful as an external aid in support of that interpretation.

LORD COOKE OF THORNDON. My Lords, having had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill, I agree with his conclusion and largely with his reasons; but I wish to add something, mainly about Hansard.

Some passages in the judgment of the Court of Appeal ([2000] 1 All ER 884, [2000] 3 WLR 141) delivered by Stuart-Smith LJ might seem to suggest that in construing s 31 of the Landlord and Tenant Act 1985 the choice is between an unlimited power and a limited one. As no statutory discretion is unlimited, that could not be right. Very probably the Court of Appeal did not mean such a stark contrast, for they did also say that ordinary *Wednesbury* principles (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) would apply. Taken as a whole, their reasoning is consistent with what I believe to be the true view: namely that the choice is between a power limited to making rent restriction orders reasonably capable of being seen to reflect the equities between landlords and tenants of dwellings, on the one hand, and a power limited to making such orders for counter-inflationary purposes, on the other.

Even so, a power conditioned only by landlord and tenant equities is very wide. I think that the Court of Appeal were correct in their view that it was not clear and unambiguous, but in doubt, that Parliament intended such a wide power. 'Ambiguous' is a word not itself free from the quality which it purports to ascribe. The philosopher Sir William Empson famously identified seven types of ambiguity, none of which appears to correspond with ordinary legal usage. In ordinary legal usage, I think that a provision is ambiguous if reasonably open on orthodox rules of construction to more than one meaning. In this sense, I think that s 31(1) and (2) of the 1985 Act, and their forerunners s 11(1) and (2) of the Housing Rents and Subsidies Act 1975, are ambiguous. While today the purposive principle of interpretation is the governing one if available, other

established canons may come into play. They include some referred to by the Court of Appeal and relied on for the landlords in argument there and in your Lordships' House: such as that Parliament does not lightly take the exceptional course of delegating to the executive the power to amend primary legislation; that, when it does so, a restrictive approach to interpretation is legitimate; and that, in the absence of clear language Parliament is presumed not to take away property rights without compensation. As the Court of Appeal said, certain provisions in other legislation designed, by phasing, to alleviate hardship in large rent increases, may also be seen as supporting a restrictive approach to the reserve power.

The Court of Appeal resolved the ambiguity in two ways. First, they thought it clear from both the context of s 11 of the 1975 Act, particularly s 11(4) and (5), and its derivation from s 11 of the Counter-Inflation Act 1973, that the purpose of the reserve power was and is limited to counter-inflation. Like Lord Bingham, I am respectfully unable to agree. The fact that counter-inflationary powers have been abolished and counter-inflationary orders revoked goes no distance towards showing that a replacement power expressed in comprehensive terms in general landlord and tenant legislation is limited to counter-inflation.

The second and alternative way in which the Court of Appeal resolved the ambiguity was by reference to the statements of responsible ministers when the 1975 Act was going through Parliament. They relied on *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593. My Lords, for the reasons to be given later herein, while not sharing their conclusions I think that the Court of Appeal were well entitled to refer to Hansard. Moreover the ministerial statements in the House of Commons and the House of Lords quoted by the Court of Appeal do provide considerable support for a restricted intention:

> '... a reserve power of a general counter-inflationary nature ... It is, of course, disproportionate in counter-inflation terms ... This power is necessary on broad grounds of Government economic policy, and is similar to the power in the Counter-Inflation Act under which the current rent freeze was imposed.' (See the quotations appearing more fully in [2000] 1 All ER 884 at 899–890, [2000] 3 WLR 141 at 158.)

But when these statements are read together with others made by the government spokesmen in Parliament, they cease to be unequivocal. The Bill which was enacted in 1975 was originally confined to local authorities. In opening the debate in the House of Commons on the second reading of the Bill, the Secretary of State for the Environment (Mr Anthony Crosland) said: 'With this short Bill the Government aim to cut the throat of the Tory Housing Finance Act at a stroke' (881 HC Official Report (5th series) col 904). It is a statement suggesting a difference of social policy rather than a concern limited to inflation. His subsequent speech did include reference to counter-inflationary policy, but a main theme is illustrated by the following passage:

> 'So this Bill restores to local authorities their power to set rents, subject only to the condition that these be "reasonable". The concept of "reasonable" rents was in force for 50 years up to the 1972 Act, and is well understood. It means that councils must strike a reasonable balance between the various interests in their communities. At the lower end, they cannot set rents so low that an unreasonable burden is laid on ratepayers. At the top end, they cannot set rents so high that they actually make a profit out of the provision

of council housing. Within those very broad limits, the decision is theirs. This provision illustrates in the sharpest form the difference in philosophy between the Opposition and ourselves. The authors of the 1972 Act envisaged a situation where many councils would make an actual profit on their housing—a profit on housing which contains an important social service element. That concept—the generation of profit out of socially necessary housing—is one which we on this side of the House reject, and which this Bill will make impossible.' (See 881 HC Official Report (5th series) cols 905–906.)

The Under-Secretary of State, Mr Kaufman, after mentioning subsidies to local authorities gave similarly general explanations of the purpose of the power, such as:

'However, we are concerned that there might be circumstances in which it appeared that rent increases were becoming disproportionate. We want this power to cover that circumstance. We specifically do not wish to take power to deal with an individual authority. We believe that, in view of the basis upon which we drafted the Bill, and bearing in mind, without being too vainglorious, what we might describe as the philosophy behind the Bill, it would be entirely wrong for the Government who have sought to restore to individual local authorities the power to fix rents then to descend upon one local authority and say, "You are behaving badly. Therefore, we are going to interfere with your rent-fixing". We shall not do that. If a pattern emerged that we regarded as dangerous, we should exercise our fall-back power in respect of that pattern. But an individual authority—not even the authority responsible for Paddington—would certainly not trigger off the use of that power.' (See HC Official Report, SC A (Housing Rents and Subsidies Bill), 3 December 1974, col 133.)

The Bill was amended to extend to private sector rents for dwellings, and on 14 January 1975 Mr Kaufman said:

'I should like to repeat and underline the assurances I gave in Committee about the way in which the power will be used. I cannot anticipate the use of reserve powers since the use of a reserve power cannot be anticipated. On the other hand, the fact that we are asking the House to agree to amendments extending that reserve power to the private sector means that we envisage the possibility that it will be used. One cannot anticipate the circumstances.' (See 884 HC Official Report (5th series) col 342.)

Self-evident though it might seem, this statement is the clearest evidence that the power was intended by the government to cover unforeseeable circumstances generally. In the House of Lords on 27 January 1975 Lord Melchett, who moved the second reading of the Bill, was also cautious:

'The noble Baroness asked me about the reserve powers in Clause 2 of the Bill. She wished to know why this power could not be left in the Counter-Inflation Act. The answer is that a power concerning rents is much better included in a housing Act. Under the Counter-Inflation Act, the power would expire early in 1976 and, since it is not possible to say whether the need for this power will expire at that date or if it will need to be continued for longer, the Government feel that it is right to put the power

into the present Bill. I think that I was also asked in what circumstances this power might be used. The power must be flexibly worded in order to cope with all situations in which it might be needed. In the private sector it could be used to deal with particular categories of dwelling, and in the public sector, where landlords are non-profit making bodies, the same problem does not arise. Clause 11(5) limits the power to specifying a description of authorities or dwellings—in other words, the use of this power in the public sector could not be aimed at an individual local authority without going beyond the plain intention of Clause 11(5).' (See 356 HL Official Report (5th series) cols 359–360.)

In the light of such statements it is difficult to agree with the Court of Appeal that it could not be clearer that the power was intended to be limited to counter-inflationary purposes. Neither in the legislative history nor in the parliamentary history can I find enough to justify reading down the power in the manner for which the landlords contend. The true interpretation, in my view, is the wide but not unlimited first alternative previously mentioned. The reserve power can legitimately be used to temper the effect of unexpected rent increases for tenants on fixed incomes, even though the rises result from a correct reinterpretation of the law rather than from general inflation. It is highly unlikely that the responsible ministers would have meant to exclude such circumstances from the ambit of the power.

Reference to Hansard does not often help the courts with issues of statutory interpretation, but experience has shown that it does so occasionally. In this instance it is as helpful as the consultation paper of May 1998 (*Limiting Fair Rent Increases: A Consultation Paper*: Department of the Environment, Transport and the Regions), summarised by my noble and learned friend Lord Bingham, in relation to the Rent Acts (Maximum Fair Rent) Order 1999, SI 1999/6. Not being persuaded that there is any good reason why the courts should deny themselves the advantage of such sources, I would adopt the opening passage of the speech of Lord Griffiths in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 at 49–50, [1993] AC 593 at 617:

'My Lords, I have long thought that the time had come to change the self-imposed judicial rule that forbade any reference to the legislative history of an enactment as an aid to its interpretation. The ever-increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament?'

Like Lord Griffiths, I agree with Lord Browne-Wilkinson in the same case ([1993] 1 All ER 42 at 69, [1993] AC 593 at 634) that ambiguity is one condition of judicial resort to Hansard (and in the present case the only relevant one). Again like Lord Griffiths, I think that ambiguity may fairly be said to exist even if, without Hansard, one would lean towards the interpretation supported by Hansard. As in the present case, it is reassuring, when considering whether sweeping general statutory language can properly be cut down by interpretation, to find a wide intention confirmed by ministerial statements in parliamentary debates.

In that respect the present case is analogous to *Marac Life Assurance Ltd v IR Comr* [1986] 1 NZLR 694, cited in the discussion in *Bennion on Statutory Interpretation* (3rd edn, 1997) pp 520–521. There an issue was whether the proceeds of certain short-term life insurance bonds were caught by the Income Tax Amendment Act 1983 taxing interest on money lent. The language of the new Act was wide, but traditionally life insurance had been treated in taxation legislation as a separate and self-contained topic. A court of five accepted that the new Act was not intended to depart from that pattern. Each judge in the Court of Appeal found confirmation in, or at least referred to, a financial statement presented by the responsible minister to the House of Representatives in moving the second reading of the Bill (see [1986] 1 NZLR 694 at 701–702, 708, 713, 716, 718).

As for the argument of expense, in some cases time may be more usefully spent in looking up Hansard than in compiling a dossier of general propositions and authorities on statutory interpretation or administrative law familiar to every judge.

It is necessary to distinguish two things often treated as if they were one. First there are cases in which the court can in the end derive real help from Hansard, even if it is not necessarily decisive help. I think that this case is an example. Hansard shows that the courts will not be thwarting a clear intention of the legislators by holding that the wider interpretation is correct. Secondly there is the question whether it is proper for counsel to cite Hansard. A practice of constant citation is unacceptable to the courts. Counsel must be expected to use their discretion. In this case I think that counsel for the landlords was fully justified in his citations. After all, they convinced the Court of Appeal. To shut out either party from relying on Hansard would have been, in my opinion, contrary to natural justice.

Accordingly I too would allow the appeal.

LORD HOPE OF CRAIGHEAD. My Lords, my noble and learned friend Lord Bingham of Cornhill, whose speech I have had the advantage of reading in draft, has described the circumstances in which the Rent Acts (Maximum Fair Rent) Order 1999, SI 1999/6, came to be made and the background to the arguments which Spath Holme Ltd have advanced to the effect that s 31 of the Landlord and Tenant Act 1985 did not give the ministers power to make the order. For the like reasons I too would allow the appeal by the ministers and dismiss Spath Holme's application for judicial review. But the case has raised important questions of statutory construction with regard to the scope of the rule-making power in s 31 of the 1985 Act, and I should like to add these observations.

The primary rule is that a discretion which is conferred by Parliament on a minister must be taken to have been conferred on him with the intention that he should use it to promote the policy and objects of the Act (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694 at 699, [1968] AC 997 at 1030 per

Lord Reid). No minister who seeks to exercise a discretion which legislation has conferred on him can claim that the discretion, however widely expressed, is unfettered or unlimited. This is essential to the maintenance of a sound relationship between the executive and the legislature in a democracy. Discretionary powers may be sought from Parliament by the executive. But decisions as to the extent of those powers and the purpose for which they may be exercised rest solely with Parliament. They depend on the meaning and effect of the legislation which confers the power. This is a matter for Parliament, not the executive. So when issues are raised as to the scope of the discretion, as they have been in this case, it is necessary to construe the Act. The purpose of doing so is to discover the true intent and meaning of the provision by which the discretion has been conferred by Parliament on the minister.

In some cases the point at issue will turn on the meaning to be given to a word or phrase in the enabling statute which appears at first sight to be ambiguous. In other cases the search for the true intent and meaning of the provision will raise broader considerations than the meaning to be given to particular words or phrases. The words or phrases which the enabling provision has used may in themselves be perfectly clear and unambiguous. On the face of it the discretion may appear to be very wide. The question will then be whether the width which the enabling provision bears according to its ordinary and natural meaning is limited by the context in which it appears when the Act is read as a whole.

In the present case none of the words or phrases which Parliament has used in s 31(1) of the 1985 Act appear to me to be ambiguous. The problem arises simply because no mention is made in the subsection of the purpose for which the power has been given or the circumstances in which it may be exercised. There is a sidenote which reads 'Reserve power to limit rents'. It may be assumed from this that the intention was that the power should be used seldom, if at all, and then only when other means of restricting or limiting rents had proved to be ineffective. But this tells one nothing about the purpose for which the power was given or the circumstances when it might be exercised. The answer to the question which has been raised in this case about the scope of the power must therefore be found by examining the wider context.

Issues of some difficulty and importance have however been raised as to how far it is proper to go in the search for guidance as to the policy and objects of the 1985 Act. On the one hand the ministers say that sufficient guidance is to be found in the 1985 Act itself and that, notwithstanding the fact that this is a consolidating enactment, it is both unnecessary and illegitimate to examine the legislative history by scrutinising the consolidated enactments. They also say that it would not be appropriate in this case to refer, on the authority of *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, to statements reported in Hansard. The argument for Spath Holme on the other hand is that the power may be used only for counter-inflationary purposes. It is based upon propositions which are drawn from an analysis of the language and history of the consolidated enactments and of material which is to be found in Hansard.

There are a number of important signposts that are to be found within the 1985 Act itself which indicate the context in which this reserve power was given to the ministers. Section 31(1) of that Act confines the power to restricting or preventing increases of rent to rent for 'dwellings'. Section 32(3) of the 1985 Act provides that the power does not apply to a dwelling forming part of a tenancy to which Pt II of the Landlord and Tenant Act 1954 applies because the premises are

occupied for business or professional purposes. The 1985 Act as a whole relates to the housing of tenants in the public and private sectors. Its primary concern is the regulation of the relationship between landlord and tenant, with a view to achieving fairness for the tenant. It deals with matters such as the provision of information to tenants, the provision of rent books, implied terms as to fitness for habitation and obligations of repair. It does not seek to replace or alter the systems for security of tenure and for the assessment of fair rents which are set out in the Rent Act 1977. But, taken overall, the context in which s 31 of the 1985 Act appears is one in which the primary concern is the maintenance of fairness as between landlord and tenant in regard to the letting of dwelling-houses in both the public and the private sector for housing. These are matters which fall within the realm of housing policy. There is nothing here to indicate that either the 1985 Act as a whole or s 31 of the 1985 Act in particular was concerned in any respect with counter-inflation policy.

The first question then is whether it is proper to look back to the consolidated legislation from which s 31 of the 1985 Act was derived in order to derive further guidance as to the purpose for which the section was enacted. There is no doubt that, as general rule, it is not permissible to construe a consolidating enactment by reference to the repealed statutes which that enactment has consolidated (see *Maunsell v Olins* [1975] 1 All ER 16 at 27, [1975] AC 373 at 392 per Lord Diplock and Lord Simon of Glaisdale). In *Farrell v Alexander* [1976] 2 All ER 721 at 725, [1977] AC 59 at 72 Lord Wilberforce said that he agreed with and endorsed the principle that it is quite wrong in every case where a consolidation Act is under consideration, as a matter of course, to look back through the history of the various provisions that have been consolidated. On the other hand an exception may be made where words used in the consolidation Act are ambiguous. In that event, as Lord Diplock and Lord Simon recognised in *Maunsell v Olins* ([1975] 1 All ER 16 at 27, [1975] AC 373 at 392–393), recourse may be had to any difference in the wording of the corresponding provision in the repealed enactment as an aid to the construction of those words. As Lord Simon said in *Farrell v Alexander* [1976] 2 All ER 721 at 735, [1977] AC 59 at 84, if the primary approach to construction discloses an ambiguity in a consolidation Act, that may sometimes (though rarely) be resolved by examination of the superseded legislation. But I do not think that that is the situation in the present case. It seems to me that there is no ambiguity in the words used in s 31 of the 1985 Act.

Another situation in which, in *Farrell v Alexander*, Lord Simon said it was permissible for the court to construe a consolidation Act by reference to a consolidated enactment—also described by him as rare—is where the purpose of a statutory word or phrase can only be grasped by an examination of the social context in which it was first used. But I do not think that any of the words or phrases used in s 31 of the 1985 Act fall into that category. The argument which has been advanced for Spath Holme in this case is not directed to any ambiguity in the meaning of words or phrases used in the consolidation Act. It seeks instead to limit the scope of the discretion which that section confers on the ministers by reference to a policy and to objects for which the sole basis in statutory language is to be found in the repealed enactments which do not appear anywhere in the consolidation Act.

I think that it is highly doubtful whether the exercise which Spath Home have invited your Lordships to carry out is legitimate in these circumstances. But even if it was I do not think that it produces the result that Spath Holme have

contended for. The general power to make orders restricting or preventing increases in rent which was contained in s 11 of the Counter-Inflation Act 1973, which replaced the power conferred by s 2(4) of the Counter-Inflation (Temporary Provisions) Act 1972, was enacted as part of a series of measures to enable the government to control inflation. The 1972 and 1973 Acts applied to the whole of the United Kingdom, including Scotland and Northern Ireland. This was consistent with the fact that inflation is a phenomenon which affects the whole of the country's economy. It does not respect internal geographical boundaries. The power to make orders restricting or preventing increases in rents adopted the same approach, as it applied to rents generally as one of a variety of species of income that needed to be dealt with in order to control inflation. It was not confined to rents payable by the tenants of dwelling-houses. Measures were included to ensure that orders made under this legislation were of a temporary nature, on the view that the restrictions would no longer be needed once inflation was under control.

All that was changed when s 11(1) of the Housing Rents and Subsidies Act 1975 was enacted. This was a power which related only to the amount of rent payable on lettings of dwelling houses. The 1975 Act applied to England and Wales only (s 17(10)). And the power was not subject to any time limits. Although counter-inflation legislation was still in force when that Act was enacted and, as s 11(4) of the 1975 Act indicates, the reserve power could have been used at that time in order to help to control inflation within the economy generally, these important alterations in the structure and content of the legislation indicate that the policy reasons for which the power could be used were no longer to be confined to this. The inference which I would draw from the enactment of this power in the 1975 Act is that it was enacted for reasons of housing policy with a view to the power being exercised by housing ministers, not for counter-inflationary reasons which would be of concern primarily to ministers responsible for economic policy.

The context in which the power conferred by s 11 of the 1975 Act, which has now been consolidated into the 1985 Act, was enacted is therefore quite different from that in which earlier powers were enacted as part of the counter-inflation legislation. The logical conclusion of the argument that Spath Holme seek to advance is that s 31 of the 1985 Act has been preserved in the consolidation Act as a relict from the counter-inflation legislation, and that it may only be used in the circumstances which were envisaged when that legislation was enacted. But the whole of the statutory framework which was designed to deal with the effects of inflation in the economy generally has disappeared. The current legislation provides no yardstick, by way of definition or otherwise, which would enable the ministers to identify the parameters within which the power was available to them to be used if its use was to be confined to counter-inflationary purposes. I am not willing to accept that it was the intention of Parliament when it enacted s 31 of the 1985 Act that the purpose for which the power might be used was so limited. For these reasons I do not consider that it is helpful in this case, even if it were legitimate, to refer to the context in which the repealed legislation was enacted for the purpose of defining the circumstances in which the power in the consolidation Act may be exercised.

Then there is the question whether it is proper to examine the statements made by ministers during the passage of the 1975 Act through Parliament as reported in Hansard. Here again I think that it is, at best, highly doubtful whether

in this case this exercise is legitimate. My own view is that it is not. It is important to appreciate the purpose for which your Lordships have been invited to undertake the exercise. It is not to construe words used in the legislation which are said to be ambiguous or obscure or which, having regard to their ordinary meaning, would lead to absurdity (see *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 at 69, [1993] AC 593 at 640 per Lord Browne-Wilkinson). Its purpose is to identify the reasons of policy for which the discretionary power to make orders restricting or preventing increases in rents was sought to be obtained from Parliament by the executive. It is not the language used by the draftsman that is in issue here, but what was in the mind of the minister.

In my opinion there are sound reasons of principle for rejecting the argument that statements made by ministers in Parliament may be used to identify the policy and objects of an enactment for the purpose of identifying the scope of a discretionary power which Parliament has conferred on the executive. As Lord Reid made clear in *Padfield*'s case ([1968] 1 All ER 694 at 699, [1968] AC 997 at 1030), the policy and objects of the Act must be determined by construing the Act. The underlying rule is that it is the intention of Parliament that defines the policy and objects of the Act, not the purpose or intention of the executive. The law-making function belongs to Parliament, not to the executive.

The limited exception to the general rule that resort to Hansard is inadmissible which was recognised in *Pepper v Hart* is available to prevent the executive seeking to place a meaning on words used in legislation which is different from that which ministers attributed to those words when promoting the legislation in Parliament. That was the situation which appears to have arisen in that case where, as Lord Bridge of Harwich observed ([1993] 1 All ER 42 at 50, [1993] AC 593 at 616), the argument which was before the House on the first hearing of the appeal raised an acute question as to whether it could be right to give effect to taxing legislation which was capable of two possible interpretations in such a way as to impose a tax which the Financial Secretary to the Treasury had assured the House of Commons it was not intended to impose.

No such issue has been raised in this case. As I have already sought to explain, the passages in Hansard to which your Lordships have been referred deal not with the meaning of words or possible interpretations of expressions that were or might be ambiguous but with statements made by ministers as to matters of policy. I consider that to permit resort to Hansard as a source for material of that kind to define the scope of a discretionary power conferred by Parliament would be to extend the decision in *Pepper v Hart* well beyond its proper limits. I respectfully agree with my noble and learned friend Lord Bingham, for all the reasons that he has given, that it is important that the conditions laid down by the House in that case should be strictly insisted upon. I also agree with him that, if a minister were to give a categorical assurance to Parliament that a discretionary power would not ever be used in a given set of circumstances, that statement would be admissible against the executive in order to control its exercise. But I also think that it is important to stress that as matter of principle the decision in *Pepper v Hart* should be confined to cases where the court is concerned with the meaning that is to be given to the words used in legislation by Parliament. It would be contrary to fundamental considerations of constitutional principle to allow it to be used to enable reliance to be placed on statements made in debate by ministers about matters of policy which have not been reproduced in the enactment. It is the

words used by Parliament, not words used by ministers, that define the scope within which the powers conferred by the legislature may be exercised. *a*

LORD HUTTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill and I gratefully adopt his account of the background giving rise to this appeal.

The Court of Appeal rightly observed in its judgment ([2000] 1 All ER 884, [2000] 3 WLR 141) that by far the most important ground of Spath Holme Ltd's application was the following one: *b*

> '27. The order has not been made to further the purpose with which s 31 of the 1985 Act was enacted namely to counter general inflation within the economy. The purpose of the order is to achieve an extraneous purpose namely to alleviate the perceived hardship or unfairness to one comparatively small class of tenants produced not by general inflation but by recent decisions prescribing the lawful and proper methods of determining fair rents. This use of the order is wholly outside the intention with which the reserve power was originally introduced into s 11 of the 1973 Act, continued into s 11 of the 1975 Act and consolidated into s 31 of the 1985 Act.' (See [2000] 1 All ER 884 at 893, [2000] 3 WLR 141 at 151.) *c d*

The Landlord and Tenant Act 1985 is a consolidation Act, its long title stating:

> 'An Act to consolidate certain provisions of the law of landlord and tenant formerly found in the Housing Acts, together with the Landlord and Tenant Act 1962, with amendments to give effect to recommendations of the Law Commission. [30th October 1985]' *e*

In its judgment the Court of Appeal cited a number of authorities on the construction of consolidation Acts. Whilst there is some variation in the speeches in the leading cases on the proper approach to the construction of a consolidation Act, I consider that the underlying principle which emerges from the cases is that in construing a consolidation Act a court should not have regard to earlier enactments unless the language of the Act is unclear or ambiguous or there is something in the context of the Act or the relevant section which causes the court to consider that it should look for guidance to an earlier enactment or enactments. *f*

In *Maunsell v Olins* [1975] 1 All ER 16, [1975] AC 373 Lord Simon of Glaisdale delivered a speech which he had prepared in collaboration with Lord Diplock. He said: *g*

> 'It is only where the actual words used in the consolidation Act are ambiguous (in the sense of being fairly susceptible of bearing more than one meaning in their context and register) that recourse may be had to any difference in phraseology of the corresponding provision in the repealed enactment as an aid to their construction.' (See [1975] 1 All ER 16 at 27, [1975] AC 373 at 392.) *h*

Lord Simon ([1975] 1 All ER 16 at 27, [1975] AC 373 at 393) also expressly warned against a court narrowing the meaning of a statutory provision by having regard to the mischief at which an earlier statutory provision was aimed, and he said: *j*

> 'The rule in *Heydon's* case ((1584) 3 Co Rep 7a, 76 ER 637) itself is sometimes stated as a primary canon of construction, sometimes as secondary (i e available

in the case of an ambiguity): c f Maxwell on Interpretation of Statutes ((12th edn, 1969) pp 40, 96), with Craies on Statute Law ((7th edn, 1971) pp 94, 96). We think that the explanation of this is that the rule is available at two stages. The first task of a court of construction is to put itself in the shoes of the draftsman—to consider what knowledge he had and, importantly, what statutory objective he had—if only as a guide to the linguistic register. Here is the first consideration of the "mischief". Being thus placed in the shoes of the draftsman, the court proceeds to ascertain the meaning of the statutory language. In this task "the first and most elementary rule of construction" is to consider the plain and primary meaning, in their appropriate register, of the words used. If there is no such plain meaning (i e if there is an ambiguity), a number of secondary canons are available to resolve it. Of these one of the most important is the rule in *Heydon's* case. Here, then, may be a second consideration of the "mischief". In the instant case, however, we ourselves find no reason to resort to any secondary canon.' (See [1975] 1 All ER 16 at 29, [1975] AC 373 at 395.)

In *Farrell v Alexander* [1976] 2 All ER 721, [1977] AC 59 Lord Wilberforce agreed with the approach stated by Lord Simon and Lord Diplock and referring to *Maunsell v Olins* he said:

'Lord Diplock and Lord Simon of Glaisdale, on the other hand, thought the word was clear and for that reason considered that it was not legitimate to go back into the legislative history. If I may say so, on that hypothesis I would agree with them. I would agree and endorse the principle that it is quite wrong that, in every case where a consolidation Act is under consideration, one should automatically look back through the history of its various provisions, and the cases decided on them, and minutely trace the language from Act to Act—a process which, incidentally, has led to an argument of four days' length in this House. In recent times, because modern statutes have become so complicated, the courts, myself included, (c f *IRC v Joiner* [1975] 3 All ER 1050, [1975] 1 WLR 1701), rather too easily accept this process, whether under persuasion of counsel or from their own scholarly inclinations. But unless the process of consolidation, which involves much labour and careful work, is to become nothing but a work of mechanical convenience, I think that this tendency should be firmly resisted; that self-contained statutes, whether consolidating previous law, or so doing with amendments, should be interpreted, if reasonably possible, without recourse to antecedents, and that the recourse should only be had when there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve.' (See [1976] 2 All ER 721 at 725–726, [1977] AC 59 at 72–73.)

See also Lord Simon [1976] 2 All ER 721 at 733, 735, [1977] AC 59 at 82, 84.

Lord Edmund-Davies ([1976] 2 All ER 721 at 746, [1977] AC 59 at 97) also stated that the harking back approach is only permissible if the wording of the section is ambiguous and its ambit obscure.

In the light of these judgments I turn to consider the wording of s 31 of the 1985 Act which provides:

'(1) The Secretary of State may by order provide for—(a) restricting or preventing increases of rent for dwellings which would otherwise take place, or (b) restricting the amount of rent which would otherwise be payable on

new lettings of dwellings; and may so provide either generally or in relation to any specified description of dwelling.

(2) An order may contain supplementary or incidental provisions, including provisions excluding, adapting or modifying any provision made by or under an enactment (whenever passed) relating to rent or the recovery of overpaid rent.

(3) In this section—"new letting" includes any grant of a tenancy, whether or not the premises were previously let, and any grant of a licence; "rent" includes a sum payable under a licence, but does not include a sum attributable to rates or, in the case of dwellings of local authorities or new town corporations, to the use of furniture, or the provision of services; and for the purposes of this section an increase in rent takes place at the beginning of the rental period for which the increased rent is payable.

(4) An order under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.'

In my opinion there is nothing ambiguous or unclear in the words of the section and I think, with respect, that the Court of Appeal fell into error because it did not first ask itself the question whether the words were unclear or ambiguous; rather it moved on to consider at the outset whether Parliament might have intended a more restricted power than the power which appeared to be given by the words of the section and it posed the question:

'... whether it is clear and unambiguous that Parliament intended to confer an unlimited and unrestricted power (other than the restraints involved in the application of *Wednesbury* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) principles); or whether the matter is in doubt. If it is in doubt the court is entitled to look at the legislative history. In our judgment the matter is not clear; on the contrary it is doubtful.' (See [2000] 1 All ER 884 at 898, [2000] 3 WLR 141 at 157 (para 42).)

But if the words of the section are clear the speeches in *Maunsell v Olins* and *Farrell v Alexander* counsel against the harking back to earlier legislation unless there is something in the context of the consolidation Act or the section which causes the court to consider that it should do so.

There can be no precise test to apply to enable a court to determine whether the context of an Act or a section is such that it should look back at an earlier provision notwithstanding that the words of the section which it is considering are clear—in essence the question is, as Lord Edmund-Davies stated in *Farrell v Alexander* [1976] 2 All ER 721 at 746, [1977] AC 59 at 97, whether its ambit is obscure. In *DPP v Schildkamp* [1969] 3 All ER 1640, [1971] AC 1, upon which Mr Bonney QC for Spath Holme Ltd relied, Lord Upjohn considered that in construing s 332(3) of the Companies Act 1948 it was appropriate to look back at a provision in the earlier Companies Act 1928, and stated:

'The argument of counsel for the Crown was straightforward. Reading sub-s. (3) he submits truly that its terms are perfectly clear and simple. There is no ambiguity; the subsection clearly applies so as to create an offence on the part of a person knowingly carrying on a business—with intent to defraud creditors or creditors of any other person or for any fraudulent

purpose, and the circumstance that the company may subsequently have been wound up is quite irrelevant. The subsection plainly applies as a matter of language to the case where there has been no subsequent winding-up. Looking at that subsection alone I agree. Naturally he relies on the contrast between sub-s. (1) where there is a reference to winding-up and sub-s. (3) where there is not; a point to which I shall return later. But, my Lords, this in my opinion is the wrong approach to the construction of an Act of Parliament. The task of the court is to ascertain the intention of Parliament; one cannot look at a section, still less a subsection, in isolation, to ascertain that intention; one must look at all the admissible surrounding circumstances before starting to construe the Act.' (See [1969] 3 All ER 1640 at 1652, [1971] AC 1 at 22–23.)

And:

'Nevertheless, in my opinion, the problem is essentially a question of construction of the Act of 1928 and not the Act of 1948 for it was the former that created the new concept of making directors liable for the fraudulent trading of a company and the true scope and ambit of that liability, whether civil or criminal must be determined by considering the terms of that Act and not of the subsequent consolidation Acts.' (See [1969] 3 All ER 1640 at 1653, [1971] AC 1 at 23–24.)

But in my opinion in the present case there is nothing in the context of the 1985 Act or s 31 which justifies the court in looking back at provisions in the Counter-Inflation Acts of 1972 and 1973 and the Housing Rents and Subsidies Act 1975.

The 1985 Act contains a number of sections designed to give protection to the tenants of dwellings. One group of sections requires landlords to give certain information to tenants, another group of sections requires landlords to provide rent books to tenants, another group of sections implies terms as to the fitness of houses for human habitation, another group of sections imposes obligations on lessors to keep houses in repair, and another group of sections imposes limitations on service charges for flats. Therefore when one comes to consider s 31 of the 1985 Act in the context of the other provisions of the Act, it appears to me that the power given to the Secretary of State by order to restrict or prevent increases of rent is given to ensure fairness to tenants. Moreover, I find nothing which would cause a court to feel a sense of concern about such a power and to cause it to think that it should consider earlier legislation to find guidance as to the ambit of the power, particularly bearing in mind that since the first Rent Act in 1915 Parliament has frequently enacted provisions to protect tenants of dwellings from the obligation to pay rents which would impose an unfair burden upon them. Therefore I am of opinion that there is nothing in the context of the 1985 Act or of s 31 which would provide a reason for a court to look back at earlier legislation and to infer from it that the apparent width of the power given by the words of s 31 is to be restricted to the counter-inflationary purpose for which the earlier statutory provisions were enacted. I am further of opinion that the presumptions and provisions to which the Court of Appeal refers in the latter part of para 42 of its judgment ([2000] 1 All ER 884 at 899, [2000] 3 WLR 141 at 157) are not of sufficient weight in the context of the 1985 Act to restrict the clear words of the section. And as I consider that there is no doubt as to the scope of the power given by the section there is no need for the restrictive approach to

subordinate legislation taken by the Court of Appeal in *McKiernon v Secretary of State for Social Security* [1989] CA Transcript 1017; sub nom *McKiernon v Chief Adjudication Officer* (1989) Times, 1 November and approved by this House in *Britnell v Secretary of State for Social Security* [1991] 2 All ER 726 at 731–732, [1991] 1 WLR 198 at 204.

Therefore in restricting the ambit of s 31 of the 1985 Act I consider that the Court of Appeal was not observing the warning given by Lord Simon and Lord Diplock in *Maunsell v Olins* [1975] 1 All ER 16 at 27, [1975] AC 373 at 393:

> 'For a court of construction to constrain statutory language which has a primary natural meaning appropriate in its context so as to give it an artificial meaning which is appropriate only to remedy the mischief which is conceived to have occasioned the statutory provision is to proceed unsupported by principle, inconsonant with authority and oblivious of the actual practice of parliamentary draftsmen.'

I further consider that Spath Holme Ltd does not derive assistance from the principle applied in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694, [1968] AC 997 and stated by Professor Sir William Wade QC in *Administrative Law* (5th edn, 1982) pp 355–356 in a passage approved by this House in *Tower Hamlets London BC v Chetnik Developments Ltd* [1988] 1 All ER 961 at 965–966, [1988] AC 858 at 872:

> 'The common theme of all the passages quoted is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely—that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended.'

It is apparent that the Court of Appeal was influenced in its decision by this principle and the court stated:

> 'In *Padfield*'s case the House of Lords were not facing the same problem as we do in this case. Although the Agricultural Marketing Act 1958 was a consolidating Act, it was perfectly possible to find the purpose for which the power was conferred from that Act alone because it contained the whole of a comprehensive scheme. There is nothing in that case or in *Julius*'s case (*Julius v Bishop of Oxford* (1880) 5 App Cas 214, [1874–80] All ER Rep 43) which justifies the conclusion that, where the purpose cannot be derived from the Act itself or there is considerable doubt whether the apparently unlimited power is intended to be so, ordinary principles of construction cannot be prayed in aid.' (See [2000] 1 All ER 884 at 896, [2000] 3 WLR 141 at 154 (para 40).)

But in my opinion Mr Parker QC was correct in submitting, on behalf of the Secretaries of State, that an argument based upon this principle ought to be advanced by reference to the purpose to be derived from the particular statute in which the discretionary power is enacted. Thus Lord Reid said in *Padfield*'s case:

> 'Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole, and

a construction is always a matter of law for the court.' (See [1968] 1 All ER 694 at 699, [1968] AC 997 at 1030.)

And referring to *Julius v Bishop of Oxford* (1880) 5 App Cas 214, [1874–80] All ER Rep 43 Lord Pearce said: 'That decision rested on the construction of the particular Act and it made clear that in the context of an Act is to be found the answer to the question how a power given by it is to be exercised.' (See [1968] 1 All ER 694 at 714, [1968] AC 997 at 1052.)

Therefore for the reasons which I have sought to give, I respectfully consider that the Court of Appeal erred when it expressed the opinion that it could look for a purpose in earlier legislation and use such a purpose to restrict the words of s 31 of the 1985 Act which, in my opinion, are clear and unambiguous.

c Because I am of opinion that the words of s 31 of the 1985 Act are clear and unambiguous I further consider that this case does not satisfy the first threshold test stated by Lord Browne-Wilkinson in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 at 69, [1993] AC 593 at 640, with the agreement of the other members of the House, Lord Mackay of Clashfern LC dissenting, and that therefore it was d inappropriate to refer to statements in Parliament in this case. I respectfully agree with my noble and learned friend Lord Bingham that the conditions laid down by the House in *Pepper v Hart* should be strictly adhered to; otherwise in many cases time will be taken up and costs will be incurred without assistance to the court in its task of construction by references by counsel to statements by ministers and by the weighing of those statements by the court.

e I think that where Lord Browne-Wilkinson referred to legislation which is 'ambiguous or obscure' he was referring to ambiguity or obscurity in the wording of a statutory provision, not to possible ambiguity as to the purpose for which Parliament gave a power. In my opinion this view finds support in the speeches of Lord Griffiths and Lord Oliver of Aylmerton. Lord Griffiths said:

f 'The ever-increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to g consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry.' (See [1993] 1 All ER 42 at 49–50, [1993] AC 593 at 617.)

Lord Oliver said:

h 'It is, however, important to stress the limits within which such a relaxation is permissible and which are set out in the speech of my noble and learned friend. It can apply only where the expression of the legislative intention is genuinely ambiguous or obscure or where a literal or prima facie construction leads to a manifest absurdity and where the difficulty can be j resolved by a clear statement directed to the matter in issue.' (See [1993] 1 All ER 42 at 52, [1993] AC 593 at 620.)

I consider, with respect, that if Lord Browne-Wilkinson's requirement that the language must be ambiguous or obscure were to be read as referring to uncertainty as to the purpose of a statutory provision where there is no ambiguity or obscurity in the wording of the provision, there would be some risk of the

process feared by Lord Diplock in *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 at 704, [1981] AC 251 at 280 that those affected by a statute might have to— *a*

> 'search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.' *b*

I would not accept the other grounds advanced by Spath Holme Ltd for challenging the lawfulness of the 1999 order for the reasons given by Lord Bingham and accordingly I would allow the appeal.

Appeal allowed.

Dilys Tausz Barrister.

Re B-J (a child) (non-molestation order: power of arrest)

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON AND HALE LJJ

12, 27 JUNE 2000

Family proceedings – Orders in family proceedings – Power of arrest attached to non-molestation order – Whether court entitled to impose power of arrest of shorter duration than order to which it was attached – Family Law Act 1996, ss 42, 47.

In the course of long-running proceedings, the appellant father applied for a parental responsibility order in respect of his daughter who lived with her mother. The judge granted that order, but also made an order for an indefinite period, under s 42[a] of the Family Law Act 1996, requiring the father not to molest the mother. A power of arrest, lasting for two years, was attached to the non-molestation order under s 47(2)[b] of the 1996 Act. Section 47(4), which applied to powers of arrest attached under sub-s (3) to orders made without notice, provided that the power of arrest could have effect for a shorter period than the rest of the order. There was, however, no such provision in respect of a power of arrest under sub-s (2). On his appeal, the father contended, in reliance on that distinction, that the power of arrest attached to a non-molestation order under s 47(2) could not last for a shorter period than the order to which it was attached. He further contended that a non-molestation order should be made for a specified period of time, unless there were exceptional or unusual circumstances.

Held – Although it would usually be preferable to attach a power of arrest under s 47(2) of the 1996 Act for the same time as the non-molestation order, such a power could last for a shorter period than the order. That conclusion was consistent with the principle that a statutory provision affecting the liberty of the subject had to be construed restrictively. Moreover, if the court were required to attach a power of arrest for a longer period than it thought necessary for the protection of the victims, there would be a manifest injustice to the person who was the subject of that power. It might also indirectly lead to injustice to the victims if the court was thereby deterred either from making an order for the appropriate period or from attaching a power of arrest. Furthermore, it would produce inconsistency between orders imposed at hearings on notice and those imposed at without notice hearings. Such an inconsistency made no sense at all in practice. Orders made without notice were usually made with a return date, and the matter therefore came back to court within a short time. It was not easy to imagine a case in which the court would find that a power of arrest was justified by s 47(3) but only for a shorter period than that. Orders made on notice might last for much longer. The court also had the opportunity of hearing arguments (and sometimes evidence) on both sides, considering the alternatives, and weighing up what was in fact justified by the circumstances of the case. To deny the court the power to give effect to conclusions reached in those circumstances

a Section 42, so far as material, is set out at p 243 *b c d*, post

b Section 47, so far as material, is set out at p 237 *c to f* and p 238 *a b*, post

was indeed inconsistent. Moreover, although non-molestation orders were sometimes, indeed often, designed to give a breathing space after which tensions might settle down so that it was no longer needed, in other cases it might be appropriate for a much longer period. In that context, it was not helpful to oblige the courts to consider whether such cases were 'exceptional' or 'unusual'. Accordingly, the appeal would be dismissed (see p 242 *j* to p 243 *a*, p 245 *g*, p 246 *g* to p 247 *b d h j* and p 248 *b c*, post).

M v W (non-molestation order: duration) [2000] 1 FLR 107 overruled.

Notes

For non-molestation orders in family proceedings, see 5(2) *Halsbury's Laws* (4th edn reissue) para 749.

For the Family Law Act 1996, ss 42, 47, see 27 *Halsbury's Statutes* (4th edn) (2000 reissue) 773, 777.

Cases referred to in judgments

Colquhoun v Brooks (1888) 21 QBD 52, CA; *affd* (1889) 14 App Cas 493, [1886–90] All ER Rep 1063, HL.

Lewis v Lewis [1978] 1 All ER 729, [1978] Fam 60, [1977] 1 WLR 409, CA.

M v W (non-molestation order: duration) [2000] 1 FLR 107.

S (a minor) (parental responsibility), Re [1995] 3 FCR 225, CA.

Whiteman v Sadler [1910] AC 514, HL.

Appeal

The father of a child known as C appealed with the permission of Hale LJ from the order of Judge Callman, made in the Principal Registry of the Family Division on 22 June 1999, requiring the father not to molest the respondent, C's mother, for an indefinite period, and attaching to that order a power of arrest for a period of two years. The facts are set out in the judgment of Hale LJ.

Geoffrey Kingscote (instructed by *Meaby & Co*) for the father.

Rosalind Carne (instructed by *Powell Spencer & Partners*) for the mother.

Cur adv vult

27 June 2000. The following judgments were delivered.

HALE LJ (giving the first judgment at the invitation of Peter Gibson LJ).

1. This case raises the simple but important question of whether a power of arrest attached to a non-molestation or occupation order made under Pt IV of the Family Law Act 1996 may last for a shorter period than the order to which it is attached.

The relevant law

2. Before the 1996 Act came into force, powers of arrest could in certain circumstances be attached to non-molestation and ouster injunctions under s 2(1) of the Domestic Violence and Matrimonial Proceedings Act 1976. This read:

> 'Where, on an application by a party to a marriage, a judge grants an injunction containing a provision (in whatever terms)—(a) restraining the other party to the marriage from using violence against the applicant, or (b) restraining the other party from using violence against a child living with the

applicant, or (c) excluding the other party from the matrimonial home or from a specified area in which the matrimonial home is included, the judge may, if he is satisfied that the other party has caused actual bodily harm to the applicant or, as the case may be, to the child concerned and considers that he is likely to do so again, attach a power of arrest to the injunction.'

Magistrates' courts had a similar but not identical power under s 18(1) of the Domestic Proceedings and Magistrates' Courts Act 1978.

3. There was nothing in either section expressly empowering the court to attach a power of arrest for a shorter term than the injunction or order to which it was attached. It was, however, a discretionary power, which the courts had said was to be used sparingly (see, eg, *Lewis v Lewis* [1978] 1 All ER 729, [1978] Fam 60). A practice note advised that 'Unless a judge is satisfied that a longer period is necessary in a particular case, the period should not exceed three months' (see *Practice Note (domestic violence: power of arrest)* [1981] 1 All ER 224, [1981] 1 WLR 27).

4. Both powers were replaced by s 47 of the 1996 Act. Part IV of the 1996 Act was largely the outcome of the consultations and recommendations of the Law Commission (see *Domestic Violence and Occupation of the Family Home* (Working Paper No 113) (1989); *Family Law, Domestic Violence and Occupation of the Family Home* (Report, Law Com No 207) (1992)). There was considerable concern that domestic violence was not being taken seriously enough by the authorities, including the courts, and that powers of arrest were not being used as often as they should, given the delays and difficulties in enforcing injunctions or orders in the usual way. The Women's National Commission had proposed that injunctions against violence should normally carry a power of arrest, unless this could be shown to be unnecessary (see *Violence against Women* (Report of an ad hoc Working Group) (1985) para 113).

5. The Law Commission Working Paper (para 6.64) suggested that the court might be able to attach a power of arrest to any order, provided that the respondent had in fact caused actual bodily harm to the victim and the order specified precisely which breaches of the order would give rise to the power, unless in all the circumstances it appeared that the victim would be adequately protected without it. The response (Report, Law Com No 207, para 5.12) revealed 'a considerable diversity of views' but three main options: some favoured retaining the then approach, in which powers of arrest were relatively exceptional; others would allow them in any case where there was a risk of future harm, 'but a few feared that if injunctions normally carried a power of arrest, there might be an increased reluctance to grant them'; but a—

'third sizeable and varied group of respondents [including the Magistrates' Association, Women's Aid Federation, Rights of Women, the Institute of Legal Executives, the Children's Legal Centre, the Association of Women Solicitors, the Law Society, the Family Law Bar Association, the National Council for One Parent Families, the Association of Chief Police Officers and the Metropolitan Police] suggested that powers of arrest should generally be attached in cases where there had been violence or threatened violence.'

6. The Commission's conclusion (Report, Law Com No 207, para 5.13) was this:

'We were impressed by the weight of informed opinion supporting this third main alternative ... There are a number of advantages in this. A power

> of arrest is seen as a simple, immediate and inexpensive means of enforcement which underlines the seriousness of the breach of the offending party. It was felt that threatened violence should be included because it is wrong in principle that women and children should have to wait to be injured before the law can offer effective protection. However, it would be wrong to provide for an absolutely automatic power of arrest as there may well be some cases in which it is inappropriate.' (See 24 *Law Commission Reports* p 475.)

7. The relevant provision is now contained in s 47(2) of the 1996 Act, which is in virtually identical terms to that recommended by the Law Commission (see cl 15(2) of the draft Bill annexed to Law Com No 207 (24 *Law Commission Reports* (Appendix A) p 514)):

> 'If—(a) the court makes a relevant order; and (b) it appears to the court that the respondent has used or threatened violence against the applicant or a relevant child, it shall attach a power of arrest to one or more provisions of the order unless satisfied that in all the circumstances of the case the applicant or child will be adequately protected without such a power of arrest.'

By s 47(1) a 'relevant order' means an occupation order or a non-molestation order.

8. However, the Law Commission also recommended (Report, Law Com No 207, para 5.14 (24 *Law Commission Reports* p 475)) that the court should not be under any obligation to attach a power of arrest to an order made without notice to the other party, for which the criteria should be more stringent. Section 47(3) of the 1996 Act again (with one exception immaterial for this purpose) mirrors the wording recommended by the Law Commission (see cl 15(3) of the draft Bill):

> 'Subsection (2) does not apply in any case where the relevant order is made by virtue of s 45(1) [ie without notice to the other party], but in such a case the court may attach a power of arrest to one or more provisions of the order if it appears to it—(a) that the respondent has used or threatened violence against the applicant or a relevant child; and (b) that there is a risk of significant harm to the applicant or child, attributable to the conduct of the respondent, if the power of arrest is not attached to those provisions immediately.'

9. The Law Commission's report and Bill made no reference to the duration of powers of arrest. It is clear that major changes to the courts' powers, and in particular their powers of enforcement were intended, so that earlier authority would be of little if any assistance. On the other hand, the Commission left it open whether a power of arrest might be attached for a fixed period which was different from the duration of the order.

10. The Family Homes and Domestic Violence Bill was first introduced in the House of Lords in the session 1994 to 1995. It was referred to a special public committee under the chairmanship of Lord Brightman; this was a new procedure specially designed for law reform measures; the committee took written and oral evidence from a wide range of interested organisations and individuals; several amendments were made as a result. The Bill fell at the end of the 1994–95 session, but was immediately reintroduced (with some further amendments) in the next, as part of the Family Law Bill, and became Pt IV of the 1996 Act.

11. Among the amendments made in the special public committee was what became s 47(4) of the 1996 Act:

> 'If, by virtue of subsection (3), the court attaches a power of arrest to any provisions of a relevant order, it may provide that the power of arrest is to have effect for a shorter period than the other provisions of the order.'

Section 47(5) continued:

> 'Any period specified for the purposes of subsection (4) may be extended by the court (on one or more occasions) on an application to vary or discharge the relevant order.'

The power to vary or discharge orders is contained in s 49 of the 1996 Act, to which it will be necessary to return.

12. Thus a distinction was introduced between the discretionary power to attach powers of arrest to orders not made on notice under s 47(3) and the mandatory duty to attach a power of arrest under s 47(2), to which the express provisions of s 47(4) and (5) did not apply. In *M v W (non-molestation order: duration)* [2000] 1 FLR 107, Cazalet J held that the consequence was that the court could not impose a power of arrest under s 47(2) which had a shorter duration than the order to which it was attached.

The facts of this case

13. The orders in this case were made by Judge Callman on 22 June 1999 in the county court jurisdiction of the Principal Registry of the Family Division as a result of an unmarried father's application for parental responsibility for his daughter C, born on 12 December 1989.

14. Her parents had lived together on and off, but never set up permanent home together. The father described their relationship as 'volatile'. The mother made complaints of violence. They finally separated in 1995. As happens all too often, the proceedings between them continued for years without any findings of fact being made. The father first applied for parental responsibility and contact in October 1995. The first two court welfare officer's reports, dated 25 January 1996 and 25 June 1996, indicated that C wanted overnight stays with her father. Relations between the parents were not good, however, and the mother was angry about the cost. On 27 June 1996, the case was transferred from the family proceedings court to the principal registry because of her implacable hostility. Nevertheless contact orders were in fact made by consent, the first on 18 April 1996 for fortnightly visits, the second on 31 October 1996 for weekly visits. The court kept the case under review. By the time of the third court welfare officer's report, dated 15 January 1997, the problem was not C's relationship with her father but the mutual hostility between the parents, which had become worse since the father had a new partner with a child. On 31 January 1997, the father gave non-molestation undertakings and an order was made for fortnightly contact alternating between visits and overnight stays.

15. Things soon went badly wrong. The fourth court welfare officer's report, dated 26 March 1997, detailed C's complaints about the intervening visits: her father had taken her to see his new partner and child even though she had said she did not want him to do so; worse still he had left her alone for some time with them; he had insisted on taking the plugs out of her recently pierced ears to put some earrings in, when it was too soon to do so and this had made her ears sore; he had not turned up for the next meeting; for the next he had come to her house

and promised to take her out to buy her a computer the next day but had not done so; she had spoken to him on the phone and said that she did not want to go and stay with him next time; then 'he had got very angry with her on the phone and he had said that in that case "he did not want to see her at all"'. C told the court welfare officer that she did not want to see her father any more 'because it upset her very much when he promised her things and did not stick to his promises and when he lost his temper and got angry with her'. Also— *a* *b*

> 'In the past she had been frightened of him because he had threatened to beat her mother up and to come and kick their door down, but now she was not frightened of him any more, she just did not want to see him.'

16. The court welfare officer commented that the parents had given different accounts of what had been happening but she had seen C on her own and C had confirmed her mother's account and was absolutely clear in her views: *c*

> 'Given the history of this case and the amount of difficulty there has been in the past in trying to get contact between C and her father to work, I believe that the court should now taken C's views very seriously. I do not believe that the ongoing conflict over contact is in C's best interest and I think there should be a break of at least one year before there is any more direct contact between her and her father.' *d*

17. When the matter next came to court, on 7 May 1997, Mr Recorder Murdoch QC made orders restraining the father from using violence against the mother, or threatening, assaulting, harassing or pestering her, and from entering, attempting to enter, visiting or loitering within 100 yards of her address, and contacting, attempting to contact or communicating with her save through her solicitors. We are told that this was because of an outburst in court from the father. The contact order was suspended and the father's application for a further court welfare officer's report refused. The matter came on for hearing before Judge Hallon on 9 July 1997. The father gave undertakings in essentially the same terms as those ordered by Mr Recorder Murdoch, and there was a consent order for indirect contact, with a review in not less than a year's time. *e* *f*

18. When the matter came back before Judge Hallon on 14 July 1998, the father had decided not to pursue his application any further. His view, as reported to the court, was that the parents seemed to get further when there were no lawyers and the court was not involved. The mother's view, as reported to the court, was that they would all— *g*

> 'benefit from a completely clean slate with no court orders hanging over them, and if at a time in the future C wanted to have contact with her father, mother certainly would not stand in her way, and would not object, say, to father writing to C or writing to mother to find out whether or not C had softened in her attitude towards her father. She finds that is greatly preferable to father turning up.' *h*

19. Judge Hallon commented that she was not being presented with 'get rid of the orders so that nothing will happen' but 'get rid of the orders so that there may be in fact greater progress'. Seen in context, however, it is clear that each party had very different perceptions of what might happen. The father was given leave to withdraw his application for contact and parental responsibility, the indirect contact order was discharged, and the father released from his undertakings. *j*

20. Various incidents took place in the latter part of 1998 which indicated that progress was unlikely. The mother made a series of complaints to the police. The father had come to C's school one lunchtime, and the school reported that he had called a month earlier to say that he was coming to get C. In November, the father sent an abusive letter to the mother, saying among other things 'anyway I am taking you back to court and this time I am going all the way untill [sic] I beat you so watch me'. Around C's birthday he came to the home with presents. Then just before Christmas, police were called to the home after an incident in which the mother alleged that the father had forced his way into the home and assaulted her partner, Mr Gonzalez, while C and a friend had taken refuge in the bathroom, although Mr Gonzalez had not wished to pursue this with the police. In evidence the father at first denied this but later admitted pushing Mr Gonzalez, whose evidence was that the father had 'grappled' with him.

21. In February 1999 the father applied for parental responsibility. In his witness statement he said that he did not want a contact order. The matter came before Judge Callman on 21 and 22 June 1999. He heard evidence from the father, the mother and the mother's partner, Mr Gonzalez. The father told him that the point of parental responsibility was 'I want contact with my daughter. I want to be involved with my daughter'.

22. The judge stated his conclusions briefly. He began thus:

> 'I have no doubt at all that the father, who is a big man, can be if he wants to be a bully, and if he wants he can push his way into the life of both mother and [C]. He has got to be told as firmly as possible that he has no place in the life of the mother, that he has no right to interfere with the upbringing she gives their daughter, and that he has no right to go to the home in which she lives with whomever she wishes to live.'

The father had shown commitment and a degree of attachment to C. But the judge had doubts about the father's motivation for seeking parental responsibility, because he wanted it to lead to contact. There had been bad incidents and matters which had made contact impossible. The father could not be part of C's life because that meant being a part of the mother's life. He had to accept that it would only cause grief and hardship to C if he barged into their lives.

23. Hence the judge decided to make a parental responsibility order but only in such a way that the father could not do this. The judge explained that he would make a non-molestation order in respect of the mother. This was for an indefinite period. He would attach a power of arrest to that order, for a period of two years. He also made an order that the father should not attend at the mother's home or enter the road where it is situated, and that he should not physically attend C's school, although he could write and telephone. He could only have contact by letter, cards or presents sent through the post, and not by telephone, although she could telephone him. The judge concluded:

> 'So what I have done has been to recognise the father as the birth father, but I have proscribed and limited his exercise of that position, and that was envisaged quite clearly in the Court of Appeal in *Re S (parental responsibility)* ([1995] 3 FCR 225) ... [C] is entitled to feel that her home and her school are her own province, where there is no tension and no conflict ... she should be able to be at home without having any conflict in her home, any incidences of the kind which involved Mr [G], and also that she can go to

> school and feel free to go to school without any conflict position arising between her parents.'

24. The orders sealed did not exactly represent the orders announced by the judge in his judgment and the parties have agreed revised versions which do so and should be substituted under the slip rule, subject of course to the outcome of this appeal.

The arguments on appeal

25. Mr Kingscote on behalf of the father has sought to attack the merits of the package of orders made by the judge, on the broad grounds that they are more draconian than had been sought and disproportionate to the case before him. He also complains that the judge did not in so many words make the findings of fact necessary for the imposition of a power of arrest under s 47(2) of the 1996 Act. I consider any such attack quite hopeless. The judge had seen and heard the parties and formed a clear view both of the facts and of what was needed in C's best interests. He clearly accepted the accounts given by the mother and Mr Gonzalez of the incident before Christmas. He also had the earlier court welfare officers' reports, in which C's own views, and the reasons for those views, were quite clear. In the circumstances it was most unlikely that C's own views would have changed in such a way as to make the resumption of contact save on her initiative any more practicable than it had been in the past. Yet the father said that he wanted contact.

26. It is also quite clear that had the judge not felt able to make the other orders, he would not have made a parental responsibility order: he would have found the father's previous commitment and the attachment between him and his daughter outweighed by the father's reasons for wanting parental responsibility and the wider considerations of C's welfare to which he referred towards the end of his judgment. That is an exercise of discretion with which this court would be very slow indeed to interfere. Even if it did feel able to do so, the logical outcome would not be to leave the parental responsibility order intact, shorn of its associated protections, but to send the matter back for rehearing.

27. I would therefore refuse permission to appeal on any ground save for the issues of law raised by the duration of the non-molestation order and the attached power of arrest.

The duration of the non-molestation order

28. Mr Kingscote attacks the non-molestation order and power of arrest on two bases arising from the judgment of Cazalet J in *M v W (non-molestation order: duration)* [2000] 1 FLR 107. First, he argues that an indefinite order was wrong. Cazalet J (at 111) stated that:

> '... the object of non-molestation orders is designed to give a breathing space for the parties and, unless there are exceptional or unusual circumstances, it should be for a specified period of time. If this latter course is not taken then many years may go by and a party may find himself or herself suddenly arrested under an order made many years previously when much has since changed and the original order has lost the substance of its main purpose.'

29. In my judgment, that passage both underestimates the range of purposes for which non-molestation orders were designed and contains a serious fallacy. A non-molestation order is indeed sometimes, even often, designed to give a

breathing space after which the tensions between the parties may settle down so that it is no longer needed. But in other cases it may be appropriate for a much longer period, and it is not helpful to oblige the courts to consider whether such cases are 'exceptional' or 'unusual'.

30. The law is contained in the 1996 Act. The criterion for making non-molestation orders is set out in s 42(5):

> 'In deciding whether to exercise its powers under this section and, if so, in what manner, the court shall have regard to all the circumstances including the need to secure the health, safety and well-being—(a) of the applicant ... and (b) of any relevant child.'

Section 42(7) provides that: 'A non molestation order may be made for a specified period or until further order.'

31. These provisions implemented the recommendations of the Law Commission (Report, Law Com No 207, para 3.28):

> '... protection should be available when and for as long as it is needed. Fixed time limits are inevitably arbitrary and can restrict the courts' ability to react flexibly to problems arising within the family. In particular, it is important that non-molestation orders should continue to be capable of enduring beyond the end of a relationship, although in some cases, short-term relief will be all that is necessary or desirable.' (See 24 Law Commission Reports p 457.)

Earlier, the Commission had rejected the idea of a two-tier system of short and long term remedies, with different criteria (para 2.43, pp 446–447):

> 'The distinction between short and long term remedies certainly arises in practice ... But this distinction does not always correspond to the requirements of particular categories of applicant and is not therefore a justification for requiring the courts to distinguish between short term and long term orders in every case. Sometimes the need for a long term order may be apparent at the outset. Often, having solved the immediate problem the parties do not need to return ... In principle, the criteria upon which a decision is based should be appropriate to the nature of the remedy sought: the duration of the remedy is simply a matter of judgment according to the circumstances of the particular case.'

32. It is obvious that occupation orders may sometimes have to be for the longer term. The 1996 Act replaced, not only the courts' powers to grant ouster and non-molestation injunctions under their inherent jurisdiction or the 1976 Act, and personal protection and exclusion orders under the 1978 Act, but also to make orders dealing with rights of occupation under the Matrimonial Homes Act 1983. If divorce proceedings are contemplated, these orders may well be superseded by orders for ancillary relief, but it is often essential to secure the indefinite continuation of matrimonial home rights after a decree absolute.

33. A non-molestation order rarely prohibits a person from doing something which would otherwise be completely unobjectionable. It is not usually appropriate to use or threaten violence, or to harass, pester or molest another person. There are obviously cases, of which this is one, in which the continuing feelings between parties who separated long ago are such that a long term or indefinite order is justified. The order in this case was made for the benefit of C as much as for her mother: it is to C's benefit that her mother is not threatened or pestered.

The case clearly falls within the criteria in s 42(5). Parliament having made the position plain, reference to earlier case law is of limited help.

34. The fallacy in the passage quoted from *M v W* was to limit the duration of a non-molestation order because of the linked power of arrest. This is to put the cart before the horse. The court has first to decide whether a non-molestation order is appropriate, and if so in what terms and for how long. Only then should the court turn its mind to the power of arrest. Mr Kingscote frankly and fairly accepted that this must be so. It would set Parliament's intentions in providing for unlimited orders and powers of arrest at naught if the latter could be used as a reason for limiting the former.

35. In my judgment, therefore, the guidance given in *M v W* as to the duration of non-molestation orders, wise though it may have been in the individual case, is too restrictive and does not represent the intention of Parliament in enacting the comprehensive new code contained in the 1996 Act. To seek to limit the great variety of factual circumstances in which these orders may be needed by such words as 'exceptional or unusual' is to invite just the sort of argument which took place in this court in respect of an order which was clearly justified by the circumstances of the case in the interests of the little girl concerned.

36. It follows that, if the decision in *M v W* as to the duration of attached powers of arrest is correct, so that the power of arrest must last for the same period as the order, the correct answer in this case is to remove the time limit on the power of arrest rather than to reduce the duration of the order. Again, Mr Kingscote frankly and fairly accepted this.

The duration of powers of arrest

37. The judge made an indefinite non-molestation order but attached a power of arrest for only two years. He did so on 22 June 1999, before the decision in *M v W* had been made, let alone reported. Anecdote suggests that such orders are not uncommon. Given the previous practice this is not unlikely. Yet on this point there are two good reasons to agree with the conclusion reached by Cazalet J in *M v W*.

38. First, s 47(4) and (5) expressly give the court power to fix a shorter duration to powers of arrest attached to orders made without notice and then to extend it if appropriate. Where a statute clearly states a proposition in one context, it usually means to exclude its implication in another: '... express enactment shuts the door to further implication ...' (see *Whiteman v Sadler* [1910] AC 514) otherwise expressed in the maxim expressio unius est exclusio alterius.

39. Secondly, given that it may well be thought that s 47(2), by saying nothing, leaves the matter ambiguous, it may be appropriate to refer to what was said in committee when s 47(4) and (5) were introduced. It is quite clear that the intention was to make a deliberate distinction. The Lord Chancellor, when moving the amendment in the special public committee, explained (HL Paper 55 (1994–95) col 17):

> 'The amendment is introduced to give the courts greater flexibility concerning the attachment of a power of arrest and will not apply where the power of arrest is mandatory. It is only discretionary powers to which this will attach.'

40. However, it is possible to read the mandatory provision in s 47(2) another way. It requires the court to—

'attach a power of arrest to one or more provisions of the order unless the court is satisfied that in all the circumstances of the case the applicant or child will be adequately protected without *such a* power of arrest.' (My emphasis.)

The words 'such a power of arrest' obviously admit of the possibility of more than one kind of power of arrest in any particular case. Otherwise they would not be needed: the subsection could simply have read 'it'. They must mean 'such power of arrest as the court has decided to attach'. Since there is no express prohibition on attaching a shorter power of arrest, that might be one of the different kinds of power of arrest contemplated by the word 'such'.

41. One answer to this argument is that the subsection expressly provides for different kinds of power of arrest by permitting the court to choose to which provision or provisions of the order it should be attached. No further explanation for the inclusion of the word 'such' is required.

42. However, the view that the Bill as originally drafted did contemplate such flexibility is strengthened by the provisions for duration, variation and discharge. The Law Commission's Bill had simply provided that 'A non-molestation order may be made for a specified period or until further order and may be varied or revoked' (see cl 13(4); similar provisions were included for each type of occupation order). The powers to vary and discharge must have been intended to apply, not only to the substantive order, but also to the attached power of arrest, which is part of the non-molestation order. The duration provision in cl 13(4) must have applied to the power of arrest as well as the substantive order, thus permitting the power of arrest to be for a fixed period or until further order, and admitting the possibility that they might be different.

43. There is nothing inherently incompatible between the mandatory duty contained in s 47(2) and such flexibility. The court would have to be satisfied that the victim would be adequately protected with only a shorter power of arrest. The cases where the court could be satisfied of this might be difficult but are not impossible to imagine: in this case Judge Callman was satisfied that the need for this particular protection would have gone in two years' time while he concluded (as he was entitled to do) that the order itself should last indefinitely. The great variety of circumstances in which Pt IV orders, perhaps especially occupation orders, may be required make this by no means impossible, although it may not be common. One thing, however, is clear from s 47(2): the criterion is whether or not the applicant or child will be adequately protected without the power of arrest, not whether its continued existence will be inconvenient for others.

44. Given the inherent difficulties in predicting the future, and in particular when people will be safe, however, it would usually be preferable to attach the power for the same time as the order. Once it can be shown that the victim will be adequately protected without it, or with a different power, the obvious course is to vary the order so as to remove the power of arrest or reduce its scope. This brings one to the court's power to vary or discharge orders, now contained in s 49 of the 1996 Act. The separate variation powers in the Law Commission Bill were extracted and combined in one section. Unfortunately, however, that section gives rise to a problem of construction which is similar to that raised by the introduction of s 47(4) and (5).

45. Section 49(1) provides:

'An occupation order or a non-molestation order may be varied or discharged by the court on an application by—(a) the respondent, or (b) the person on whose application the order was made.'

46. Section 49(4) provides:

> 'If, by virtue of section 47(3), a power of arrest has been attached to certain provisions of an occupation order or non-molestation order, the court may vary or discharge the order under subsection (1) in so far as it confers a power of arrest (whether or not any application has been made to vary or discharge any other provision of the order).'

It might be argued that, as this is the only provision expressly referring to the variation or discharge of a power of arrest, such powers cannot be varied under the general power contained in s 49(1). Such a result would, however, be absurd. We have already seen how s 47(2) expressly contemplates more than one kind of power of arrest attaching to any particular order. It must be possible to vary the order relating to which provisions will carry the power of arrest. Section 47(2) also expressly contemplates cases in which a power of arrest is not in fact needed. The court must be able to remove the power altogether, if satisfied that the victim will be adequately protected without it. To require the court to discharge the whole order and start again is an unnecessary piece of bureaucracy.

47. Hence, were it not for s 47(4) and (5), it is obviously *possible* to read s 47(2) as permitting, although not necessarily encouraging, the orders made in this case. Once s 3(1) of the Human Rights Act 1998 comes into force on 2 October 2000, it will be the court's obligation to read and give effect to primary legislation 'in a way which is compatible with the Convention rights'. If there is a case in which an order is appropriate but the court is indeed satisfied that the victim will be adequately protected by a time-limited power of arrest, an order which gives a larger power of arrest without warrant might indeed be incompatible with convention rights. The court would then have to read s 47(2) so as to permit this.

48. The question, then, is whether the maxim expressio unius est exclusio alterius requires the court to reach a different conclusion now. As Lopes LJ observed in *Colquhoun v Brooks* (1888) 21 QBD 52 at 65:

> 'It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.'

49. Three of those considerations point strongly in the direction of construing s 47(2) so as to permit what was done in this case. First, the subject matter is the imposition of a power to arrest without warrant, following which the police have no power themselves to grant bail, but must instead detain the person arrested and bring him before the court within (usually) 24 hours. In the context of the liberty of the subject, statutes are normally to be construed in such a way as to limit rather than enlarge the powers of the state. Powers of arrest for breach of the orders of a civil court are themselves unusual, although amply justified by the need effectively to secure the performance of the obligations contained in the order. Secondly, to require the court to attach a power of arrest for a longer period than the court is satisfied is required for the protection of the victims is manifestly unjust to the respondent; it may also indirectly lead to injustice to the victims if the court is thereby deterred, either from making an order for the appropriate period, or from attaching a power of arrest. Thirdly, it produces an inconsistency between orders imposed at hearings on notice and those imposed at without notice hearings. This makes no sense at all in practice: orders made

without notice are usually made with a return date (indeed there is an argument, upon which I do not propose to express any opinion, that the obligation in s 45(3) of the 1996 Act to 'afford the respondent an opportunity to make representations relating to the order as soon as just and convenient at a full hearing' requires a return date rather than 'liberty to apply'). The matter therefore comes back to court within a short time. It is not easy to imagine a case in which the court would find that a power of arrest was justified by s 47(3) but only for a shorter period than that. Orders made on notice may, as we have seen, last for much longer. The court has also had the opportunity of hearing arguments (and sometimes evidence) on both sides, considering the alternatives, and weighing up what is in fact justified by the circumstances of the case. To deny the court the power to give effect to conclusions reached in those circumstances is indeed inconsistent.

50. Only one consideration tells the other way. It is, in the light of the Lord Chancellor's words in the special public committee, difficult to say that the exclusion was inadvertent. But the inclusion may easily have been made on the assumption that the power was not already contained in s 47(2). For all the reasons given earlier, that assumption was in my judgment incorrect. The power was already there. That being so, I do not find it necessary to construe s 47(4) and (5) as taking it away.

51. Accordingly, I would overrule the decision in *M v W* and dismiss this appeal.

PETER GIBSON LJ.

52. The central question raised by this appeal is whether s 47 of the Family Law Act 1996 allows the court at a with notice hearing to attach a power of arrest to a provision of an occupation order or non-molestation order for a shorter period of time than the other provisions of the order. I own to having found that question one of great difficulty.

53. At first sight the view taken by Cazalet J in *M v W (non-molestation order: duration)* [2000] 1 FLR 107 that the answer to that question is in the negative has much to commend it. The mandatory provisions of s 47(2) appear to suggest that the power of arrest which must be attached if conditions (a) and (b) of that subsection are fulfilled (unless the court is satisfied that the applicant or child will be adequately protected without it) is to be attached for whatever period the provision to which it is attached is to have effect. That impression is reinforced by s 47(4), expressly allowing, as it does, the power of arrest to have effect for a period shorter than the period for which the provision to which it is attached has effect.

54. But if one stands back and looks at the position more generally, other considerations pointing in a different direction compel a closer look at the statutory language. Why should the ability to impose the power of arrest for a shorter period be limited to an order made without notice, when the respondent at a with notice hearing may be able to satisfy the court that a power of arrest is only needed for a period shorter than that during which the provision to which the power of arrest is to be attached is to have effect? It would be wrong in principle to shorten the period for the provision on the ground that the power of arrest to be attached to the provision cannot be justified for that period. A statutory provision affecting the liberty of the subject must be construed restrictively.

55. As Hale LJ has pointed out, the concluding words of s 47(2), 'such a power of arrest', can either be interpreted as a reference to the power of arrest mentioned earlier in the subsection, in which case it is surprising that it was not replaced by the pronoun 'it', or as signifying the particular power of arrest which the court chooses to attach, in which case they point to the possibility of more than one kind of power of arrest being available to attach in any given set of circumstances. The Law Commission's report and Bill admitted of such flexibility and it is improbable that the introduction of s 47(4) was intended to cut down that flexibility. I conclude, though not without hesitation, that for these and the reasons given by Hale LJ there is power to do what the judge in this case did. I am the happier to reach that conclusion because it leaves s 47 according better with the United Kingdom's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). I therefore agree with her that this appeal should be dismissed.

Appeal dismissed.

Kate O'Hanlon Barrister.

Duer v Frazer

QUEENS BENCH DIVISION

EVANS-LOMBE J

16, 20 MARCH, 19 APRIL 2000

Execution – Leave to issue execution – Application for permission to issue execution more than six years after judgment – Principles governing exercise of court's discretion to permit execution more than six years after judgment – CPR Sch 1, RSC Ord 46, r 2.

In March 1984 the claimant, D, obtained a judgment in Germany against the defendant, F. That judgment, which was registered in England four months later, remained enforceable in Germany for 30 years after being made. In 1988 D employed inquiry agents to trace F and identify assets on which her judgment could be executed. They discovered that F was living on a Caribbean island where he owned a small plot of land, and one of their representatives met him in 1989. Nevertheless, D took no further steps to enforce the judgment until 1994 when she employed new inquiry agents, and it was only in 1997 that F became aware that D was still seeking to pursue execution of the judgment. D subsequently applied under RSC Ord 46, r 2[a] (as scheduled to the CPR) for the court's permission to issue execution on the judgment, such permission being required where six years or more had elapsed since the date of the judgment. The master granted the order at a without notice hearing, but subsequently discharged it. D appealed to the judge, contending that the court should be prepared to extend time for the whole period in which the judgment was enforceable in Germany.

Held – The court would not, in general, extend time beyond the six-year period under RSC Ord 46, r 2, unless it was demonstrably just to do so. The burden of demonstrating that rested on the judgment creditor. Although each case turned on its own facts, the court would have regard, in the absence of special circumstances, to such matters as the explanation given by the judgment creditor for not issuing execution during the initial six-year period, and any prejudice which the judgment debtor might have been subject to as a result of such delay including, in particular, any change of position by him. The longer the period that had been allowed to elapse since the judgment, the more likely it was that the court would find prejudice to the judgment debtor. Moreover, there was no reason to treat the judgment of a foreign court, registered in England, any differently from an English judgment when applying r 2. In the instant case, D had not made out a case for the exercise of the court's discretion to prolong the period of six years from the registration of the judgment in England. Accordingly, the appeal would be dismissed (see p 255 *b* to *f* and p 256 *g*, post).

Dicta of Dillon LJ in *BP Properties Ltd v Buckler* [1987] 2 EGLR 168 at 171 and Slade LJ in *National Westminster Bank plc v Powney* [1990] 2 All ER 416 at 432–433 applied.

Notes

For leave to issue execution, see 17 *Halsbury's Laws* (4th edn) para 408.

a Rule 2, so far as material, is set out at p 252 *h*, post

Cases referred to in judgment

BP Properties Ltd v Buckler [1987] 2 EGLR 168, CA.

Lamb (W T) & Sons v Rider [1948] 2 All ER 402, [1948] 2 KB 331, CA.

Lougher v Donovan [1948] 2 All ER 11, CA.

Lowsley v Forbes (t/a L E Design Services) [1998] 3 All ER 897, [1999] 1 AC 329, [1998] 3 WLR 501, HL.

National Westminster Bank plc v Powney [1990] 2 All ER 416, [1991] Ch 339, [1990] 2 WLR 1084, CA.

Appeal

The claimant, Anne-Margaret Duer, appealed from the order of Master Hodgson on 3 February 2000 discharging an order made by him without notice on 19 April 1999 giving her permission to enforce a judgment obtained against the defendant, Peter Nigel Frazer, at the Higher Hanseatic Regional Court of Hamburg on 20 March 1984, such judgment having been registered in England on 24 July 1984. The case was heard in private, but judgment was given in open court. The facts are set out in the judgment.

Catherine Newman QC and *Richard Morgan* (instructed by *Zimmers*) for the claimant.

Jonathan Harvey (instructed by *Eversheds*) for the defendant.

Cur adv vult

19 April 2000. The following judgment was delivered.

EVANS-LOMBE J.

1. This is an appeal against the order of Master Hodgson of 3 February 2000 whereby he discharged his order made without notice giving the claimant permission to issue execution to enforce a judgment dated 20 March 1984 of the Higher Hanseatic Regional Court of Hamburg (to which I will refer as the German judgment) against the defendant registered pursuant to the order of Master Topley made on the 24 July 1984.

2. The background facts from which the issues in this appeal arise are as follows: the claimant is a German national. The defendant is a former British army officer. In late 1970 the claimant and the defendant started an antiques business in Germany. They later formed a close relationship. It is the claimant's case that in order to assist the defendant to establish the business she advanced to the defendant a loan of DM 250,000. It is her case that when the relationship broke up and the antiques business was liquidated she was never repaid that sum. In 1983 she commenced proceedings in the German courts against the defendant. Initially those proceedings failed but succeeded on appeal when judgment was entered for the claimant in the Higher Hanseatic Regional Court on 20 March 1984. The defendant's appeal from that judgment to the Federal High Court was summarily dismissed.

3. After the dissolution of the antiques business the defendant went to live on a property owned by him in Devon. His main source of income was an army pension. On 24 July 1984 on the application of the claimant, the German judgment was registered in England by order of Master Topley pursuant to the Foreign Judgments (Reciprocal Enforcement) Act 1933. By this date the defendant had sold the property in Devon and moved to the island of Nevis in the West Indies. The claimant then applied to garnishee the defendant's army pension. In response

the defendant applied to set aside the registration of the German judgment on the grounds set out in an affidavit sworn by him on the 8 November 1985. That affidavit showed as his address, 'Zetland Plantation, Gingerland in the Island of Nevis, West Indies'. The defendant made his application in person but it was dismissed by Master Topley on the 13 November 1985. The claimant's garnishee proceedings were withdrawn in 1986 because it was discovered that it was not possible to garnishee an army pension.

4. On 1 July 1986 a plot of land on Nevis was vested in the defendant 'as Trustee' by a company called North Shore Estates Ltd of which he was a small shareholder. The defendant's explanation for this transaction is set out at paras 7–10 of his most recent witness statement. It is the defendant's case that at this time he formed a partnership with a prominent citizen of the island to develop a plot of land on which the defendant wished to build a house for himself. The defendant's partner had funds which would have enabled them to build other houses on the site. The defendant's name appeared on the title to the land as trustee for the purpose of this partnership and also for the purpose of avoiding the payment of a local 'alien land holding tax' which would otherwise have been payable. The defendant paid the purchase price for the land from his own resources which amounted to $US 35,000. The attempt to avoid the land holding tax was unsuccessful and the partnership was soon dissolved. In 1987 the defendant purchased an additional small plot of land for $US 9,000. Because of the demise of the partnership this plot was not purchased subject to a trust. The defendant's name has at all times since 1986 appeared on the register of deeds of the Nevis Circuit as the proprietor of land on the island. The defendant's evidence was that he sold off parts of the land to other purchasers to build houses and built a house for himself on part of it. At this time also the defendant appears to have been concerned in the management of the hotel called the Zetland Hotel in which he may also have had an interest.

5. Meanwhile the claimant attempted to find a Nevis lawyer to act on her behalf. She did so acting on the recommendation of her English solicitors but was unsuccessful because none of the lawyers she approached responded. Her German lawyers suggested that they visit the island for the purpose of obtaining information about the defendant upon which an attempt to execute the German judgment could be based. She was unable for lack of money to finance such an expedition. In 1988 execution of the German judgment was issued in Germany but proved useless for lack of assets of the defendant in that country.

6. On 19 March 1988 the claimant instructed a firm of German inquiry agents called Cosmopol to trace the defendant and find assets on which her judgment could be executed. In May of 1988 the claimant happened on an article in a travel magazine published in Germany describing Nevis and mentioning the Zetland Hotel and the defendant's connection with it. A representative of Cosmopol met the defendant's wife in Germany from whom it appears he obtained information that the defendant's interest in the hotel was small and or alternatively held in his wife's name and that it was unprofitable. Exhibited to a witness statement of the claimant was a report from Cosmopol dated 1 August 1988 which appears to indicate that they had discovered a plot of land on Nevis belonging to the defendant.

7. It appears therefore that by the end of 1988 the claimant was possessed of information that the defendant was living on Nevis with an address on the Zetland estate, that he was the owner of a plot of land on the island and had an interest, albeit of doubtful value, in a hotel there.

8. In 1989 Cosmopol appears to have made or instigated further investigations on Nevis. During a visit in August a representative of Cosmopol met the defendant and talked to him. As result of this conversation the representative was persuaded to go on a barren expedition to a nearby island. In the same year a hurricane struck the island as result of which the hotel was largely destroyed. Although it has been rebuilt it is now under different ownership.

9. From 1989 until mid-1994 the claimant took no steps to enforce the German judgment save that in 1992 a family friend, a Mr Huebner, made a series of telephone calls to the island in an attempt to discover the whereabouts of the defendant but without contacting him directly. The claimant's inquiry agents, Cosmopol, went out of business and she had difficulty in recovering her papers from them.

10. In mid-1994 the claimant called in a new and more prestigious inquiry agent called Creditreform to assist her. They sent an agent to Nevis to make enquiries. It appears from their report to the claimant that their agent searched the public records on the island but was unable to discover the defendant. Further inquiries on the island in February 1995 produced the same result. After the claimant had suggested to them further possible leads they pursued largely unproductive inquiries in England, the USA and Australia as well as further enquiries on the island of Nevis. The report to the claimant of the inquiries in Australia states that they had found the defendant living in Australia with or near his daughter but no assets of any substance on which to execute judgment.

11. On 21 April 1997 in the course of a visit to Australia the claimant contacted the defendant's daughter. On the assumption that this contact was communicated by the defendant's daughter to him this was the first occasion since 1989, of which there was evidence, when contact was made between the claimant or her agents and the defendant so as to indicate to the defendant that the claimant was continuing to pursue execution of her judgment.

12. In late 1997 the claimant succeeded in instructing a Nevis lawyer who wrote to the defendant at his address on the island demanding payment of the judgment sum.

13. Thereafter proceedings were taken in Nevis to freeze the defendant's assets, an abortive attempt was made on behalf of the claimant to re-register the German judgment in England, the defendant failed in an application to Astill J for leave to appeal out of time against the order of Master Topley on the 13 November 1985 registering the German judgment in England, the claimant applied for permission to issue execution on that judgment under RSC Ord 46, r 2 and Master Hodgson made the order on the 3 February 2000 the appeal from which is before me.

14. RSC Ord 46, r 2 provides:

> '(1) A writ of execution to enforce a judgment or order may not issue without the permission of the Court in the following cases, that is to say—(a) where six years or more have elapsed since the date of the judgment or order ...'

15. It seems that the application to Master Hodgson for permission to issue execution in England is only capable of being of indirect benefit to the claimant in the absence of evidence of the existence of any assets of the defendant within the jurisdiction on which that execution could operate. I was told that an order in England giving permission to execute the German judgment in this country would greatly assist the passage of a similar execution in Nevis.

16. By contrast the defendant has adduced the evidence of a Nevis solicitor deposing to the relevant provisions of the law applicable in Nevis. This is the affidavit of Nigel Bishop sworn on the 8 December 1999. At para 4 of that affidavit, having stated that enforcement of foreign judgments is governed by the provisions of the Reciprocal Enforcement of Judgments Act 1922, Ch 67 of the Laws of St Christopher and Nevis, Mr Bishop states:

> '4. The Act and the subsidiary legislation thereto provide that judgments obtained in the Court of Session of Scotland and the High Courts of England, Northern Ireland, several Commonwealth Caribbean states, New South Wales, and Nigeria are directly enforceable in this jurisdiction, once they have been duly registered in the High Court here. There is, however, no provision for the enforcement of a judgment of a court in Germany or any other continental European state, nor is there any provision for the registration of judgments by courts of unnamed states in the courts of named states, so that, for instance, the German judgment might become enforceable in the High Court of St Christopher and Nevis by first being registered in England. There is therefore no question of the statutory enforcement of the Plaintiff's German judgment by prior registration thereof in London notwithstanding paragraph 7 of the Plaintiff's solicitor's affidavit.
>
> 5. An alternative means of enforcing a foreign judgment that is not directly enforceable under the Act is available at common law, by which a judgment creditor may enforce any foreign judgment *in personam* for a debt or definite sum of money by an action for the amount due under the judgment. Actions at common law based upon foreign judgments are, however, time-barred by the Limitation Act, 1961, Chapter 45 of the Laws of St Christopher and Nevis after the expiration of 12 years from the date on which the judgment became enforceable. Since the Plaintiff's German judgment became enforceable on 20th March 1984, any action thereon by the Plaintiff at common law became time-barred 12 years thereafter, that is, on 20th March 1996. Any action on arrears of interest became time-barred under the Limitation Act after the expiration of 6 years from the date on which the interest became due.'

17. As I understand it the claimant does not accept that Mr Bishop properly summarises the applicable law in these two paragraphs.

18. Until the decision of the House of Lords in *Lowsley v Forbes (t/a L E Design Services)* [1998] 3 All ER 897, [1999] 1 AC 329 whether or not the Limitation Act 1980 applied to executions on judgments was uncertain by reason of the conflicting decisions of the Court of Appeal in *Lougher v Donovan* [1948] 2 All ER 11 and *W T Lamb & Sons v Rider* [1948] 2 All ER 402, [1948] 2 KB 331 (see *National Westminster Bank plc v Powney* [1990] 2 All ER 416, [1991] Ch 339). *Lowsley v Forbes* now decides that, by contrast with an action to obtain relief based on a judgment, limitation does not apply. It follows that an application under RSC Ord 46, r 2 to issue execution on a judgment more than six years after it was made is not barred by limitation.

19. The practice on applications for permission under RSC Ord 46, r 2 is set out on p 911 of Civil Procedure (White Book, October 1999) at note 46.2.2 as follows:

> 'Application for permission to issue execution on a judgment more than six years old should be made without notice supported by evidence (usually an affidavit of facts by the applicant or his solicitor). The evidence should state

(1) the date of the judgment (2) the amount of the original judgment debt (3) the amount remaining due (4) the causes of delay (5) that the applicant is entitled to execution, *i.e.* that there has been no change of parties or devolution of interest ...' a

20. It follows that the judgment creditor before getting permission must give an explanation for his delay in seeking execution. It is also the practice that in cases where the master considers it appropriate he may order notice to be given to an affected party, usually, the judgment debtor, to enable him to apply to discharge any order for permission already given, as was done in the present case. It follows also that both the rule and the practice contemplate permission being refused by the court in appropriate cases. b

21. In the *National Westminster Bank* case the Court of Appeal was considering a case where application was being made for the issue of a fresh warrant of execution after six years had elapsed since the date of an order for possession of property partly owned by the defendant and mortgaged to a bank. The delay in obtaining execution was largely brought about by administrative delays in the relevant county court. The applicable statutory provision was CCR Ord 26, r 5(1)(a) which read: '(1) A warrant of execution shall not issue without the leave of court where—(a) six years or more have elapsed since the date of the judgment or order ...' c d

22. In the result the Court of Appeal, reversing the judge below, gave leave on the ground that 'it is in our judgment the cardinal principle of procedural law that no party should suffer unnecessarily for delay which is not his fault but rather a fault in the administration of justice'. To refuse the bank leave by reason of any procedural errors on the bank's part would be to impose 'too large a fine ... on the Bank'. Slade LJ said: e

'It is, however, necessary to bear in mind that six years have elapsed since the 1980 order was made. The right to sue on it as a judgment, for monetary relief, is time-barred unless there has been part payment or an appropriate monetary acknowledgement. In many, perhaps most, cases this might be a powerful reason for refusing, as a matter of principle, leave to issue a fresh warrant for possession. That approach is supported by the judgment of Dillon LJ in *BP Properties Ltd v Buckler* ([1987] 2 EGLR 168). But on the particular facts of this case, which we hope were exceptional, it would not be right to refuse leave as a matter of discretion on that ground.' (See [1990] 2 All ER 416 at 432–433, [1991] Ch 339 at 363.) f g

23. The relevant passage in the judgment of Dillon LJ in *BP Properties Ltd v Buckler* [1987] 2 EGLR 168 at 171 referred to by Slade LJ reads: h

'The true position, in my judgment, under the 1939 Act was that after a judgment for possession had been obtained in an action for the recovery of land begun in due time, the successful plaintiff had 12 years from the date of the judgment to enforce the judgment before any question of limitation could arise. This result may follow from the view expressed by a Scott LJ in *Lougher v Donovan* ([1948] 2 All ER 11) that an application to issue or extend a warrant for possession is itself an "action brought upon a judgment" for which there was a prescribed limitation period of 12 years under section 2(4) of the 1939 Act. Alternatively, it may be based on the view expressed by the editors of the *County Court Practice* in their notes to the present Order 26, rule 5 that, although the right to sue on a judgment has always been regarded as a j

matter quite distinct from the right to issue execution under it which is essentially a matter of procedure, (*W T Lamb & Sons v Rider* ([1948] 2 All ER 402, [1948] 2 KB 331)), nevertheless leave to issue a warrant of execution will not be granted, nor will a warrant issued be renewed, at a time when the limitation period appropriate to an action on the judgment has expired.'

24. Dillon LJ was giving judgment before the decision in the House of Lords in *Lowsley v Forbes* had settled the conflict between *Lougher v Donovan* and the *W T Lamb* case in favour of the latter. His judgment must now be treated as approving the notes in *The County Court Practice* to which he refers.

25. It seems to me that these two passages from judgments in the Court of Appeal apply to govern the exercise of the discretion to permit the issue of execution after the expiry of six years under RSC Ord 46, r 2 and that they are support for the proposition that the court would not, in general, extend time beyond the six years save where it is demonstrably just to do so. The burden of demonstrating this should, in my judgment, rest on the judgment creditor. Each case must turn on its own facts but, in the absence of very special circumstances such as were present in the *National Westminster Bank* case, the court will have regard to such matters as the explanation given by the judgment creditor for not issuing execution during the initial six-year period, or for any delay thereafter in applying to extend that period, and any prejudice which the judgment debtor may have been subject to as a result of such delay including, in particular, any change of position by him as a result which has occurred. The longer the period that has been allowed to lapse since the judgment the more likely it is that the court will find prejudice to the judgment debtor.

26. It was argued on behalf of the claimant that the discretion should be exercised with due regard to comity between the courts of different countries which are prepared to enforce each other's judgments. Thus in the present case the German judgment remains enforceable in Germany for a period of 30 years after it was made. It was submitted that the court should be prepared to extend time for the issue of execution for the whole of that period. I cannot accept this submission. There seems to me to be no reason to treat the judgment of a foreign court registered in this country any differently from an English judgment when applying RSC Ord 46, r 2.

27. The picture sought to be presented by the defendant in his evidence was of a man living openly on the island of Nevis on or near the Zetland estate, latterly, in a house built by him on land which he had purchased in the vicinity and of which the conveyancing documents were registered at the local register of deeds. It was his evidence that, although living on the island, he would leave from time-to-time for short visits abroad, in particular, visits to his daughter in Australia. In support of his case there was adduced the evidence of a British expatriate who had visited the island every year since 1984 and who had been, since 1987, a property owner on the island. He is a friend of the defendant. It was his uncontradicted evidence that the island has a population of approximately 10,000 persons. There is a British/North American expatriate population of up to 200 persons. There is a practising legal profession on the island of about 12 lawyers. The witness had met the defendant on his first visit to the island in 1984. It was his evidence, as to which there was clearly an issue with the claimant's evidence, that the defendant had been habitually resident on the island from that date. The defendant was an 'outgoing person' involved in projects on the island from time-to-time. He was a 'well known figure'. His name had been

in the local telephone directory 'at all times' and the witness had obtained his telephone number from the United Kingdom from Directory Enquiries in 1986. *a*

28. The picture presented by the claimant was radically different. It was one of the defendant, continuously since 1984, attempting to cover his tracks and conceal his assets from her. If he was, in truth, resident on Nevis since that time, then, it was in hiding from her, taking every step available to him to make himself untraceable. It was submitted that in this he may well have been assisted by the *b* local population.

29. I confess to being puzzled by the apparent inability of the claimant or her inquiry agents to trace the defendant on the island of Nevis save on one occasion in August 1989 by Cosmopol. The claimant's agents' evidence of search through the public registers on the island is in direct conflict with evidence of the defendant and on his behalf that his name has appeared at all material times on *c* those registers. There was no cross-examination of witnesses either before the master or before me. Unless I am able to reject the evidence of any witness as being inherently unbelievable on its face I cannot decide any such conflict. I find myself unable to reject the evidence adduced on behalf of the defendant on this issue. It follows that I cannot find proved that the defendant has since 1984 been *d* concealing himself or his assets from the claimant.

30. A period of approximately eight years went by between August 1989 and April 1997 when no contact was made between the claimant and the defendant to indicate that the claimant was still pursuing her judgment. Thereafter, when he had been again traced to Nevis by the claimant various steps were taken culminating in this application. In the note of Master Hodgson's judgment the *e* following passage appears describing this period:

> 'Meanwhile the defendant, for whom one must not have too much sympathy, destroyed his papers 12 years on and now finds himself, 14 or 15 years on, having to deal with this. He is now 73 and not in the best of health according to the affidavit of a friend. He has had a heart attack.' *f*

31. The heart attack occurred in 1992. Sixteen years have now gone by since the German judgment was made and 15½ years since it was registered in England. If execution requires the defendant to leave his house or surrender his possessions it will be much more onerous for him now than it would have been six years after registration. *g*

32. These proceedings are by way of re-hearing in which I am able to exercise the master's discretion afresh. I have come to the conclusion that the claimant has not made out a case for the exercise of the court's discretion to prolong the period of six years from the registration of the German judgment in England so as to entitle her to leave to issue execution today. For these reasons I would affirm the decision of Master Hodgson.

Appeal dismissed.

Dilys Tausz Barrister.

Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd

COURT OF APPEAL, CIVIL DIVISION

SWINTON THOMAS, WALLER LJJ AND ARDEN J

15, 25 MAY, 28 JULY 2000

Arbitration – Award – Leave to appeal against award – Appeal to Court of Appeal – Jurisdiction – Refusal of High Court judge to grant leave to appeal from his decision on appeal from arbitrator – Whether Court of Appeal having jurisdiction to grant leave to appeal or review refusal of lower court to grant leave – Arbitration Act 1996, s 69(8) – Access to Justice Act 1999, s 55.

An arbitrator made an interim award in arbitration proceedings between the parties to a building contract. The contractors appealed to the High Court against that award under s 69[a] of the Arbitration Act 1996, but the appeal was dismissed by the judge. The contractors thereupon asked the judge for leave to appeal under s 69(8) of the 1996 Act, which provided that no appeal lay from the decision of the court on an appeal under s 69 without the leave of the 'the court', and that such leave would be granted only if the 'the court' considered that the question was one of general importance or was one which should be considered by the Court of Appeal for some other special reason. The term 'the court' was defined as the High Court or a county court. The judge refused to grant leave and the contractors made an application to the Court of Appeal, contending that that court could itself give leave or, alternatively, that it was entitled to review the judge's refusal to give leave.

Held – (1) On the true construction of s 69(8) of the 1996 Act, the Court of Appeal had no jurisdiction to grant leave to appeal from a decision of the High Court or a county court on an appeal under s 69. Rather, an appeal to the Court of Appeal from such a decision could be brought only with the leave of those lower courts. Nor did the Court of Appeal have any jurisdiction to review a refusal to grant such leave. A conclusion to the contrary would defeat the clear objective of s 69(8). Moreover, a limitation on rights of appeal was consistent with the philosophy of the Act, namely that parties who had agreed to have their disputes arbitrated should have finality as speedily as possible and with as little expense as possible. The fact that one tribunal would be dealing with the question was also consistent with that philosophy. Accordingly, the Court of Appeal had no jurisdiction to entertain an appeal by the contractors from the judge's decision (see p 264 *f* to *h* and p 265 *c to e j*, post); *Scherer v Counting Instruments Ltd* (1977) [1986] 2 All ER 529 distinguished.

(2) That conclusion was not affected by s 55[b] of the Access to Justice Act 1999 which provided that where an appeal was made to a county court or the High Court in relation to any matter, and on hearing that matter the court made a decision in relation to it, no appeal could be brought from that decision to the Court of Appeal unless the latter considered that such an appeal would raise an

a Section 69, so far as material, is set out at p 260 *b c*, post

b Section 55 is set out at p 266 *b c*, post

important point of principle or practice, or there was some other compelling reason for the Court of Appeal to hear it. Section 55 of the 1999 Act, which the court had considered after recalling its initial judgment, had not impliedly repealed s 69(8) of the 1996 Act. Accordingly it had not dispensed with the requirement that leave to appeal had to be obtained from the court which had had heard the appeal from the arbitrator (see p 271 *a b*, p 272 *b* and p 274 *c*, post).

Per Swinton Thomas and Waller LJJ. Section 55 of the 1999 Act has no effect at all on s 69(8) of the 1996 Act. Thus, where a party wishes to appeal from the court's decision on an appeal from an arbitrator under s 69 of the 1996 Act, it has only to obtain leave from the court that heard the appeal, not from both that court and the Court of Appeal (see p 271 *e* to p 272 *a* and p 274 *b c*, post).

Per Arden J. Section 55 of the 1999 Act applies in addition to s 69(8) of the 1996 Act. Thus, even if a High Court judge has granted leave to appeal under s 69(8), the appellant must also obtain permission to appeal from the Court of Appeal under s 55 (see p 273 *b* to p 274 *a*, post).

Notes

For appeals to the Court of Appeal in arbitration proceedings, see 2 *Halsbury's Laws* (4th edn reissue) para 711.

For the Arbitration Act 1996, s 69, see 2 *Halsbury's Statutes* (4th edn) (1999 reissue) 609.

Cases referred to in judgments

Aden Refinery Co Ltd v Ugland Management Co, The Ugland Obo One [1986] 3 All ER 737, [1987] QB 650, [1986] 3 WLR 949, CA.

Blackpool Corp v Starr Estate Co Ltd [1922] 1 AC 27, [1921] All ER Rep 79, HL.

Churchwardens and overseers of West Ham v Fourth City Mutual Building Society [1892] 1 QB 654.

Gelberg v Miller [1961] 1 All ER 618, [1961] 1 WLR 459, HL.

Geogas SA v Trammo Gas Ltd [1991] 3 All ER 554, [1991] 1 WLR 776, HL.

Henderson v Sherborne (1837) 2 M & W 236, 150 ER 743.

Inco Europe Ltd v First Choice Distribution (a firm) [2000] 1 All ER (Comm) 674, [2000] 1 WLR 586, HL.

Jennings v US Government [1982] 3 All ER 104, [1983] 1 AC 624, [1982] 3 WLR 450, HL.

Lane v Esdaile [1891] AC 210, HL.

Michell v Brown (1858) 28 LJMC 53.

National Westminster Bank plc v Arthur Young McClelland Moores & Co (a firm) [1985] 2 All ER 817, [1985] 1 WLR 1123, CA.

Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema [1980] 1 Lloyd's Rep 519, CA.

Poh, Re [1983] 1 All ER 287, [1983] 1 WLR 2, HL.

R v Davis (1783) 1 Leach 271, 168 ER 238.

Scherer v Counting Instruments Ltd (1977) [1986] 2 All ER 529, [1986] 1 WLR 615, CA.

Seward v Vera Cruz (owners), The Vera Cruz (1884) 10 App Cas 59, [1881–5] All ER Rep 216, HL.

Tanfern Ltd v Cameron-MacDonald [2000] 2 All ER 801, [2000] 1 WLR 1311, CA.

Cases also cited or referred to in skeleton arguments

Balfour Beatty Building Ltd v Chestermount Properties Ltd (1993) 32 Con LR 139.

Bankamerica Finance Ltd v Nock [1988] 1 All ER 81, [1988] AC 1002, [1987] 3 WLR 1191, HL.

Barker (John) Construction Ltd v London Portman Hotel Ltd (1996) 83 Build LR 31.

Glenlion Construction v The Guinness Trust (1987) 39 Build LR 89.
Hyde Park Residence v Secretary of State for the Environment, Transport and the Regions (2000) Times, 14 March, CA.
Patel v Patel [1999] 1 All ER (Comm) 923, [1999] 3 WLR 322, CA.
Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.
Percy Bilton Ltd v Greater London Council [1982] 2 All ER 623, [1982] 1 WLR 794, HL.
R v Horsham Justices, ex p Farquharson [1982] 2 All ER 269, [1982] QB 762, CA.
R v Tang (1995) Times, 23 May.
Wells v Army and Navy Co-operative Society Ltd (1902) 86 LT 764.
West Faulkner Associates v Newham London BC (1994) 71 Build LR 1, CA.

Application for permission to appeal

The applicant, Henry Boot Construction (UK) Ltd (Henry Boot), applied for permission to appeal from the decision of Dyson J ((1999) 70 Con LR 32) on 18 October 1999 dismissing its appeal from an interim award of an arbitrator (Bruce Mauleverer QC), dated 3 June 1999, in arbitration proceedings between it and the respondent, Malmaison Hotel (Manchester) Ltd (Malmaison). The facts are set out in the judgment of Waller LJ.

Michael Black QC (instructed by *Elliotts*, Manchester) for Henry Boot.
Finola O'Farrell (instructed by *Shadbolt & Co*, Reigate) for Malmaison.

Cur adv vult

15 May 2000. The court ruled that it had no jurisdiction to grant permission to appeal, for reasons to be given later.

25 May 2000. The following judgments were delivered.

WALLER LJ (giving the first judgment at the invitation of Swinton Thomas LJ). Henry Boot Construction (UK) Ltd (Henry Boot) are the main contractors under a building contract on JCT Standard Form of Building Contract (1980 edn) (with Quantities). Malmaison Hotel (Manchester) Ltd (Malmaison) are the employers. A dispute arose in relation to the proper construction of cl 25 of the contract, and as to whether the architect should have granted a further extension of time. The matter was referred to arbitration, and Mr Bruce Mauleverer QC made an interim award. With the consent of Malmaison (by virtue of cl 41.6.1 of the contract), Henry Boot challenged the interim decision under s 69(1) of the Arbitration Act 1996 in the Mercantile Court in Manchester. The matter was transferred to the Technology and Construction Court at the Royal Courts of Justice, and heard by Dyson J ((1999) 70 Con LR 32). He upheld the view of the arbitrator. Henry Boot sought from the judge leave to appeal to this court under s 69(8) of the 1996 Act. That was refused by Dyson J. They then sought leave from Dyson J to appeal his refusal of leave. He was of the view that he had no jurisdiction to grant such leave but made clear that even if he had he would have refused leave.

Mr Black QC on behalf of Henry Boot has sought to persuade us either that the Court of Appeal has jurisdiction to grant leave to appeal under s 69(8) of the 1996 Act, or at the least that it has the power to review the refusal of leave ie (as I would understand it) that this court has the power either to treat Dyson J's refusal

as a decision of the High Court in relation to which this court could itself grant leave to appeal; or review it in the sense of holding that the judge did not exercise his discretion properly, and substituting the exercise of this court's discretion for that of the judge. *a*

At the conclusion of Mr Black's submissions, we ruled that on the proper construction of s 69(8), since Dyson J had refused leave to appeal, this court had no jurisdiction either itself to grant leave or to review that refusal to grant leave. *b* These are our reasons for so ruling.

Section 69(8) provides as follows:

> 'The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal. But no such appeal lies without the leave of the court which shall not be given unless the *c* court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.'

The court is defined in s 105 as the High Court or the county court.

Simply as a matter of construction 'the court' whenever it appears in the *d* subsection seems to mean the 'High Court' or the 'County Court', and it is to be contrasted with the use of the words the 'Court of Appeal' where that court was intended. At one stage of his argument Mr Black felt constrained to accept that that must be so, but he submitted that the words of the subsection did not preclude the Court of Appeal reviewing the grant of leave. He submitted that *e* although it was understandable that Parliament should support the view that arbitrators were tribunals chosen by the parties and that interference in their decisions should be kept to a minimum, that philosophy should not apply to proceedings once they were in court. He submitted that clear words would be necessary to curtail a litigant's right of appeal.

Miss Finola O'Farrell in her skeleton argument submitted that the language of *f* the subsection is clear, that a requirement for leave to be obtained from the High Court or county court to appeal a decision on an arbitration application was consistent with Parliament's attitude that there should be as little interference as possible with arbitration awards, and she would not accept the approach that there was prima facie any 'right' to appeal. To be entitled to appeal a would-be appellant must bring himself within a statutory provision providing for that right. *g*

In my view it would be difficult to find words clearer than the words of this particular subsection for the proposition that leave of the High Court (or the county court) was needed before any appeal could be brought in the Court of Appeal. Furthermore, if one has regard to its statutory predecessor, the position becomes clearer still. It is in my view unnecessary to have regard to the *h* Departmental Advisory Committee's Report on the Arbitration Bill (1995) which lay behind the drafting of the 1996 Act, but if confirmation were needed of the views formed they are readily ascertained from that report.

It would furthermore seem to me absurd to contemplate a review process in the Court of Appeal in relation to the giving of that leave, otherwise the objective *j* sought to be attained is defeated.

Let me start with that last point first, not least because it enables the authorities to be reviewed in chronological sequence.

In *Lane v Esdaile* [1891] AC 210 the House of Lords had to consider whether an appeal lay to the House of Lords after a refusal by the Court of Appeal to grant 'special leave' under the following provision (at 211):

'No appeal to the Court of Appeal from any interlocutory order ... shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days ...'

Lord Halsbury's speech (at 211–212) is instructive, and I make no apology for quoting a substantial portion of it:

'My Lords, I am of opinion that this preliminary objection ought to prevail. An appeal is not to be presumed but must be given. I do not mean to say that it must be given by express words, but it must be given in some form or other in which it can be said that it is affirmatively given and not presumed. In the particular case now before your Lordships the appeal is certainly not given in express words. The words used are "leave of the Court"; and although it may be that in some sense the leave of the Court, whether it is given or withheld, becomes an order (that I will not stay to discuss), that is not the ordinary mode in which it would be described. It is to be something that is done by the order of the Court. I confess myself I should hesitate if it was only to turn upon the question of language, because although a thing might be called an order, or might be called a judgment, or might be called a rule, or might be called a decree, it might well be that nevertheless by reason of the context it would come within the obvious meaning and purpose of the statute; so that although it was no one of those things in name it might be one of those things in substance, and therefore would come within the general provision that an appeal should lie. But when I look not only at the language used, but at the substance and meaning of the provision, it seems to me that to give an appeal in this case would defeat the whole object and purview of the order or rule itself, because it is obvious that what was there intended by the Legislature was that there should be in some form or other a power to stop an appeal—that there should not be an appeal unless some particular body pointed out by the statute (I will see in a moment what that body is), should permit that an appeal should be given. Now just let us consider what that means, that an appeal shall not be given unless some particular body consents to its being given. Surely if that is intended as a check to unnecessary or frivolous appeals it becomes absolutely illusory if you can appeal from that decision or leave, or whatever it is to be called itself. How could any Court of Review determine whether leave ought to be given or not without hearing and determining upon the hearing whether it was a fit case for an appeal? And if the intermediate Court could enter and must enter into that question, then the Court which is the ultimate Court of Appeal must do so also. The result of that would be that in construing this order, which as I have said is obviously intended to prevent frivolous and unnecessary appeals, you might in truth have two appeals in every case in which, following the ordinary course of things, there would be only one; because if there is a power to appeal when the order has been refused, it would seem to follow as a necessary consequence that you must have a right to appeal when leave has been granted, the result of which is that the person against whom the leave has been granted might appeal from that, and inasmuch as this is no stay of proceeding the Court of Appeal might be entertaining an appeal upon the very same question when this House was entertaining the question whether the Court of Appeal ought ever to have granted the appeal. My Lords, it seems to me that that would reduce the provision to such an absurdity that even if the language were more clear than

is contended on the other side one really ought to give it a reasonable construction.' *a*

In *Gelberg v Miller* [1961] 1 All ER 618, [1961] 1 WLR 459, the House of Lords considered s 1(2) of the Administration of Justice Act 1960. That section provided as follows:

'No appeal shall lie under this section except with the leave of the court below or of the House of Lords; and such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the House of Lords, as the case may be, that the point is one which ought to be considered by that House.' *b c*

The petitioner in that case did not obtain a certificate from the Divisional Court that a point of law of general public importance was involved. The submission on behalf of the petitioner to the House of Lords was that if the court below did not grant a certificate the House of Lords itself had the power to grant it, or if there was no power to grant they had the power to remit with a direction to the Divisional Court to grant it. *d*

Viscount Simonds said:

'This petition is refused. It is quite hopeless, for it is obvious that the whole purpose of section 1(2) of this Act is to ensure that leave to appeal shall not be granted unless it is certified by the court below that a point of law of general public importance is involved.' (See [1961] 1 All ER 618 at 619, [1961] 1 WLR 459 at 461.) *e*

Lane's case and the obvious logic of the above House of Lords authorities were the foundation of the Court of Appeal decision in the arbitration context in *Aden Refinery Co Ltd v Ugland Management Co, The Ugland Obo One* [1986] 3 All ER 737, [1987] QB 650 (see in particular the judgment of Sir John Donaldson MR [1986] 3 All ER 737 at 741–742, [1987] QB 650 at 657–658). In that case a principle relied on by Mr Black in his submissions, the '*Scherer* principle', was held to be confined to its own subject matter and to be inapplicable to appeals under the Arbitration Act 1979. The '*Scherer* principle' was so called after a decision of the Court of Appeal in *Scherer v Counting Instruments Ltd* (1977) [1986] 2 All ER 529, [1986] 1 WLR 615 in which the Court of Appeal held that despite the wording of s 31(1)(h) of the Supreme Court of Judicature (Consolidation) Act 1925, which provided that 'No appeal shall lie ... without leave of the court or judge making the order ... as to costs only which by law are left in the discretion of the court', the Court of Appeal could entertain an appeal if the judge had 'no relevant grounds available or ... in fact acted on extraneous grounds.' *f g h*

In the *Aden* case the court was considering s 1(6A) of the Arbitration Act 1979 as amended by s 148(2) of the Supreme Court Act 1981 which provided:

'Unless the High Court gives leave, no appeal shall lie to the Court of Appeal from a decision of the High Court—(*a*) to grant or refuse leave under subsection (3)(*b*) ...' *j*

All three members of the court were of the view that the *Scherer* principle did not apply to the plain words of that section. Mustill LJ explained how that principle had grown out of the statutory provisions relating to costs (see [1986] 3 All ER 737

at 747, [1987] QB 650 at 665). In the result an attempt to appeal the refusal of leave to appeal by Leggatt J failed on that ground as well as others.

In *National Westminster Bank plc v Arthur Young McClelland Moores & Co (a firm)* [1985] 2 All ER 817, [1985] 1 WLR 1123 the Court of Appeal considered a further provision of the Arbitration Act 1979, s 1(7). That section was the predecessor of the section of the 1996 Act with which we are concerned. The section provided as follows:

> 'No appeal shall lie to the Court of Appeal from a decision of the High Court on an appeal under this section unless—(*a*) the High Court or the Court of Appeal gives leave; and (*b*) it is certified by the High Court that the question of law to which its decision relates either is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal.'

The judge in that case had refused leave and refused to certify a question of law. Sir John Donaldson MR, having dealt with the leave aspect as not being fatal because of the reference in the alternative to the Court of Appeal, continued as follows, and again I make no apology for quoting extensively:

> 'It is submitted by counsel for the applicants that the court has jurisdiction to review the judge's refusal to grant a certificate because, as he submits, the decision to which s 1(7) applies is the underlying decision, namely a decision on questions of law raised in the arbitration. That subsection has no application to the grant or refusal of a certificate, which is a decision of the High Court to which s 16 of the Supreme Court Act 1981 would apply. He further draws our attention to the fact that in *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1980] 1 Lloyd's Rep 519 at 522 Lord Denning MR, giving the judgment of the court, held that this court had jurisdiction to review a discretionary decision by a High Court judge whether to grant or refuse leave to appeal to the High Court, a judgment which was reversed by Parliament by including a new s 1(6A). Counsel for the applicants submits that, in the absence of an equivalent subsection in s 1 of the 1979 Act, we should be persuaded by the decision of this court in *The Nema* to take a similar line. It is not apparent to what extent the matter was argued below; and, in any event, the problem with which we are faced is different, because, as was pointed out by Sir John Megaw in argument, in s 1(7) there is a direct and clear antithesis between leave which can be granted alternatively by the High Court and the Court of Appeal and the certificate which can only be granted by the High Court. In the face of that antithesis and the decision of the House of Lords in *Gelberg v Miller* [1961] 1 All ER 618 at 619, [1961] 1 WLR 459 at 461 in the context of similar provisions for criminal appeals, where Viscount Simonds said that the whole purpose of s 1(2) of the Administration of Justice Act 1960 is to ensure that leave to appeal shall not be granted unless it is certified by the *court below* that a point of law of general public importance is involved, I have no doubt at all that on the true construction of s 1(7) this court has no jurisdiction to consider an appeal from a refusal by a judge of the High Court to grant a certificate under the 1979 Act.' (See [1985] 2 All ER 817 at 818, [1985] 1 WLR 1123 at 1123–1124; Sir John Donaldson MR's emphasis.)

Thus under s 1(7) of the Arbitration Act 1979 leave could be obtained from either the High Court *or* the Court of Appeal, but no appeal could be brought without

a certificate. The *National Westminster Bank* case held that a refusal to grant a certificate was not a decision within s 16 of the Supreme Court Act 1981. This section provides as follows:

> 'Subject as otherwise provided by this or any other Act (and in particular to the provision in section 13(2)(*a*) of the Administration of Justice Act 1969 excluding appeals to the Court of Appeal in cases where leave to appeal from the High Court directly to the House of Lords is granted under Part II of that Act), the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court.'

That section is the foundation of litigant's rights to appeal, and demonstrates that there is no presumption that they have such a right, and demonstrates that when construing a statutory provision relating to appeals it is illegitimate to start from the point of view that litigants have such rights. Lord Halsbury in *Lane*'s case in the passage I have quoted makes this very point.

I should also add for completeness that Mr Black, by a note received following conclusion of the argument, helpfully drew our attention to two further House of Lords authorities where the *Lane*'s case reasoning had been applied. In *Geogas SA v Trammo Gas Ltd* [1991] 3 All ER 554, [1991] 1 WLR 776, the House of Lords held they had no jurisdiction to entertain an appeal from a grant of leave to appeal to the Court of Appeal by the Court of Appeal under s 1(7) of the Arbitration Act 1979. *Re Poh* [1983] 1 All ER 287, [1983] 1 WLR 2 related to refusal by the Court of Appeal of leave to apply for judicial review where again the House of Lords held they had no jurisdiction to entertain an appeal against that refusal.

I now return to the wording of the relevant section of the Arbitration Act 1996 which for convenience I will requote:

> 'But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.'

The wording of the section would indicate to me that the draftsman saw no good reason to maintain a system as per the 1979 Act, whereby leave could be granted by either the Court of Appeal or the High Court, but a point of law needed to be certified by the High Court. The subsection contemplates one court doing one exercise, but, it should be emphasised, an exercise including considering whether the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal, which was the exercise heretofore carried out by the High Court, and *not* the Court of Appeal. The definition of 'court' is the High Court or the county court, and on a natural reading of the section it would seem that sensibly the draftsman has thought that since it was the High Court that previously certified, and since in the context of most litigation that arises from arbitrations it is the commercial judges, the judges of the Technology and Construction Courts and mercantile judges who will consider whether a point needs to go to the Court of Appeal, that is a sensible place to have that question resolved.

I also reject Mr Black's submissions that once matters are in court the philosophy applicable to arbitrations somehow has no further application. Parties who have agreed to have their disputes arbitrated should have finality as speedily as possible and with as little expense as possible (see generally s 1(a) of the 1996 Act). Limitation on the rights of appeal is consistent with that

philosophy and one tribunal dealing with the question is also consistent with that philosophy (see the observations of Sir John Donaldson MR in the *Aden* case [1986] 3 All ER 737 at 739, [1987] QB 650 at 655). As Lord Nicholls emphasised in *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 1 All ER (Comm) 674 at 678, [2000] 1 WLR 586 at 590, many sections of the 1996 Act provide for applications to the court and some of them restrict appeals from decisions of the court. The Act thus adopts the same philosophy and the construction I have placed on s 69 is consistent with its context.

Conclusion

Thus in my view 'court' means the High Court (or the county court) but not the Court of Appeal. It follows that the note in *Civil Procedure* (2000 edn) vol 2, para 2B-256 is inaccurate in suggesting leave can be obtained from the Court of Appeal. The refusal of leave by the High Court or the county court is not a decision within s 16 of the Supreme Court Act 1981 which can itself be the subject of an application for leave to appeal to the Court of Appeal. The above is confirmed by s 18(1)(g) of the Supreme Court Act 1981 (as amended by s 107(1) and para 37(1), (2) of Sch 3 to the Arbitration Act 1996), and supported by the reasoning in the *Inco Europe* case particularly in Lord Nicholls of Birkenhead's speech with which all others agreed (see [2000] 1 All ER (Comm) 674 at 678, [2000] 1 WLR 586 at 590). The *Scherer* principle has no application, and the refusal of leave cannot thus be reviewed in the Court of Appeal.

In the result it is not open to a would-be appellant to challenge in the Court of Appeal a decision of the High Court (or the county court) under s 69 without leave of the High Court (or the county court), and the refusal of the High Court (or the county court) to grant leave to appeal is not capable of challenge in the Court of Appeal.

As indicated at the commencement of this judgment, the above conclusion seems to me plain without recourse to the Departmental Advisory Committee's Report on the Arbitration Bill, but it is comforting to note that in their report dated January 1997 para 27 said:

> 'The Bill used the words "unless the court certifies". These were changed by amendment to "which shall not be given unless the court considers". This amendment was made to make clear that where an appeal is desired from a decision of the Court, leave must be obtained from that Court itself, and will always be required. Leave may not be obtained from the Court of Appeal. As originally drafted, the incorrect impression was given that leave of the Court may not be necessary where that Court certified the issue as being one of general importance or one which for some other special reason should be considered by the Court of Appeal.'

It is for these reasons that we held that this court has no jurisdiction to entertain the appeal of Henry Boot from the decision of Dyson J.

ARDEN J. I agree.

SWINTON THOMAS LJ. I also agree.

[The court withdrew the judgments in order to consider whether its decision was

affected by s 55 of the Access to Justice Act 1999.] *a*

28 July 2000. The following addendum judgments were delivered.

WALLER LJ. On the day that we handed down our judgments our attention was drawn to s 55 of the Access to Justice Act 1999 which came into force on 27 September 1999, ie before Dyson J's decision in this case. That section reads as follows: *b*

> '*Second appeals.*—(1) Where an appeal is made to a county court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that—(a) the appeal would raise an important point of principle or practice, or (b) there is some other compelling reason for the Court of Appeal to hear it. *c*
>
> (2) This section does not apply in relation to an appeal in a criminal cause or matter.'

(Rule 52.13 now supports that section but since that rule did not come into force until 2 May 2000, it did not apply to the application for permission to appeal in this case.) *d*

We recalled our judgments in order to give consideration to the question whether s 55 could have any influence on the views expressed.

What was suggested was that on the wording of s 55 an appeal from an arbitrator to the High Court or the county court is an 'appeal ... in relation to any matter' and thus that Dyson J's decision being in relation to that matter would be covered by the section. It was thus further suggested that if the section applied it would follow that no appeal could be made to the Court of Appeal unless the Court of Appeal considered that the point would raise an important point of principle or practice or that there was some other compelling reason for the Court of Appeal to hear it. A possibility which needed consideration was whether s 55 had by implication repealed s 69(8). *e* *f*

The following are, as it seems to me, the alternatives for consideration, which can be identified by reference to the positions that the parties have now taken up.

1. Implied repeal *g*

Mr Black QC for the applicant submits that the above is a correct interpretation of the section and that the consequence is that by implication s 55 has repealed s 69(8) of the Arbitration Act 1996. He submits that Dyson J had no jurisdiction to deal with the question whether permission to appeal should be given and that the Court of Appeal was the only court that had that jurisdiction. *h*

2. Permission now needed from both the court who heard the appeal from the arbitrator and the Court of Appeal

This is the alternative which Miss O'Farrell supports in her written submissions. She submits that albeit the above is the correct interpretation of s 55, ie that the appeal from an arbitrator to the High Court or a county court is a first tier appeal for the purposes of s 55, that does not produce an implied repeal of s 69(8). She submits that both sections apply and that an applicant for permission to appeal must obtain leave to appeal from the court which makes the decision on appeal from an arbitrator under s 69(8), *and* permission from the Court of Appeal under s 55. If that were the appropriate construction that would *j*

be sufficient for her purposes since this was a case in which Dyson J refused permission to appeal. On her construction a refusal cannot be reviewed by the Court of Appeal for the reasons given in the judgment originally handed down.

3. Section 55 was not intended to deal with appeals from an arbitrator to the High Court or the county court

Mr Black, in his response to Miss O'Farrell, points to the cumbersome process that her solution produces and points to the fact that it seems to produce an inconsistency with the objectives of s 69(8) of the Arbitration Act, which, as explained in the original judgment, included limiting hearings as much as possible and leaving the question of permission to appeal in the hand of the courts most experienced in the field rather than the Court of Appeal. Thus, an alternative possibility which it seems to me needs consideration is whether although s 55, because of the broad terms in which it is drafted, could as a matter of language be said to cover an appeal from the High Court or county court where that court has been dealing with an appeal from an arbitrator, it was not in fact intended to do so, and s 69(8) was intended to continue to be the only section covering such appeals.

We have received great assistance from both counsel. They have put in further extensive written submissions, and we are grateful to them. We are also grateful to Philip Jamieson, a judicial assistant with the Court of Appeal, for certain research which he has done and which we made available to both counsel.

Mr Black in his written submissions first deals with the rather strange circumstance that s 55 came into force on 27 September 1999, but the rule supporting it only came into force on 2 May 2000. He submits that s 55 was not dependent on a rule or any further order before it came into force. Miss O'Farrell does not contend otherwise and we accept that he is right in this submission. It is also right to say that I do not think that the coming into force of the rule will add anything to the arguments in relation to applications for permission to appeal made after 2 May 2000. The question is one of statutory construction, and if s 55 applies then as from 2 May 2000 the rule applies; if s 55 never did apply then the rule does not apply either.

It is relevant to see both s 69(8) and s 55 in their contexts. In the original judgment I set out the philosophy which supported the view I took about the construction of s 69(8). That philosophy included limiting the court's interference in the awards of tribunals chosen by the parties to try their disputes; speed in obtaining a final resolution; and keeping down the costs so far as possible. Those objectives would be supported by the philosophy that lay behind the Access to Justice Act 1999.

Section 55 was concerned with limiting the rights of appeal where there had already been one appeal. I can quote paras 6 to 9 from Mr Black's submissions which set the background accurately, and assist in identifying the philosophy lying behind the section.

> '6. The Parliamentary debates make it clear that section 55 was intended to give effect to the recommendations of Sir Jeffrey Bowman in his report on the Civil Division of the Court of Appeal. On 11th May 1999, Mr Hoon, Minister of State in the LCD, addressed Standing Committee "E" on what was then Clause 41 of the Bill (incorrectly described in Hansard) (Session 1998–99, Publications on the Internet, Standing Committee Debates, *Access to Justice Bill* [HL], Standing Committee E, [Part II], column 303); "The clause

introduces the principle that, in normal circumstances, there should be only one appeal to the courts in relation to any matter. The Bowman review found that many cases reaching the civil division of the Court of Appeal had already been considered on appeal by a lower court and concluded that that was inconsistent with the principles of certainty and proportionality which are at the heart of the wider civil justice reforms. It will of course remain possible to appeal to the Court of Appeal, but under more restricted circumstances."

7. The Bowman report had been published on 6th November 1997. In the section "*Current Situations and Reasons for the Review*" (Internet version, LCD web-site) the committee (of which Lord Woolf was a member) said, "*The principles underlying a civil appeals system* 8. The application of the Woolf principles led us to the conclusion that more than one level of appeal cannot normally be justified. In addition, we concluded that certain appeals which now reach the CA should normally be heard at a lower level provided that they are heard by a court or judge with a superior jurisdiction to that which made the first instance decision. Such appeals could reach the CA, however, where there is an important point of principle or practice or one which for some other special reason should be considered by the CA." And at "*Summary of recommendations*" number 9: "More than one level of appeal cannot normally be justified except in restricted circumstances where there is an important point of principle or practice or one which for some other special reason should be considered by the CA."

8. Following the sitting of the Standing Committee, the wording of the relevant clause of the Bill reached its final form and was published on 17th May 1999.

9. In *Tanfern Ltd v Cameron-MacDonald* [2000] 2 All ER 801 at 811–182 Lord Justice Brooke commented as follows: "44. The reason for this significant change of appellate policy can be found in the 1997 Review of the Business of the Court of Appeal (Civil Division). This Review reported that over the previous decade there had been a substantial increase in the number of cases coming to the Court of Appeal. Its authors believed that if there had to be an appeal in a civil case this should normally be the end of the matter. This principle reflected the need for certainty, reasonable expense and proportionality, and they said that there must be special circumstances if there was to be more than one level of appeal. Elsewhere in their report they had said that judges of the quality of Lords Justices of Appeal were a scarce and valuable resource, and that it was important that they were used effectively and only on work which was appropriate to them (Review of the Court of Appeal (Civil Division), pp 10, 26 and 22). 45. It is clear that in the Access to Justice Act 1999 Parliament not only accepted the report's analysis of the problems confronting the Court of Appeal but that it also adopted even tougher measures than those recommended by the Review to ensure that second appeals would in future become a rarity and that the judges of this court would be freed to devote more of their time and energy in hearing first appeals in more substantive matters which either their court or a lower court had assessed as having a realistic prospect of success."'

In para 10 Mr Black submits as follows: 'It is submitted that the policy behind section 55 appears to have been that it would apply to all second appeals.' In so far as that is suggesting that the policy intended s 55 to apply to second appeals

where the first appeal was from a tribunal other than a court, I am not sure he is right, and his paras 6 to 9 do not in fact support it.

Schedule 15 of the Access to Justice Act 1999 deals with repeals and revocations. The following points are of interest.

1. There is no reference to s 69(8) of the Arbitration Act 1996 and thus no express repeal of that section.

2. That schedule includes as repealed ss 18(1A) and 18(1B) of the Supreme Court Act 1981. It will be remembered that by virtue of s 18(1)(g) of that Act (as amended by s 107(1) and para 37(1), (2) of Sch 3 to the Arbitration Act 1996) it is provided that '(1) No appeal shall lie to the Court of Appeal ... (g) except as provided by Part 1 of the Arbitration Act 1996, from any decision of the High Court under that Part', and there is no repeal or alteration of that subsection.

3. That schedule repealed the words 'with the leave of the judge or of the Court of Appeal' in s 375(2) of the Insolvency Act 1986. That section read as follows:

> 'An appeal from a decision made in the exercise of jurisdiction for the purposes of those Parts by a county court or by a registrar in bankruptcy of the High Court lies to a single judge of the High Court; and an appeal from a decision of that judge on such an appeal lies, with the leave of the judge or of the Court of Appeal, to the Court of Appeal.'

The effect of the repeal of the particular words is that s 55 would then appear to apply. Thus, where there has been an appeal to a single judge of the High Court from a decision of the county court or a registrar in bankruptcy, appeal to the Court of Appeal will lie *only* with permission of the Court of Appeal.

4. It seems that there are provisions similar to s 375(2) of the Insolvency Act 1986 with words similar to those now repealed in the following ten other statutes: (1) the Banking Act 1987, s 31(3); (2) the Building Act 1984, s 42(5) (not yet commenced); (3) the Building Societies Act 1986, s 49(3); (4) the Estate Agents Act 1979, s 7(5); (5) the Friendly Societies Act 1992, s 61(3); (6) the Patents Act 1977, s 97(3) (the Patents Court being part of the Chancery Division of the High Court: Supreme Court Act 1981, s 6); (7) the Planning (Listed Buildings and Conservation Areas) Act 1990, s 65(5); (8) the Town and Country Planning Act 1990, s 289(6); (9) the Transport Act 1985, ss 9(8), 43(4) (although s 43 has been prospectively repealed by the Greater London Authority Act 1999, s 423, Sch 34); and (10) the Tribunals and Inquiries Act 1992, s 11(5).

Schedule 15 could have contained repeals of the words 'the court or the Court of Appeal' in all those sections if it had been intended that s 55 would now cover second tier appeals in so far as they were appeals from the relevant tribunals under the above Acts to the court and from the court to the Court of Appeal. It is noteworthy that all those sections deal with circumstances where the first tier decision was of a tribunal or person, not a court. One answer may be that those sections have by implication been repealed, but the alternative is that the decision not to make the alteration was deliberate, and it was intended that s 55 should simply apply to second tier appeals where the first hearing was before a court.

Has s 55 by implication repealed s 69(8)?

Mr Black has helpfully set out the relevant authorities which guide us in consideration of this question, and again I can quote certain paragraphs of his written submissions.

'IMPLIED REPEAL

15. In *Churchwardens and overseers of West Ham v Fourth City Mutual Building Society* [1892] 1 QB 654 at 658 (DC) A L Smith J said: "The test of whether there has been a repeal by implication by subsequent legislation is this: Are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together?"

16. There is a presumption against implied repeal. In *Jennings v US Government* [1982] 3 All ER 104 at 116 (HL) Lord Roskill said: "My Lords, counsel for the defendant also referred your Lordships to a number of cases in the last century and indeed before on the subject of the implied repeal of an earlier by a later statute, as, for example, *Henderson v Sherborne* (1837) 2 M & W 236, 150 ER 743 and *Michell v Brown* (1858) 28 LJMC 53. An even more striking example can be found in the earlier case of *R v Davis* (1783) 1 Leach 271, 168 ER 238, where a statute creating a capital offence was, perhaps not surprisingly, held to have been impliedly repealed by a later statute carrying a penalty of only £20. My Lords, I do not doubt that the principles applicable to the implied repeal of an earlier by a later statute are well established. But today those old cases must be approached and applied with caution. Until comparatively late in the last century statutes were not drafted with the same skill as today."

17. Implied repeal is also subject to the principle that where the literal meaning of a general enactment covers the situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one and that the earlier specific provision is not to be treated as impliedly repealed. In *Seward v Vera Cruz (owners), The Vera Cruz* (1884) 10 App Cas 59 at 68 (HL) the Earl of Seborne LC said: "Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." In *Blackpool Corp v Starr Estate Co Ltd* [1922] 1 AC 27 at 34 (HL) Viscount Haldane said: "My Lords, in that state of matters we are bound, in construing the general language of the Act of 1919, to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specially declared. A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to. An intention to deal with them may, of course, be manifested, but the presumption is that language which is in its character only general refers to subject-matter appropriate to class as distinguished from individual treatment. Individual rights arising out of individual treatment are presumed not to have been intended to be interfered with unless the contrary is clearly manifest." (See generally *Cross on Statutory Interpretation* (3rd edn, 1995) pp 5 and 77 and *Bennion on Statutory Interpretation* (3rd edn, 1997) pp 225–227.'

In my view it would not be right to construe s 55 as having impliedly repealed s 69(8). The reasons for that view are: (1) the indications are that Parliament did not intend that all second tier appeals would require the permission of the Court of Appeal, in any event where the first tier was not a court but a tribunal; (2) where there was an intention to repeal a provision inconsistent with s 55 Parliament did so expressly; (3) the draftsman actually looked at s 18 of the Court and Legal Services Act 1990, repealed certain subsections, but left untouched the provision relating to appeals under the Arbitration Act 1996; and (4) s 55 is a general provision not intended to effect s 69(8) which gave individual treatment to appeals from arbitrators.

Is the position that in relation to arbitrations there are now two hurdles, s 69(8) and s 55?

This is the more difficult question because unlike the position in relation to the sections in the ten statutes to which I have referred, it is possible to insist on compliance with both s 55 as well as s 69(8). In the other provisions the fact that it is the court or the Court of Appeal demonstrates that compliance with the relevant provision and s 55 cannot have been intended.

The question whether there are two hurdles or whether s 55 simply has no application does not actually arise on this appeal and it is for that reason that we have not asked the parties to come back and argue the matter orally. It did not seem right that they should they be put to that expense when neither need contend for it.

However, it is right that I should express a view for the assistance of others and for consideration as to whether what I suggest is the result was the intended result by those concerned with these matters.

In my judgment the right conclusion is that s 55 simply has no effect so far as s 69(8) is concerned, in the same way as it has not by implication repealed the ten provisions to which I have drawn attention. In other words if the court who has heard the appeal from the arbitrator grants leave to appeal to the Court of Appeal, that means what it says and there is no additional requirement to obtain the permission of the Court of Appeal.

I reach that conclusion for these reasons.

1. It seems to me to follow from the fact that so many provisions were left unamended, and it is difficult to conclude that that was an oversight, since one provision in the section in the Insolvency Act 1986 was amended.

2. One would have expected if two hurdles were now to be appropriate, that would have been expressly referred to.

3. It would actually be contrary to the philosophy of the Arbitration Act to put the parties to the extra cost and expense of applying to the Court of Appeal for very much the same considerations to be considered by that court. It would be extremely unlikely that the Court of Appeal would consider refusing leave to appeal if the court has granted it on the basis of the requirements of s 69(8), thus one can conclude it was intended by Parliament that parties were not to be put through an unnecessary exercise.

4. It would actually be contrary to the philosophy of the Access to Justice Act 1999 generally to require two applications for permission to appeal. Section 55 contemplates only one application and I know of no other situation in which if 'leave to appeal' is given by one court, permission must still be gained from some other court as well. Certification of a point of law of public importance is one

thing, but actually granting permission to appeal, and then needing a further grant of permission makes little sense. *a*

5. (As already stated) s 55 is a general provision not intended to effect s 69(8) which gives individual treatment to appeals from arbitrators.

Thus, despite the interesting arguments presented, our previous judgment should stand. *b*

ARDEN J.

1. For the reasons given below, I agree with Waller LJ that s 55 of the Access to Justice Act 1999 has not repealed s 69(8) of the Arbitration Act 1996. That point is strictly the only point which needs to be decided on this appeal but as the court in reaching that decision has had to consider the interrelationship between the two sections, it has decided to issue this supplementary judgment. *c*

2. On the question whether s 55 of the 1999 Act applies in addition to s 69(8) of the 1996 Act or whether s 69(8) applies to the exclusion of s 55, I have come to a different conclusion. I prefer the former alternative, namely the view that permission to appeal is now needed from both the High Court and the Court of Appeal. The reasons for my conclusion may be shortly expressed as the relevant legislation has been set out in full in the judgment of Waller LJ. *d*

3. Permission can be given under s 69(8) by a county court judge or a High Court judge but for simplicity I refer only to a High Court judge granting permission under this section.

4. The Bowman report states that 'More than one level of appeal cannot normally be justified except in restricted circumstances where there is an important point of principle or practice or one which for some other special reason should be considered by the Court of Appeal' (report, ch 2, para 16). This recommendation appears under the heading 'Principles underlying the operation of the civil appeals system'. In ch 4, para 59, the report recommends that the tribunals structure should be examined in detail with a view to bringing the arrangements for appeals in line with the principles which the report identifies as underlying the appeals system. For my own part, I would therefore accept that the principle that one level of appeal should be the norm was a principle which was to be examined and where appropriate applied to appeals from decisions of tribunals and to arbitration appeals. I further note that the question of rationalising appeal routes from tribunals is in fact currently under review (Review of Tribunals, The Rt Hon Sir Andrew Leggatt, consultation paper, 9 June 2000, question F10). The introduction to this consultation paper refers to the Bowman report. *e* *f* *g*

5. Neither s 55 of the 1999 Act nor CPR 52.13 nor PD 52, para 4.9 precludes the possibility of an application for permission to the High Court as well as to the Court of Appeal although in many cases this course will not be appropriate. *h*

6. There was no need for the 1999 Act to amend s 18 of the Supreme Court Act 1981, as it is still the case that there is no appeal at all in arbitration matters unless the 1996 Act provides for such an appeal. Section 18 does not deal with the question of which court may give permission to appeal. *j*

7. In my judgment the express repeal by the 1999 Act of the words 'with the leave of the judge or of the court of appeal' in s 375 of the Insolvency Act 1986 is not necessarily significant. Those words are inconsistent with s 55 since they contemplate in a second tier appeal that a litigant has the right to appeal to the Court of Appeal if the High Court grants him or her permission. The amendment to s 375 reflects a decision as a matter of policy by Parliament to apply the general

principle identified by the Bowman report to second tier bankruptcy appeals. Bankruptcy matters are principally governed by Insolvency Rules, and so in the circumstances the view may have been taken that the most convenient course was to repeal the relevant words in s 375 by the 1999 Act. I accept that the like words have not been repealed in the other statutes mentioned in Waller LJ's judgment, but the appeals to which they relate are subject to CPR r 52.13. In addition the relevant words may be capable of repeal by order consequential on the making of CPR r 52.13: see s 4 of the Civil Procedure Act 1997.

8. It is common ground that the 1999 Act has not expressly repealed s 69(8) of the 1996 Act. In my judgment neither has it not done so by implication. First the courts presume that Parliament does not intend an implied repeal: see Bennion *Statutory Interpretation* (3rd edn, 1997), p 225. That presumption is strengthened in this case by the express amendment to s 375 of the Insolvency Act 1986. Second, s 69(8) of the 1996 Act is not actually inconsistent with s 55 of the 1999 Act. Because s 55 is not inconsistent with s 69(8), it can be read as imposing an additional or cumulative requirement. Both statutory provisions have as their effect the limitation of appeals in arbitration matters. But the limitations are for different purposes. Under the 1996 Act Parliament requires permission to be given for second tier appeals on points of law as part of a policy of restricting appeals in arbitration matters: see the philosophy of the 1996 Act as described in the judgment of Waller LJ and in the court's judgment dated 25 May 2000. The High Court judge is the person selected by Parliament in that Act to consider whether the conditions for the grant of permission are satisfied. The judge may conclude that the question is not one of general importance and this will prevent an appeal from taking place even though the Court of Appeal would have concluded that an important point of principle or practice was involved. The judge has had the advantage of hearing the case and probably of hearing other similar cases and will be in a strong position to decide consistently with the policy of the 1996 Act whether permission to appeal should be given, and moreover I would expect the Court of Appeal to give weight to the views of the judge if the judge decided that it was appropriate to give permission. The double requirement is not therefore contrary to common sense. If it was, that might then lead to the conclusion that Parliament could not have intended that result and that accordingly s 69(8) had been impliedly repealed. The requirement for permission to be granted by the Court of Appeal is inserted into the 1999 Act so that the Court of Appeal can safeguard its own resources. Like Waller LJ I am unaware of the imposition of two hurdles in any other case, but I see no reason why there should not be two requirements for permission where as here there are different policy requirements to be addressed.

9. The converse result is that s 55 of the 1999 Act does not apply to appeals pursuant to s 69(8) of the 1996 Act. But s 55 is general on its face. It refers to 'appeals' and does not specify that they should be appeals from another court. Section 69(8) of the 1996 Act also uses the word 'appeal' (and accordingly I need not consider whether an appeal by way of case stated is included: cf s 54(5) of the 1999 Act). I do not see any method by which s 55 of the 1999 Act can be read as qualified in this case. Furthermore, the criteria in the two sections differ slightly and the policy behind the two requirements is different: see above. Moreover, to achieve its purpose s 55 needs to be applied to as many cases as possible.

10. Accordingly, I conclude that even if a High Court judge grants permission to appeal under s 69(8) of the 1996 Act the appellant must also obtain permission from the Court of Appeal under s 55 of the 1999 Act.

11. I appreciate that this means that a prospective appellant has two hurdles to cross before he or she can appeal but in practice there is unlikely to be a great difference between the two stages. Moreover, it follows from our earlier judgment that this problem will arise only if the High Court judge gives permission. Furthermore it is possible that (if appropriate) the position may be capable of being changed by secondary legislation. a

12. Finally, I too would like to express my appreciation of counsels' further written submissions and the work done by Philip Jamieson, judicial assistant. b

SWINTON THOMAS LJ.

1. I agree with the addendum judgment given by Waller LJ. For the reasons given by him I am of the opinion that s 55 of the Access to Justice Act 1999 has no effect so far as s 69(8) of the Arbitration Act 1996 is concerned. In my judgment, it is very unlikely indeed that Parliament or the draftsman could have intended that leave to appeal should be obtained twice over, and the legislation does not, in my opinion, so require. c

2. I agree with both Waller LJ and Arden J that s 55 has not repealed s 69(8).

Application outside court's jurisdiction.

Dilys Tausz Barrister.

Messier-Dowty Ltd and another v Sabena SA and others (No 2)

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF MR, HALE LJ AND LORD MUSTILL

7, 21 FEBRUARY 2000

Practice – Parties – Joinder of parties – Claim for negative declaration – Whether party properly joined – Whether claim should be set aside as against party – Whether negative declaration should be granted.

Conflict of laws – Jurisdiction – Court – Appropriate court – Exclusive jurisdiction – Whether defendant 'one of a number of defendants in the courts of the place where any one of them is domiciled' – Civil Jurisdiction and Judgments Act 1982, Sch 1, arts 6, 22.

An aircraft owned by the first defendant, S, and manufactured by the second defendant, A, a consortium of which the third defendant, B, was the British partner, was involved in an incident at Brussels airport. The incident was caused by a failure of the aircraft's starboard landing gear, which was designed and manufactured by the claimant, D. The aircraft had been supplied to S by A under a contract governed by French law and which contained an exclusive jurisdiction clause which gave jurisdiction to the Tribunaux de Paris. The contract relating to the design and supply of the landing gear was between B, acting on behalf of A, and D. English law was the applicable law of the contract and the English courts were given exclusive jurisdiction. It was D's contention that the faults in the landing gear were due to the failure of B or A or both to provide data for the design and manufacture of the landing gear which was 'sufficiently demanding'. S applied to the Tribunal de Commerce in Paris for the appointment of a panel of experts to investigate and report on the causes of the incident. The tribunal declared the application competent and appointed the experts who were to investigate and report. D entered an appeal against that decision. In the meantime, D issued proceedings in the High Court seeking declarations of non-liability against S, A, and B. S applied to have service on it of the claim form set aside on the grounds: (i) that the proceedings against S were an abuse of the process of the court because D had no cause of action against S, and in such circumstances the court should refuse to entertain a claim for a negative declaration on non-liability; or, alternatively (ii) that the court had no jurisdiction to determine the claim against S, since S was domiciled in Belgium and the case did not fall within any of the exceptions to art 2 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (as set out in Sch 1 to the Civil Jurisdiction and Judgments Act 1982 as amended). The judge set aside service of the claim form and declared that the court had no jurisdiction over S. D appealed.

Held – (1) The correct approach to the question whether to grant a negative declaration was one of discretion rather than jurisdiction. The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice were achieved, the courts should not be reluctant

to grant such declarations. It would, however, be wrong to conclude that just because a negative declaration would serve some useful purpose it would always be appropriate for it be granted, since there might be other reasons why it would amount to a misuse of the court's procedure. In the instant case, as an issue of domestic law alone, the joinder of S at the present stage was not justified and was inconsistent with resolving the English proceedings justly. S should, therefore, be dismissed from the proceedings unless it would be inconsistent with the policy of the Brussels Convention to do so (see p 285 *e* to *h*, p 286 *b c*, p 287 *d e* and p 288 *j*, post); *Midland Bank plc v Laker Airways Ltd* [1986] 1 All ER 526 and *Camilla Cotton Oil Co v Granadex SA, Shawnee Processors Inc v Granadex SA* [1976] 2 Lloyd's Rep 10 and [1975] 1 Lloyd's Rep 470 considered.

(2) Article 6[a] of the convention had to be read with art 22[b], which meant that art 6(1) only applied where the actions brought against the various defendants were related when the proceedings were instituted, i e where it was expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. In the instant case, as S had as yet made no claim against D, D could not establish that the joinder of S met that additional requirement of art 6.1. The appeal would accordingly be dismissed (see p 288 *d* to *g* and p 288 *j*, post); *Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co* Case 189/87 [1988] ECR 5565 considered.

Per Lord Woolf MR. The development of the use of declaratory relief in relation to commercial disputes should not be constrained by artificial limits wrongly related to jurisdiction, but should instead be kept within proper bounds by the exercise of the court's discretion (see p 285 *h j*, post).

Notes

For additional parties and related claims under the Brussels Convention, and for stay of proceedings on the grounds of forum non conveniens, see 8(1) *Halsbury's Laws* (4th edn reissue) paras 644, 1085 respectively.

For the Civil Jurisdiction and Judgments Act 1982, Sch 1, arts 6, 22, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 1185, 1190.

Cases referred to in judgments

Boss Group Ltd v Boss France SA [1996] 4 All ER 970, [1997] 1 WLR 351, CA.

Camilla Cotton Oil Co v Granadex SA, Shawnee Processors Inc v Granadex SA [1976] 2 Lloyd's Rep 10, HL; *rvsg* [1975] 1 Lloyd's Rep 470, CA.

Clay, Re, Clay v Booth, Re a Deed of Indemnity [1919] 1 Ch 66, [1918–19] All ER Rep 94, CA.

Dyson v A-G [1911] 1 KB 410, CA.

First National Bank of Boston v Union Bank of Switzerland [1990] 1 Lloyd's Rep 32, CA.

Gannon v British and Irish Steampacket Co Ltd [1993] 2 IR 359, Ir SC.

Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, [1914–15] All ER Rep 24, CA.

Handelskwekerij G J Bier BV v Mines de Potasse d'Alsace SA Case 21/76 [1978] QB 708, [1976] ECR 1735, ECJ.

Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co Case 189/87 [1988] ECR 5565.

a Article 6, so far as material, is set out at p 281 *e*, post

b Article 22 is set out at p 281 *j* to p 282 *a*, post

Maciej Rataj, The, Tatry (cargo owners) v Maciej Rataj (owners) Case C-406/92 [1995] All ER (EC) 229, [1994] ECR I-5439, ECJ.
Messier-Dowty Ltd v Sabena SA [2000] 1 All ER (Comm) 101.
Midland Bank plc v Laker Airways Ltd [1986] 1 All ER 526, [1986] QB 689, [1986] 2 WLR 707, CA.
New Hampshire Insurance Co v Aerospace Finance Ltd [1998] 2 Lloyd's Rep 539.
S (hospital patient: court's jurisdiction), Re [1995] 3 All ER 290, CA.
Saipem SpA v Dredging VO2 BV, The Volvox Hollandia [1988] 2 Lloyd's Rep 361, CA.

Cases also cited or referred to in skeleton arguments

Berliner Bank AG v C Czarnikow Sugar Ltd, The Rama [1996] 2 Lloyd's Rep 281.
Charman v WOC Offshore BV [1993] 2 Lloyd's Rep 55, CA.
Expandable Grafts Partnership v Boston Scientific BV [1999] FSR 352, CA Hague.
Fort Dodge Animal Health Ltd v Akzo Nobel NV [1998] FSR 222, CA.
Gascoine v Pyrah (unreported, 25 May 1993), CA.
Holding Oil Finance v Marc Rich (unreported, 27 February 1996), CA.
Maciej Nataj, The [1991] 2 Lloyd's Rep 458.
Molnlycke AB v Procter & Gamble Ltd [1992] 4 All ER 47, [1992] 1 WLR 1112, CA.
New Hampshire Insurance Co v Phillips Electronics North America [1999] LRLR 58, CA.
Qingdao Ocean Shipping Co v Grace Shipping Establishment, The Xing Su Hai [1995] 2 Lloyd's Rep 15.
Rewia, The [1991] 2 Lloyd's Rep 15, CA.
Sarrio SA v Kuwait Investment Authority [1997] 4 All ER 929, HL.

Appeal

The claimants, Messier-Dowty Ltd (Dowty) and X-MD Ltd, appealed from the order of Moore-Bick J on 26 July 1999, whereby he set aside service of their claim form on the first defendant, Sabena SA, in respect of the claimants' application for declaration of non-liability, and ruled that the court had no jurisdiction over Sabena in respect of the causes of action set out in the claim form. The second defendant, GIE Airbus Industrie (Airbus), and the third defendant, British Aerospace Airbus Ltd (BAA), did not take part in the proceedings. The facts are set out in the judgment of Lord Woolf MR.

Sir Sydney Kentridge QC and *Michael Swainston* (instructed by *Herbert Smith*) for Dowty.
Philip Shepherd (instructed by *Beaumont & Son*) for Sabena.

Cur adv vult

21 February 2000. The following judgments were delivered.

LORD WOOLF MR.

1. This is an appeal by the claimant (Dowty) from a judgment given by Moore-Bick J on 26 July 1999. The judge set aside service of the claim form on the first defendant (Sabena), declared that the court had no jurisdiction over Sabena in respect of the causes of action (if any) set out in the claim form and stayed the effect of his order pending the present appeal. The judge gave leave to appeal because he accepted that the case raised questions of general importance in relation to the grant of negative declarations and as to the effect of the Brussels

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. The convention has force of law in this jurisdiction in consequence of the Civil Jurisdiction and Judgments Act 1982.

The facts

2. The proceedings follow from an Airbus A340 aircraft owned by Sabena being involved in an incident when landing at Brussels Airport on 29 August 1998. The incident was caused by the aircraft's starboard landing gear failing. Fortunately the injuries to those on board were slight but the aircraft and its starboard engine were extensively damaged. The loss caused by the failure of the landing gear, including losses sustained as a result of the aircraft being out of use while being repaired, is said to be about $US 50m. The aircraft was manufactured by the second defendant (Airbus). Airbus is a French economic entity registered under the laws of France. It is a consortium of European aircraft manufacturers. The British partner is the third defendant (BAA).

3. The landing gear was designed and manufactured by successive members of the Dowty group of companies to whom I will refer collectively as 'Dowty'. Dowty and BAA are companies registered in this country. Sabena is a Belgian company.

4. Airbus was responsible for the manufacture and the supply to Sabena of the Airbus A340 involved in the incident. The aircraft was supplied by Airbus to Sabena under a contract governed by French law. The contract contains an exclusive jurisdiction clause, which gives jurisdiction to the 'Tribunaux de Paris'. The contract relating to the design and supply of the landing gear states that it is made between BAA (the purchaser) and Dowty (the supplier). The contract recites that BAA is acting for and on behalf of Airbus. English law is the applicable law of the contract and the English courts are given exclusive jurisdiction. 'The purchaser' is recorded in the contract as having a number of obligations.

5. From the background facts which I have already set out, it is apparent that the incident on 29 August 1998 was likely to provide fertile ground for protracted and expensive litigation involving highly undesirable satellite disputes as to which jurisdiction is, or which jurisdictions are, the appropriate seats for the litigation. As Sir Sydney Kentridge QC for Dowty accepted, it is now reasonably clear that the cause of the incident was faulty design or manufacture or both of the landing gear. It is no longer suggested that there has been any default on the part of Sabena. Sabena, subject to the terms of its contract with Airbus, would therefore appear to be in the relatively happy position of having a straightforward claim against Airbus for breach of the contract, which is governed by the French jurisdiction clause. Sabena could also have a claim against Dowty in tort or delict for breach of duty by Dowty in the design and manufacture of the landing gear. Under English law it could hardly be disputed that a designer and manufacturer of landing gear owes a duty of care to the operator of the aircraft for which the landing gear is provided. Equally, it is clear that Airbus could have a claim for indemnity in so far as the faulty design was the responsibility of Dowty under the contract with Dowty in so far as Dowty was in breach of contract.

6. It is Dowty's contention that the faults in the landing gear were due to the failure of BAA and/or Airbus to provide data for the design and manufacture of the landing gear which was 'sufficiently demanding'. In particular the 'fatigue spectra' which was provided to Dowty by BAA did not indicate the need for what would be an adequate fatigue strength. Dowty contends that BAA owed a duty of care to Dowty as to the provision of the data. Whether that duty was owed

only in tort or in tort and contract depends upon whether BAA was a party to the contract.

7. On 15 April 1999 Sabena made an application to the Tribunal de Commerce in Paris under art 145 of the new Civil Code. The application was for the appointment of a panel of experts to investigate and report on the causes of the incident on 15 April 1999. Dowty and Airbus were named as the defendants to the application. It is common ground that such an application does not amount to the commencement of proceedings. The 'Expertise', as it is called can, and frequently does, result in proceedings against those who are named as defendants to the application.

8. On 11 May 1999 the Tribunal de Commerce in Paris declared the application competent and appointed the experts who were to investigate and report. That order was made despite the opposition of Dowty. Dowty has entered an appeal against this decision and the date for the hearing of the appeal is at present 24 February of this year. The procedure in France under art 145 is not dissimilar to the procedure which is now possible under the extended powers contained in our Civil Procedure Rules. The rules enable the civil courts in this country to make extensive pre-litigation orders (under CPR 25.1 and 25.2).

9. On 30 April 1999 Dowty issued proceedings in the High Court. This was followed by the service of the particulars of claim on 14 June 1999. The claim form recited Dowty's claims, so far as relevant, in these terms:

> '(a) Against [Sabena], for a declaration that [Dowty] are not liable to [Sabena] in respect of any loss, expenditure, liability or damage incurred by [Sabena] in consequence of or in connection with an accident at Brussels Airport on 29 August 1998 involving an A340/200 aircraft ... which was being operated by [Sabena] including, but not limited to, all costs associated with carrying out of remedial works and modification to aircraft equipped with landing gear supplied by [Dowty] or arising out of limitations imposed upon the operation of such aircraft; (b) Against [Airbus], for a declaration that [Dowty] are not liable to [Airbus] in respect of any loss, expenditure, liability or damage incurred by [Airbus] in consequence of or in connection with the accident referred to in paragraph (a), including but not limited to (i) any sum for which [Airbus] is liable to [Sabena] or any other party as a result of the accident; and (ii) any expenditure incurred by [Airbus] in carrying out remedial works and modifications to aircraft manufactured by it which are equipped with landing gear supplied by [Dowty] or arising out of limitations imposed upon the operation of such aircraft as a result of the accident. (c) Against [BAA], for a declaration that [Dowty] are not liable to [BAA] in respect of any loss, expenditure, liability or damage incurred by [BAA] in consequence of or in connection with the accident ...'

10. The declaration against BAA then continues in like terms to the declaration sought against Airbus but extending the indemnity which is sought to any liability to Sabena or Airbus.

11. The particulars of claim, which were delivered, set out fully the claim for the declarations. They refer to the contract for the design, development and supply of the landing gear as being concluded between Dowty and BAA 'acting for and on behalf of Airbus'. It also refers to various obligations of BAA under that contract. It alleges that Airbus and/or BAA were in breach of contract and negligent in the data which they provided to Dowty. The particulars also include an allegation that Dowty has suffered and will continue to suffer loss and damage

in respect of which it is entitled to seek compensation and a declaration of indemnity. As particulars of this allegation, it is alleged that there is a clear risk that Dowty will be joined in proceedings arising out of the failure or potential failure of landing gear of other aircraft and that Dowty has already incurred legal costs in connection with the 'likely assertions of liability by Sabena'.

12. The particulars of claim accept that Dowty owes a duty to prospective owners of Airbus aircraft but contend that duty was discharged and the damage to the aircraft did not arise through any negligence on its part. Dowty also claims to recover from BAA and/or Airbus compensation for the substantial work which it has carried out to establish the cause of the accident and the implications for the reliability of landing gear on other Airbus aircraft and for the supply of spare parts etc. This is therefore a claim against Airbus or BAA for work done and materials supplied.

13. Since the service of the particulars of claim there have been meetings of the experts in France, Belgium and in this country under the art 145 procedure. In particular, on 14 September, there was a meeting of experts in Gloucester which involved Dowty.

The proceedings in the courts below

14. On 1 July 1999, in the English proceedings, there was a hearing for directions before Rix J. This was followed by the application which has given rise to this appeal. This application by Sabena to Moore-Bick J was made on alternative grounds. The first being that the court had no jurisdiction to determine the claim against Sabena and the second that the proceedings against Sabena were an abuse of the process of the court. Airbus and BAA have taken no part in the application and do not contest the jurisdiction of the High Court to determine the proceedings which have been brought against them. Airbus and BAA did, however, make an application for a stay of the English proceedings. That application was refused by Langley J on 3 December 1999 (see *Messier-Dowty Ltd v Sabena SA* [2000] 1 All ER (Comm) 101).

15. Before the judge Mr Shepherd (who also appeared in this court on their behalf) made two main submissions. The first was that Dowty had no cause of action against Sabena and that the court should refuse to entertain a claim for a negative declaration of non-liability in the circumstances of this case. Mr Shepherd based himself on the decision of this court in *Clay, Re, Clay v Booth, Re a Deed of Indemnity* [1919] 1 Ch 66, [1918–19] All ER Rep 94 and subsequent decisions to the like effect. The second submission was that as Sabena is domiciled in Belgium and this case does not fall within any of the exceptions to art 2 of the Brussels Convention, the English courts do not have jurisdiction over Dowty's claims.

16. The judge dealt with the second contention first because, as he explained:

> '... although the authorities contain dicta which suggest that in certain cases the court has no jurisdiction to grant a negative declaration, I think in the light of the more recent authorities that they must be taken as meaning only that in such cases the court cannot properly exercise its jurisdiction in favour of the claimant. The court has an inherent jurisdiction to grant declaratory relief which, as Sir Thomas Bingham MR pointed out in *Re S (hospital patient: court's jurisdiction)* [1995] 3 All ER 290 at 296 is regulated rather than conferred by Ord 15, r 16. Moreover, it was a jurisdiction which the court may exercise at its discretion in appropriate cases. The convention, on the other hand, is concerned with regulating the exercise of jurisdiction

a by national courts over persons domiciled within the contracting states. That does not depend on the exercise of the court's discretion but upon giving effect to the rules set out in the convention itself: see for example *Boss Group Ltd v Boss France SA* [1996] 4 All ER 970 at 976–977, [1997] 1 WLR 351 at 358 per Saville LJ.'

b *The Brussels Convention*

17. Before turning to the judge's decision, it is desirable to refer to the relevant articles of the Brussels Convention to which this country is a party and which is part of our domestic law under the Civil Jurisdiction and Judgments Act 1982. The starting point is the general provision contained in art 2 that: '... persons domiciled in a Contracting State shall, whatever their nationality, be sued in the c courts of that State.'

18. This general principle is subject to special rules. Of the special rules the first one to which it is necessary to refer is art 5 which provides:

> 'A person domiciled in a Contracting State may, in another Contracting d State, be sued ... (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred ...'

19. The next article to which it is necessary to make reference is art 6 which contains a further exception to the general rule, namely that:

> 'A person domiciled in a Contracting State may also be sued: (1) where he e is one of a number of defendants, in the courts for the place where any one of them is domiciled ...'

20. Read literally art 6(1) is in very wide terms. However, as I will make clear later, it has been construed restrictively by the Court of Justice of the European Communities.

f 21. The next article to which it is necessary to refer is art 17. That article provides that where parties—

> 'one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a g particular legal relationship, that court or those courts shall have exclusive jurisdiction.'

22. The only other articles to which it necessary to refer are arts 21, 22 and 23. They are the contents of s 8 of the convention, which is headed 'Lis Pendens— h Related actions'.

23. Article 21 gives precedence to the first court seised of proceedings when 'proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States', subject to the jurisdiction of the first court being established.

24. Article 22 provides: j

> 'Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings. A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions. For the

purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.' a

25. Article 23 provides that:

'Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.' b

26. It is obvious from the language of the articles to which I have referred that the jurisdictional rules of the convention place a premium on being the first court seised of the proceedings. This encourages parties to disputes to rush into proceedings. This is quite contrary to the culture which our Civil Procedure Rules are seeking to promote. However, it is generally accepted that the jurisdictional rules of the convention are not subject to a discretion in a national court to stay an action on the basis that the courts of some other contracting state are the more appropriate forum. (See Dicey and Morris *The Conflict of Laws* (13 edn, 2000), vol I, p 267, para 11–012.) The same position applies if a party commences proceedings precipitously and does not first seek to dispose of the proceedings without resorting to litigation. c d

The decision of Moore-Bick J e

27. The jurisdictional rules of the convention do not prevent the English courts under their own procedural rules disposing summarily of proceedings which should not have been brought. This is important to the approach adopted by Moore-Bick J. He considered that the action brought by Dowty against BAA had not been 'properly brought so as to entitle the court to exercise jurisdiction over Sabena under art 6(1) of the Brussels Convention'. He also considered that Dowty's claims against Sabena for a negative declaration could not be supported because Sabena may not bring proceedings if it decides that it can succeed more easily against Airbus. He did not consider that it would be appropriate for the court to entertain a claim for a negative declaration when it was accepted on behalf of Dowty that there was no pressing commercial need to have the issue resolved otherwise than in the normal way. He therefore granted Sabena's application. f g

Forum shopping

28. In between the decision of Moore-Bick J and the hearing of this appeal, Sabena commenced proceedings in France claiming damages for breach of contract. Under art 17 of the convention, France is the only jurisdiction in which those proceedings could appropriately be brought. If Sabena is to remain a party to the English proceedings, then the consequence of Dowty's proceedings will be that Sabena will inevitably be involved in two sets of proceedings arising out of the incident. h j

29. In his judgment of 3 December 1999 Langley J, of the proceedings issued by Dowty, states ([2000] 1 All ER (Comm) 101 at 103):

'This step was admittedly and indeed unashamedly taken because Dowty was apprehensive that the art 145 procedure in Paris might result in Dowty being drawn into proceedings in Paris thus undermining the

a agreement of Dowty and Airbus that the appropriate forum for the resolution of disputes between them was in England.'

30. Mr Shepherd relied on this as an indication that Dowty was forum shopping when it issued its proceedings. That this is the position is confirmed by a letter written by Dowty's solicitors dated 30 April 1999. The commencement of proceedings to obtain a jurisdictional advantage can be categorised as forum b shopping. The use of this term is designed to suggest that there is something objectionable in itself in a claimant starting proceedings for this collateral purpose. However, in view of the primacy which the convention gives to the jurisdiction which is first seised of proceedings, it is not proper to criticise a claimant, who is in a position to bring perfectly appropriate proceedings, for c commencing those proceedings earlier than he would otherwise do, so as to obtain an advantage under the convention. As Saville LJ stated in *Boss Group Ltd v Boss France SA* [1996] 4 All ER 970 at 977, [1997] 1 WLR 351 at 358:

> '... the charge of forum shopping can only be made good by assuming that a party which takes advantage of the convention exceptions to the general d rule of domicile is somehow doing something illegitimate; but that assumption cannot be sustained if in truth one of the exceptions is applicable.'

31. The position is different if a defendant is added to the proceedings, despite the absence of any credible claim, solely to claim jurisdiction against a party who could otherwise not be joined in the proceedings. Such tactics are an abuse of the e process of the court, as was held by the Supreme Court of Ireland in *Gannon v British and Irish Steampacket Co Ltd* [1993] 2 IR 359.

32. Whether it be desirable that this should be the position or not (and there are strong arguments that it is undesirable) there is good sense in the recommendations contained in Briggs and Rees *Civil Jurisdiction and Judgments* f (2nd edn, 1997) p 210–213) that claimants are well advised not to delay proceedings.

The outcome of the appeal

33. Sir Sydney Kentridge QC submits on the appeal that there is a very considerable advantage in Sabena being joined in the claimant's proceedings g because it will enable a consistent determination of all questions of responsibility and fault concerning the landing gear to be determined in those proceedings. From a case management point of view, there would be benefits if this could be achieved. However, in view of the proceedings which have already been commenced by Sabena, it is now extremely doubtful whether this objective could h be achieved. It is therefore preferable to focus on the alternative questions which arises on this appeal, namely whether Sabena is entitled to be removed from the proceedings as a matter of English procedural law concerning negative declarations or under the jurisdictional rules of the Brussels Convention.

j *A. Negative declarations*

34. Sir Sydney no doubt confines his reference to our procedural law since the jurisprudence of the European courts suggests that in the application of the convention the correct approach is to treat negative declarations, that is declarations that the claimant is under no liability, in exactly the same way as claims for positive relief are treated. This is not our domestic approach as I will seek to show hereafter. As to the position in relation to the convention, the

situation is accurately stated by Advocate General Tesauro in *The Maciej Rataj, Tatry (cargo owners) v Maciej Rataj (owners)* Case C-406/92 [1995] All ER (EC) 229 at 244, [1994] ECR I-5439 at 5455. The Advocate General stated:

> '23. It should also be borne in mind that the bringing of proceedings to obtain a negative finding, which is generally allowed under the various national procedural laws and is entirely legitimate in every respect, is an appropriate way of dealing with genuine needs on the part of the person who brings them. For example, he may have an interest, where the other party is temporising, in securing a prompt judicial determination—if doubts exist or objections are raised—of the rights, obligations or responsibilities deriving from a given contractual relationship.'

35. The approach reflected in the decision in *The Tatry* can be contrasted with the less sympathetic consideration which is sometimes given to the use of negative declarations in transnational litigation by English courts. The situation as it existed in 1995 was commented upon by Dr Bell at the time he wrote his article 'The Negative Declaration in Transnational Litigation' (1995) 111 LQR 674. He concluded that the form of relief sought should not affect the assessment of the jurisdictional propriety of the chosen forum. He adds (p 695):

> 'As far as the impact of this form of relief on the interests of comity is concerned, it has been argued that the problems created by negative declarations are the problems of concurrent litigation in general. If it is the case that the right to initiate litigation should not be the exclusive preserve of those parties seeking to vindicate positive rights, then the problems of multiple litigation must be addressed in a way that does not simply entail the emasculation of a long-established and potentially useful form of action. There is no valid reason to penalise one prospective party and not the other in relation to matters which may be as strategically critical in a transnational dispute as the timing and venue for litigation.'

36. There is force in these comments. I can see no valid reason for taking an adverse view of negative declaratory relief. This is whether it is claimed in relation to transnational disputes or domestic litigation. In this respect I would treat with reservation the observations of Kerr LJ in *First National Bank of Boston v Union Bank of Switzerland* [1990] 1 Lloyd's Rep 32 at 39 and in *Saipem SpA v Dredging VO2 BV, The Volvox Hollandia* [1988] 2 Lloyd's Rep 361 at 391. The use of negative declarations domestically has expanded over recent years. In the appropriate cases their use can be valuable and constructive.

37. Mr Shepherd on behalf of Sabena strongly refutes that this approach is permissible on the authorities. He submits that in this case the court is bound to follow the approach adopted eighty years ago in *Re Clay* [1919] 1 Ch 66, [1918–19] All ER Rep 94. He draws attention to the fact that it was followed in *Midland Bank plc v Laker Airways Ltd* [1986] 1 All ER 526 at 534, [1986] QB 689 at 700–701 by Lawton LJ with whom Dillon and Neill LJJ agreed. Lawton LJ stated:

> 'As the liquidator has never threatened to take proceedings against either bank in the English courts, on the authority of *Re Clay, Clay v Booth, Re a Deed of Indemnity* [1919] 1 Ch 66, [1918–19] All ER Rep 94 there is no *jurisdiction* in the court to make the declarations asked for.' (My emphasis.)

38. This approach was applied by Timothy Walker J in *New Hampshire Insurance Co v Aerospace Finance Ltd* [1998] 2 Lloyd's Rep 539.

39. As against these authorities there are the numerous cases where without objection negative declarations have been granted. There are also the judgments of Lord Denning MR in this court and Lord Wilberforce in the House of Lords in *Camilla Cotton Oil Co v Granadex SA, Shawnee Processors Inc v Granadex SA* [1975] 1 Lloyd's Rep 470 at 474–475 and [1976] 2 Lloyd's Rep 10. Lord Denning said:

> 'It has been said that a declaration as to non-liability ought very rarely to be made, see *Dyson v. Attorney-General* ([1911] 1 KB 410) and *Guaranty Trust Co. of New York v. Hannay & Co.* [1915] 2 KB 536. And *Re Clay* ([1919] 1 Ch 61, [1918–19] All ER Rep 94), is sometimes cited for the proposition that it cannot be made. But it is nothing of the kind. In modern times, I think that a declaration as to non-liability can be made whenever it will serve a useful purpose. I would not limit it in any way.'

40. In the House of Lords, Lord Wilberforce stated the position in his own words but the effect was very much the same. He said ([1976] 2 Lloyd's Rep 10 at 14):

> 'The declaration claimed is of a negative character and as Lord Sterndale himself had said ... a declaration that a person is not liable in an existing or possible action is one that will hardly ever be made. "Hardly ever" is not the same as "never" but the words warn us that we must apply some careful scrutiny. So I inquire whether to grant such a negative declaration would be useful. The liability which the English Court is asked to negative is any possible liability of the respondents on the basis of agency ...'

41. Lord Wilberforce and Lord Denning differed in the circumstances of that case as to whether the declaration would serve a *useful* purpose. However, if it would, that it would then be appropriate to grant a declaration was agreed. The approach is pragmatic. It is not a matter of jurisdiction. It is a matter of discretion. The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved the courts should not be reluctant to grant such declarations. They can and do assist in achieving justice. For example, where a patient is not in a position to consent to medical treatment, declarations have an important role to play. Without the use of negative declarations, recent extensions in the use of declaratory relief, including the beneficial intervention of the courts in cases concerning mentally incapacitated people would not have been possible. As Sir Thomas Bingham MR said in *Re S (hospital patient: court's jurisdiction)* [1995] 3 All ER 290 at 303:

> 'Any statutory rule, unless framed in terms so wide as to the give the court an almost unlimited discretion, would be bound to impose an element of inflexibility which would in my view be wholly undesirable.'

He considered that the different situation he was there considering was 'pre-eminently an area in which the common law should respond to social needs'. So in my judgment the development of the use of declaratory relief in relation to commercial disputes should not be constrained by artificial limits wrongly related to jurisdiction. It should instead be kept within proper bounds by the exercise of the courts' discretion.

42. While negative declarations can perform a positive role, they are an unusual remedy in so far as they reverse the more usual roles of the parties. The

natural defendant becomes the claimant and vice versa. This can result in procedural complications and possible injustice to an unwilling 'defendant'. This in itself justifies caution in extending the circumstances where negative declarations are granted, but, subject to the exercise of appropriate circumspection, there should be no reluctance to their being granted when it is useful to do so.

B. Should Sabena have been made a party to the English proceedings?

43. It would be wrong to conclude that just because a negative declaration would serve some useful purpose that means that it is appropriate for a claim to be made so that it should be granted. There may be other reasons why to claim a negative declaration amounts to a misuse of the courts' procedure. In this case it is submitted there is no justification for Sabena being joined as a party to the proceedings. Whether a party should be joined in proceedings is always a matter for the discretion of a court. That discretion is now subject to Pt I of the Civil Procedure Rules and in determining whether a joinder of party is appropriate a court takes into account its overriding obligation 'to deal with cases justly'. It is the joinder of Sabena which has caused me more concern then the fact that Dowty is seeking a negative declaration.

44. I turn to consider whether as a matter of domestic English practice, the joinder of Sabena as a party by Dowty is consistent with the requirement to deal with cases justly. In considering this issue I do not draw any adverse inference from the fact that Dowty's primary motive for joining Sabena as a party to the proceedings and for seeking a negative declaration against Sabena was a desire to ensure that the English courts had jurisdiction to determine between all relevant parties the extent, if any, of the liability of Dowty for the loss caused to Sabena and the cost of rectifying the design faults generally. In doing so, I also reject the contention of Mr Shepherd that as a matter of principle negative declarations should not be granted (or perhaps only in wholly exceptional cases granted) in respect of possible tortious liability. I would not quarrel, however, with the judge's statement that:

> 'It may well be that few such cases will lend themselves to relief of that kind, especially where the injured party has a choice of which defendants to sue.'

45. As I have already indicated, Sir Sydney Kentridge's primary justification for joining Sabena was that it would achieve a consistent determination of all questions of responsibility and fault concerning the landing gear in one set of proceedings. This is now almost certainly unobtainable because Sabena has commenced proceedings in France against Airbus and France under the convention has exclusive jurisdiction in relation to those proceedings (art 17). Against this now flawed justification for Sabena being joined, there has to be placed the substantial arguments against Sabena being joined. These arguments are as follows. (1) Sabena's primary claim must always have been against Airbus. Airbus was the party with which Sabena contracted. Any litigation involving Sabena's contractual rights against Airbus was, for the reason already indicated, inevitably going to be based in France. (2) Requiring Sabena to defend proceedings in England would mean that Sabena was going to be subjected to the substantial disadvantage of having to litigate in a second jurisdiction, namely England, against its wishes at the same time as it was litigating in France. (3) Although Sabena has every reason to reserve its position as to whether it intends to make a claim against Dowty, it is doubtful if it will ever have cause to do so. The real

dispute is as to who was responsible for the faulty design of the landing gear. This is now primarily a dispute between Dowty, Airbus and possibly BAA. (4) It is not at this stage suggested, because, for example, of a term in the contract between Airbus and Sabena, that Sabena will be unable to recover the same compensation from Airbus as it could from Dowty. From Sabena's point of view it could well be the case that there is no advantage in it being involved in the English proceedings. (5) If Sabena made a claim against Dowty (and I do not regard its involvement of Dowty in the art 145 procedure as being a claim) there would then be a real justification for involving Sabena in the English proceedings. There would then be a conflict of jurisdiction. The conflict would be between the French proceedings and the English proceedings. At this stage, it is not possible to say whether in those circumstances it would be preferable from a case management point of view for the proceedings to be disposed of as part of the French proceedings or as part of the English proceedings. However, for reasons I will explain later there would be a real prospect that Sabena could then be justly joined in the English proceedings applying the provisions of the convention. If there is to be joinder of Sabena, the right time to do this in this case is when Sabena has reached a decision on whether to claim or at least not before it is in such a position.

46. Looking at the situation as a whole, the conclusion which I have come to is that, as an issue of domestic law alone, the joinder of Sabena at this stage is not justified and is inconsistent with resolving the English proceedings justly. Sabena should therefore unless this would be inconsistent with the policy of the convention be dismissed from the proceedings. This would be a procedural decision taken in the light of the position as it now is and therefore a decision which could be reconsidered by the English courts if the position should change in consequence of Sabena making a claim or being in a position to make up its mind as to whether to claim directly against Dowty.

C. Jurisdiction under the convention

47. This is not however a situation where the question of the joinder of Sabena can be considered in isolation from the question of jurisdiction. Jurisdiction is governed by the convention and if the convention required Sabena to be sued now within this jurisdiction or if this was consistent with the policy of the convention, then this would be a compelling circumstance against exercising discretion in a way which I have indicated. In fact there is nothing in the convention which requires Dowty to bring proceedings in England and, if proceedings are brought, England does not have exclusive jurisdiction.

48. The primary jurisdiction for proceedings against Sabena is, under art 2, Belgium. Under art 5.3, Sabena theoretically could seek to bring proceedings against Dowty in Belgium as being the place 'where the harmful event occurred'. Bearing in mind the proceedings which have already been commenced, I regard the risk of this happening as being remote. Even if this did happen I would expect the Belgian courts to decline jurisdiction in favour of this country or France. As to this country this would be because this is also a jurisdiction in which proceedings could be brought under art 5.3. The Court of Justice decided in *Handelskwekerij G J Bier BV v Mines de Potasse d'Alsace SA* Case 21/76 [1978] QB 708, [1976] ECR 1735 that the defendant under art 5.3 may be sued at the option of the claimant, either in the courts for the place where the damage occurred or in the courts for the place of the event which gave rise to and is at the origin of that damage. In proceedings in tort for faulty design by Sabena, in addition to

Belgium having jurisdiction as the place of the event, England would also have jurisdiction as the place which was the origin of the damage. England would also be the primary country to have jurisdiction in proceedings against Dowty under art 2.

49. Mr Shepherd vigorously contested the right of Dowty to justify its joinder of Sabena as a defendant to the English proceedings by relying on art 6.1. His first ground for doing so was because he submitted that BAA were an unnecessary defendant to the English proceedings. Moore-Bick J was sympathetic to this argument. Sir Sydney Kentridge on the other hand argued that any responsible counsel would in addition to making claims against Airbus also bring proceedings against BAA both in tort and under the contract. Neither Airbus nor BAA have suggested that there is any impropriety in BAA having been joined as a defendant and having regard to the nature of the dispute between BAA and Dowty, I reject Mr Shepherd's contention that BAA was not a proper defendant to Dowty's proceedings. Irrespective of whether there is a contractual liability on Airbus, if BAA negligently failed to provide the design information to which Dowty was entitled then this in itself would make it legitimate for BAA to be a defendant in proceedings by Dowty alleging BAA had been negligent. If BAA is a legitimate defendant, then Dowty can contend with regard to Sabena that it is 'one of a number of defendants in the courts of the place where any one of them is domiciled' in accordance with art 6.1.

50. However, in order to rely on art 6.1, Dowty has to do more than comply with the literal terms of art 6. In *Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co* Case 189/87 [1988] ECR 5565 at 5584 the Court of Justice held that art 6 must be read with art 22 of the convention so that art 6.1 only applies—

> 'where the actions brought against the various defendants are related when the proceedings are instituted, that is to say where it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

At this stage, when Sabena has made no claim against Dowty, Dowty cannot establish that the joinder of Sabena meets this additional requirement of art 6.1. It is not at present expedient that Sabena should be joined for the reasons already given. However, if a claim were to be made by Sabena against Dowty, Dowty would be in a different position. Dowty would be entitled to contend that the additional requirement had been fulfilled. There would then be a risk of irreconcilable judgments. (A claim against BAA by Dowty in contract would not be sufficient for this purpose.)

51. This examination of the position under the convention shows that treating the joinder of Sabena at this stage as being improper is not contrary to the jurisdictional regime established by the convention. On the facts as they are now, Moore-Bick J came to the right decision although I do not agree with the whole of his reasoning.

52. I would dismiss this appeal.

HALE LJ. I agree.

LORD MUSTILL. I also agree.

Appeal dismissed. Permission to appeal to the House of Lords refused.

Kate O'Hanlon Barrister.

Hollicourt (Contracts) Ltd (in liq) v Bank of Ireland

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON, MUMMERY AND LATHAM LJJ

4, 20 OCTOBER 2000

Company – Compulsory winding up – Avoidance of disposition of property after commencement of winding up – Whether bank liable for payments out of company's account made after commencement of winding up – Insolvency Act 1986, s 127.

A petition was presented for the winding up of a company. Although the petition was advertised, the company's bank missed the advertisement due to human error. As a result, payments continued to be made to third parties out of the account for over three months after the petition was advertised. Throughout that time, the account had remained in credit. After the company was wound up, its liquidator made an application against the bank under s 127[a] of the Insolvency Act 1986, seeking recovery of the post-advertisement payments as void dispositions of the company's property. The judge required the bank to reconstitute the fund, holding that s 127 operated not only against third party recipients, but also against the bank which had made the payments. The bank appealed.

Held – Where cheques were drawn on a company's account, whether in credit or overdrawn, after the presentation of a winding-up petition, s 127 of the 1986 Act did not enable the company to recover from its bank the amounts paid. Rather, s 127 only invalidated dispositions by a company of its property to the payees of the cheques and enabled it to recover the amounts disposed of only from those payees. Such a conclusion was consistent with the purpose of s 127 which was part of a statutory scheme designed to prevent company directors disposing of the company's assets when liquidation was imminent, to the prejudice of its creditors, and to preserve those assets for the benefit of the general body of the creditors. That purpose was accomplished without any need for s 127 to impinge on the legal validity of intermediate steps, such as banking transactions, which were merely part of the process by which dispositions of the company's property were made. For that provision to operate, there had to be a disposition amounting to an alienation of the company's property. There was no such alienation to a bank when it honoured a company's cheque. It was merely obeying as agent the order of its principal to pay out of the principal's money, in the agent's hands, the amount of the cheque to the payee. Accordingly, the appeal would be allowed (see p 294 *c j* to p 295 *g*, p 297 *g* to *j*, p 298 *f* to *j* and p 299 *a*, post).

Coutts & Co v Stock [2000] 2 All ER 56 approved.

Dicta of Buckley LJ in *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814 at 818–819, 823 disapproved.

Decision of Blackburne J [2000] 2 All ER 45 reversed.

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a Section 127 is set out at p 290 *j*, post

Notes

For the avoidance of dispositions of a company's property after commencement of winding up, see 7(3) *Halsbury's Laws* (4th edn) (1996 reissue) para 2460.

For the Insolvency Act 1986, s 127, see 4 *Halsbury's Statutes* (4th edn) (1998 reissue) 823.

Cases referred to in judgment

Bank of East Asia Ltd v Rogerio Sou Fung Lam [1988] 1 HKLR 181, HK CA.
Coutts & Co v Stock [2000] 2 All ER 56, [2000] 1 WLR 906.
Gray's Inn Construction Co Ltd, Re [1980] 1 All ER 814, [1980] 1 WLR 711, CA.
Leslie (J) Engineers Co Ltd (in liq), Re [1976] 2 All ER 85, [1976] 1 WLR 292.
Loteka Pty Ltd (in liq), Re (1989) 7 ACLC 998, Qld SC.
Mal Bower's Macquarie Electrical Centre Pty Ltd (in liq), Re [1974] 1 NSWLR 245, NSW SC.
Mersey Steel & Iron Co Ltd v Naylor, Benzon & Co (1884) 9 App Cas 434, [1881–85] All ER Rep 365, HL.
Oriental Bank Corp, Re, ex p Guillemin (1884) 28 Ch D 634.
Tasmanian Primary Distributors Pty Ltd (in liq) v RC and MB Steinhardt Pty Ltd (1994) 13 ACSR 92, Tas SC.
Westminster Bank Ltd v Hilton (1926) 136 LT 315, HL.
Wiltshire Iron Co, Re, ex p Pearson (1868) LR 3 Ch App 443.
Wily v United Telecasters Sydney Ltd (1996) 14 ACLC 863, Aust FC.

Appeal

By notice of appeal dated 14 December 1999 the Bank of Ireland appealed with permission of Blackburne J from his decision on 11 November 1999 ([2000] 2 All ER 45, [2000] 1 WLR 895) whereby, on the application of Raymond Claughton, the liquidator of Hollicourt (Contracts) Ltd, he ordered the bank to reconstitute the company's account in respect of payments which had been made from it after the commencement of the company's winding up. The facts are set out in the judgment of the court.

Gabriel Moss QC and *David Marks* (instructed by *Brooke North*, Leeds) for the bank.
Hugh Jory (instructed by *Eversheds*, Leeds) for the company.

Cur adv vult

20 October 2000. The following judgment of the court was delivered.

MUMMERY LJ.

1. This is the judgment of the court.

2. INTRODUCTION

3. Section 127 of the Insolvency Act 1986 provides:

> 'In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void.'

In the case of compulsory liquidation, the winding up of a company is deemed to commence at the time of the presentation of the petition (see s 129(2)).

4. 'Property' includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property (see s 436 of the 1986 Act).

5. This appeal concerns the impact of s 127 in the context of payments made to creditors of Hollicourt (Contracts) Ltd (the company) after the presentation of a winding-up petition. The payments were made by cheques drawn on the company's bank account with the Bank of Ireland (the bank). The account was in credit at all material times.

6. The question is: does s 127 make the bank, which continued to operate the account in accordance with the instructions of the company, liable, on the application of the liquidator, to make restitution to the company of the amounts of those cheques? Or does s 127 make only the payees of the cheques liable to make restitution to the company?

7. The normal and prudent practice of banks, upon becoming aware of a winding-up petition against a corporate customer, is to take prompt action. The bank freezes the company's existing bank accounts, whether in credit or overdraft, as at the date of the presentation of the petition and insists that all subsequent dealings be on a new and separate account in respect of which a validation order may be obtained (see *Paget's Law of Banking* (11th edn, 1996) p 207). The presentation of the petition usually comes to the notice of banks on publication of the advertisement of the petition.

8. According to the evidence in this case the bank operates a manual system of checking for the presentation of winding-up petitions against its customers by using a member of staff to consult that week's edition of *Stubbs Gazette* which records all winding-up petitions that have been presented. If a petition is shown as having been presented against a customer a block is placed upon the account.

9. Unfortunately that did not happen in this case. As a result of human error the advertisement was missed. The bank account continued to be operated by the company for over three months after a winding-up petition was presented. The issue on this appeal from the judgment of Blackburne J (delivered on 11 November 1999 and now reported at [2000] 2 All ER 45, [2000] 1 WLR 895) is whether in these circumstances the bank is liable, on the application of the liquidator of the company, to restore the account to the position which it would have been in had withdrawals not been made from it in the interval between presentation of the petition and the making of the winding-up order. The judge held that the retrospective effect of the statutory declaration of voidness of post-presentation dispositions in s 127 is to render the bank liable to make restitution to the company.

10. Within two weeks of that decision judgment was given by Lightman J in *Coutts & Co v Stock* [2000] 2 All ER 56, [2000] 1 WLR 906 in which he said that: 'The authorities are in disarray and the state of the law is uncertain, if not confused.' (See [2000] 2 All ER 56 at 58, [2000] 1 WLR 906 at 909.) His judgment was delivered on 24 November 1999 and is now reported immediately after the judgment in *Hollicourt*. He held that the bank in that case, which concerned post-presentation drawings by a company on an account in overdraft at all material times, was not liable. Mr Stock, who was held liable as the guarantor of the company's overdraft, appealed, but he was subsequently made bankrupt. This court was notified on the day before the hearing of the appeals in both cases that Mr Stock's appeal would not be pursued. Nevertheless there was detailed argument at the hearing of this appeal on the judgment in *Coutts & Co v Stock*.

THE FACTS

11. The facts of the case are simple. The company carried on business in the construction industry. On 5 February 1996 a winding-up petition was presented. The petition was advertised on 26 February. A compulsory winding-up order was made on 7 June 1996.

12. At the time of the presentation of the petition the company had a credit balance in its account No 605409353 with the bank at its branch at 31 King Street, Leeds. Notwithstanding the presentation and advertisement of the petition and the absence of any court order under s 127, the account was not frozen. The bank continued to debit that account with payments in favour of third parties totalling £156,200. Money continued to be paid into the account. The bank first became aware of the petition on 16 May 1996. Only then was the account frozen.

13. No proceedings have been taken by the liquidator of the company to recover the amounts from the payees of the cheques. No repayments have in fact been made by them. Instead, the liquidator, Mr Raymond Claughton, issued an originating application on 9 September 1998 seeking repayment by the bank to the company of the monies paid out to third parties by the bank after the commencement of the winding up.

14. On 11 November 1999 Blackburne J gave judgment for the company against the bank. He decided that all the post-presentation payments made out of the account were void under s 127 and he required the bank to reconstitute the account. The bank appeals.

THE JUDGMENT

15. Blackburne J set the legal scene:

> 'There is no doubt that, where a company withdraws a sum of money from its bank account in credit and pays that sum to a third party, there is a disposition of the company's property which, if it occurs after the commencement of the company's winding up, is avoided by s 127. There is also no doubt that the third party recipient can be required to repay the sum so received, subject to validation of the payment by recourse to the dispensing power contained in the section. The question for decision on this application is whether, in these circumstances, the bank as well as the third party recipient of the payment can be required to make repayment.' (See [2000] 2 All ER 45 at 48, [2000] 1 WLR 895 at 898.)

16. After reviewing English and Australian authorities cited to him the judge stated his conclusions in the following passage ([2000] 2 All ER 45 at 52–53, [2000] 1 WLR 895 at 903):

> '... I fail to see why the consequence of the avoidance of a transaction by s 127 must be limited to the recipient (or disponee) of the property disposed of if, by "disponee", is meant (as it appears to be in those [Australian] decisions) the person to whom the sum withdrawn from the company's account was paid. Nor, for that matter, do I follow why, where payment is made by cheque, the disposition of the company's property is confined to delivery of the company's cheque to the third party. The debiting to the customer's account of the amount of his cheque on presentation for payment (by paying out that amount to the third party in satisfaction of the cheque) seems to me to be in every sense a disposition of the company's property. In my judgment, the transaction which is avoided by s 127, ie the withdrawal from the account, is avoided not simply as against the third party

recipient of the money in question but also as against the bank which makes the payment. The amount of the company's credit balance on its account with the bank constituted a debt owed by the bank to the company. The action of the bank in debiting the company's account with the various payments had the effect of reducing the bank's liability to the company. The bank's liability to the company arising out of their relationship of banker and customer could only be reduced by those payments if they were validly made (ie not avoided). Section 127, however, renders all such payments void and ineffective with effect from the commencement of the company's winding up. The consequence of such avoidance, so far as the bank is concerned, must therefore be that its liability to the company falls to be considered as if those payments out had not been made. In short, the bank's liability to the company must be what it was (ie the credit balance) as at the date of commencement of the winding up together with all sums credited to the account since the winding up began.'

17. Blackburne J considered that this was in accord with the conclusion of the Hong Kong Court of Appeal in *Bank of East Asia Ltd v Rogerio Sou Fung Lam* [1988] 1 HKLR 181. We shall return to that decision later in this judgment.

18. He made two further points at the end of his judgment ([2000] 2 All ER 45 at 54–55, [2000] 1 WLR 895 at 905):

1. 'The fact that the relationship between the company and the bank is also that of principal and agent (in respect of the drawing and payment of the customer's cheques as against money of the company in the banker's hands) does not afford the bank any defence against the liquidator's claim …'

2. '… the fact that the liquidator is entitled to seek recovery from the individual recipients of the withdrawals from the company's account (the "disponees" to adopt the Australian terminology) does not deprive the liquidator of his remedy against the bank. He is under no duty to exhaust his remedies against the recipients before resorting to the bank.'

GROUNDS OF APPEAL

19. Mr Gabriel Moss QC, appearing for the bank, made two main points which he developed in his citation of the authorities, including the Australian cases which were not followed by Blackburne J, and the later decision of Lightman J in *Coutts & Co v Stock*, which was not, of course, available to him.

(1) *The double disposition point*

This point turns on the identity of the relevant dispositions at which s 127 is aimed. The section refers to '*any*' disposition of the company's property. It is common ground that, where a company pays a creditor by cheque drawn on an account in credit between the date of a petition and the winding-up order, there is a disposition of the company's property *in favour of the creditor* falling within s 127. But it is contended that the judge was not required by principle nor by authority to hold (and he was wrong in holding) that there was another relevant disposition of the company's property *in favour of the bank* when the bank debited the company's account with the sum paid to the creditor and that that disposition was avoided by s 127, so as to render the bank liable to restore the company's account to its pre-disposition condition.

(2) *The void point*

This related point turns on the extent of the legal consequences flowing from the undoubted application of s 127 to the dispositions of the company's property in favour of the payees of the cheques. How far do the consequences of that statutory avoidance extend? It is contended that the judge was wrong to hold that the legal effect of applying s 127 to those dispositions was to avoid not only those dispositions of the company's property as between the company and the payees of the cheques, but also the related transactions between the company and the bank, as customer and banker. Blackburne J's construction of s 127 renders the bank liable to make restitution to the company for what it has done as agent of the company in honouring the cheques in accordance with its mandate.

THE LEGAL POSITION

20. In our judgment, this appeal succeeds on both points.

(1) *The policy of s 127*

Both grounds of appeal turn on the construction of the width of the section. Account must be taken of the purpose of this provision and of equivalent provisions in earlier corporate insolvency legislation. In *Re Wiltshire Iron Co, ex p Pearson* (1868) LR 3 Ch App 443 at 446–447 Lord Cairns LJ referred to s 153 of the Companies Act 1862 (which was in similar terms) as—

> 'a wholesome and necessary provision, to prevent, during the period which must elapse before a Petition can be heard, the improper alienation and dissipation of the property of a company *in extremis*.'

21. In *Coutts & Co v Stock* [2000] 2 All ER 56 at 59, [2000] 1 WLR 906 at 909 Lightman J, in a valuable summary of the relevant principles, described the provision as—

> 'part of the statutory scheme designed to prevent the directors of a company, when liquidation is imminent, from disposing of the company's assets to the prejudice of its creditors and to preserve those assets for the benefit of the general body of creditors.'

22. As Oliver J pointed out in *Re J Leslie Engineers Co Ltd (in liq)* [1976] 2 All ER 85 at 90, [1976] 1 WLR 292 at 298 the invalidating provisions (then to be found in s 227 of the Companies Act 1948) do not spell out the appropriate remedy of the company when the disposition is avoided. The right of recovery of the company's property which has been disposed of is determined by the general law. It is common ground in these proceedings that the right of recovery, whether invoked against the payees or against the bank, is restitutionary. There is no claim against the bank in these proceedings for damages either for breach of an alleged duty of care owed to the company and to the general body of its creditors or for breach of an express or implied term of a contract between the company and the bank.

23. In our judgment the policy promoted by s 127 is not aimed at imposing on a bank restitutionary liability to a company in respect of the payments made by cheques in favour of the creditors, in addition to the unquestioned liability of the payees of the cheques. The bank operated the company's account as agent for the company. In accordance with its mandate it debited the account with the amounts of the cheques. Those amounts have been received by the payees of the cheques in consequence of the bank duly honouring the cheques drawn in their

favour by the company. The section impinges on the end result of the process of payment initiated by the company, ie the point of ultimate receipt of the company's property in consequence of a disposition by the company. The statutory purpose stated by Lord Cairns LJ and Lightman J is accomplished without any need for the section to impinge on the legal validity of intermediate steps, such as banking transactions, which are merely part of the process by which dispositions of the company's property are made. This is not a restitutionary situation where the bank has been unjustly enriched as against the company and where the general law requires the restitution of the benefit. Mr Jory for the company has directed us to no case where in comparable circumstances restitution has been ordered.

(2) *Dispositions of the company's property*

Consistent with that legislative policy the only dispositions of the company's property affected by the section in this case are the payments to the payees of the cheques drawn, after the presentation of the petition, on the company's bank account. What is needed for the section to operate is a disposition amounting to an alienation of the company's property (see *Mersey Steel & Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 440, [1881–85] All ER Rep 365 at 368–369 per Earl of Selborne LC). The bank in honouring the company's cheque obeys as agent the order of its principal to pay out of the principal's money in the agent's hands the amount of the cheque to the payee (see *Westminster Bank Ltd v Hilton* (1926) 136 LT 315 at 317 per Lord Atkinson). The beneficial ownership of the property represented by the cheque was never transferred to the bank, to which no alienation of the company's property was made.

24. We therefore reject the contention that there were additional relevant dispositions of the company's property to the bank to which s 127 applies. The reasoning in the Australian authorities is convincing on this point. Lightman J expressed the view in *Coutts & Co v Stock* [2000] 2 All ER 56 at 62, [2000] 1 WLR 906 at 913 that the Australian cases are in accord with and supportive of the general principles expounded by him at [2000] 2 All ER 56 at 59–61, [2000] 1 WLR 906 at 909–911. In a recent and perceptive discussion of the authorities Professor L Sealy expressed the same view, with which we agree (see Company Law Newsletter (issue 57, 11 July 2000)).

25. We also accept Mr Moss's submission that there is no binding English decision to the contrary and that the decision of the Court of Appeal of Hong Kong relied on by Blackburne J is not persuasive on this point.

(a) The Australian authorities

The combined effect of ss 223(2) and 227(1) of the Australian Companies Act 1961 is the same as s 127 of the 1986 Act. In *Re Mal Bower's Macquarie Electrical Centre Pty Ltd (in liq)* [1974] 1 NSWLR 245 Street CJ in Eq held that the invalidating provisions do not operate to affect agencies, such as a bank interposing between the company making the disposition and the recipient of the property as 'disponee'. That case concerned payments out of the company's bank account which was in credit throughout the relevant period. The liquidator made a claim against the bank for the amount of the payments out of the account between the date of the petition and the date of the order and the date when the account was subsequently closed. The claim was dismissed. Street CJ (at 258) considered that there was 'great force' in the argument that—

'the paying by a bank of a company's cheque, presented by a stranger, does not involve the bank in a disposition of the property of the company so as to disentitle the bank to debit the amount of the cheque to the company's account. The word "disposition" connotes in my view both a disponor and a disponee. The section operates to render the disposition void so far as concerns the disponee. It does not operate to affect the agencies interposing between the company, as disponor, and the recipient of the property, as disponee ... The intermediary functions fulfilled by the bank in respect of paying cheques drawn by a company in favour of and presented on behalf of a third party do not implicate the bank in the consequences of the statutory avoidance prescribed by s. 227 ... I consider that the legislative intention ... is such as to require an investigation of what happened to the property, that is to say, what was the disposition, and then to enable the liquidator to recover it upon the basis that the disposition was void. It is recovery from the disponee that forms the basic legislative purpose of s. 227.'

26. This approach was followed by the Supreme Court of Queensland in *Re Loteka Pty Ltd (in liq)* (1989) 7 ACLC 998 in which a claim was made by the liquidators of the company, whose account with the bank was in credit in the relevant period between the presentation of the petition and the winding-up order, against the bank in respect of payments out of the account by cheques to third parties. McPherson J analysed the relation between banker and customer and held that the winding up of the company had not terminated the mandate by the company to the bank to pay the amount of the cheque drawn by the customer, provided there are funds in the account to meet it; that the invalidating provisions do not operate upon a mere contract after winding up, unless it was one that of its own force served to transfer an interest in a corporate asset away from the company; and that in the course of the transaction there was nothing in the nature of the disposition of the property of the company as customer to the bank. He said (at 1004) that:

'The amount standing to the credit of the customer's account is simply diminished thus reducing *pro tanto* the indebtedness of the bank to the customer. It is the payee of the cheque that receives the benefit of the proceeds of the cheque. All that happens between customer and banker is an adjustment of entries in the statement recording the accounts between them ...'

27. He concluded (at 1005) that—

'although there was a disposition of property of the company, it took place not when the cheques were paid but on the date or dates on which each cheque was issued; and that the disponee in each case was not the bank but the particular creditor in whose favour the cheque was drawn and delivered ... [It] is therefore only against those creditors as disponees, and not against the bank, that the disposition of company property is avoided by the operation of sec. 368(1) [of the Companies (Queensland) Code].'

28. The same view was taken by Underwood J in the Supreme Court of Tasmania in *Tasmanian Primary Distributors Pty Ltd (in liq) v RC and MB Steinhardt Pty Ltd* (1994) 13 ACSR 92 at 97 in the case of a 'bank cheque' (or bankers order) and by the Federal Court of Australia in *Wily v United Telecasters Sydney Ltd* (1996) 14 ACLC 863 at 870–872 per Lindgren J, approving the view that where a company

makes a payment by cheque, thereby reducing the amount standing to its credit in its bank account, the property of the company disposed of in such a case is, for the purpose of the corporate insolvency invalidating provisions (in that case s 468(1) of the Australian Corporations Law), the property in the cheque as tangible property and the payee must make restitution of the benefit obtained at the cost of the company, ie the amount of the cheque.

(b) The English authorities

The only two English authorities are the decision of this court in *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814, [1980] 1 WLR 711 and of Lightman J in *Coutts & Co v Stock*. There are certain passages in the judgment of Buckley LJ in *Re Gray's Inn Construction* (concurred in by Goff LJ and Sir David Cairns) which, when read out of context, appear to lend some support to the propositions that: (i) all post-presentation cheques drawn in favour of third parties on a company's bank account, whether that account is in credit or in debit, involve a disposition of the amount of the cheque in favour of the bank and are invalidated by the provisions, unless validated by the court (see [1980] 1 All ER 814 at 818–819, [1980] 1 WLR 711 at 715–716); and (ii) in consequence of statutory avoidance of such dispositions, the bank may be liable in proceedings by the liquidator for the amounts of the dispositions of property, albeit only to the extent that the amounts prove to be irrecoverable from the creditors who were paid (see [1980] 1 All ER 814 at 823, [1980] 1 WLR 711 at 721).

29. In our judgment *Re Gray's Inn Construction* is not binding authority for either of these propositions. It was unnecessary for the court to examine, let alone arrive at a final view on, either of these far reaching propositions, because of the concessions made by counsel in the passages referred to in (i) and because the decision in the case was in fact concerned with *payments made into an overdrawn account* and not, as is the case here, with payments made out of an account in credit. The judgment also dealt in detail with the exercise of the court's discretion to validate otherwise invalid dispositions. In those circumstances the passages in question cannot be relied on as part of the ratio of the decision. In view of the absence of full argument on these points it is even difficult to treat these statements as considered dicta carrying the weight which they normally would when coming from a judge as experienced and eminent in company law as Buckley LJ.

30. This court has had the benefit of full argument and citation of authorities on these points, as did Lightman J in *Coutts & Co v Stock*.

31. In summary, our conclusion, in the light of these authorities, is that s 127 only invalidates the dispositions by the company of its property to the payees of the cheques. It enables the company to recover the amounts disposed of, but only from the payees. It does not enable the company to recover the amounts from the bank, which has only acted in accordance with its instructions as the company's agent to make payments to the payees out of the company's bank account. As to the intermediate steps in the process of payment through the bank, there is no relevant disposition of the company's property to which the section applies.

32. We would add that, even if the company's bank account were in overdraft, which is not this case, the foregoing analysis of the legal effect of s 127 would produce the same result in respect of a claim for recovery against the bank. This result has the very real practical advantage of not requiring what in some cases could be a complex analysis of whether payments were made out of an account

which was in debit or in credit. The need for such an analysis cannot be justified by any sensible view of the purpose of s 127.

(c) The Hong Kong case

Blackburne J ([2000] 2 All ER 45 at 54) said that the reasoning of Clough JA in the judgment of the Court of Appeal of Hong Kong in the *Bank of East Asia Ltd v Rogerio Sou Fung Lam* [1988] 1 HKLR 181 'is exactly in point in the present' and followed it. The relevant reasoning was that the Court of Appeal in *Re Gray's Inn Construction* had regarded the payment as recoverable by a liquidator against both the payee and the company's bank, albeit primarily against the payee; that that English Court of Appeal had not been persuaded to accept the reasoning of Street CJ in the *Mal Bower* case (which was not even relied on by counsel arguing the Hong Kong appeal); and that the basis of recovery was 'obvious' in a straightforward case, as the section rendered the dispositions void and ineffective and, as between the company and the bank, the bank remained in receipt of the company's property to which it was not entitled.

33. We are unable to agree with Blackburne J on the precedent value of the decision in the *Bank of East Asia* case. Its force is diminished by its reliance on those parts of the judgment of Buckley LJ in *Re Gray's Inn Construction* which, for the reasons already stated, are not considered dicta on argued points. We would also point out that the focus in the Hong Kong case was not on a claim by the company against the bank for restitution, but on a claim by the bank, which had reimbursed the company, for reimbursement by the payee to whom the amount had originally been paid. It was a case which assumed, rather than decided, that the bank was liable under s 127 to make restitution to the company.

3. *The effect and extent of avoidance*

It follows from the above reasoning that there is no claim for recovery from the bank on the basis that, quite apart from the 'double disposition' point, the effect of avoiding the dispositions to the payees under s 127 is, without more, to render the bank liable to make restitution to the company.

The extent of the automatic retrospective avoidance is limited both by the terms of the section and by the purpose which it was enacted to achieve. The section only avoids 'dispositions' of the company's property (see *Re Oriental Bank Corp, ex p Guillemin* (1884) 28 Ch D 634 at 638–639). It does not in terms avoid all or any related transactions. As already explained, the purpose of the section is achieved by only avoiding dispositions of the company's property to the ultimate payees of the cheques (ie the end result), without the need to affect the validity of any intermediate contracts or transactions occurring during the course of the agency relationship between the company and the bank. Section 127 did not avoid, revoke or countermand the company's mandate to the bank to make payments of money out of its account to meet cheques sent by the company to the payees and subsequently presented for payment. The company continued to use the bank as its agent for the purpose of transmitting payments to creditors. Section 127 impinges on the dispositions to the creditors, but not on the authority of the bank to act on the instructions of the company or on contracts and other intermediate transactions between the company and the bank as part of the process leading to the ultimate disposition of the company's property to the payees.

a 34. Because of this conclusion it is not necessary to say anything on the bank's alternative argument that, if the bank is liable, the company cannot recover against the bank without first exhausting its remedies against the payees.

35. For these reasons we allow the appeal and set aside the order of the judge.

Appeal allowed. Permission to appeal refused.

Kate O'Hanlon Barrister.

W v H (Family Division: without notice orders)

FAMILY DIVISION

MUNBY J

5, 10, 12 JULY 2000

Practice – Family Division – Without notice orders – Disclosure obligations – Recital of evidence in order – Undertakings in damages – Guidance.

In 1996 W, a Saudi Arabian woman, applied for ancillary relief in divorce proceedings against her husband, H, who was also from Saudi Arabia. She claimed that H's assets in the jurisdiction included a valuable residential property whose registered proprietor was B Co. In 2000 H abducted the couple's children, took them to Saudi Arabia and ignored a court order requiring him to return them to the jurisdiction. W subsequently applied for leave to issue a writ of sequestration, seeking to punish H for his contempt, to put pressure on him to comply with the order for the children's return and to protect her claim for ancillary relief. At the hearing (the sequestration hearing), a third party, X, claimed to have purchased from H the shares in B Co for value in good faith, and produced a copy of the share purchase agreement. Nevertheless, the wife later applied ex parte in the Family Division for an injunction restraining B Co and X from disposing of the property, contending that the agreement between X and her husband had been a sham and that H remained the true beneficial owner. The judge granted the injunction, but his order contained neither an undertaking in damages from W nor any reference to the evidence that had been read. Although X's solicitors sought confirmation from W's solicitors concerning the evidence that had been before the court, they received no reply. X subsequently applied to have the injunction discharged, contending, inter alia, that W had been guilty of non-disclosure by failing to take the judge to the evidence setting out his position, which had been placed before the court at the sequestration hearing. X also relied on the omission from the order of the undertaking in damages and the recital of the evidence.

Held – (1) A person who sought relief ex parte, in the Family Division as elsewhere, was under a duty to make full and frank disclosure of all the material facts. Those who failed in that duty, and those who misrepresented matters to the court, exposed themselves to the very real risk of being denied interlocutory relief whether or not they had a good arguable case, or even a strong prima facie case. In every case, however, the court retained a discretion to continue or to grant interlocutory relief even if there had been non-disclosure or worse. In the instant case, although the court had some misgivings about the way in which matters had been approached at the ex parte hearing, there had not been any wilful or culpable default, and it would be inappropriate to exercise the discretion in favour of X and against W (see p 316 *a* to *d* and p 317 *c* to *f*, post); *Brink's-MAT Ltd v Elcombe* [1988] 3 All ER 188 and *Behbehani v Salem* [1989] 2 All ER 143 applied.

(2) In general, any ex parte order in the Family Division containing injunctions should set out on its face, either by way of recital or in a schedule, a list of all affidavits, witness statements and other evidential materials read by the judge.

The applicant's legal representatives should, whenever possible, liaise with the associate with a view to ensuring that the order as drawn contained that information. On receipt of the order from the court, those legal representatives should satisfy themselves that the order as drawn correctly set out the relevant information and, if it did not, take urgent steps to have it amended under the slip rule. They should also respond forthwith to any reasonable request from the party injuncted or his legal representatives either for copies of the material read by the judge or for information about what took place at the hearing. At the very least, if they asked, they were entitled to be told exactly what documents, bundles or other evidential materials were lodged with the court either before or during the course of the hearing, and what legal authorities were cited to the judge. It would therefore obviously be prudent for those acting for applicants in such cases to keep a proper note of the proceedings, lest they otherwise find themselves embarrassed by a proper request for information which they were unable to provide. In the instant case, it was unfortunate that the order as drawn up contained no indication of the material that had been read by the judge. That omission, and the absence of any attendance note of the proceedings, meant that X and his legal advisers had been left in the dark as to what materials had been shown to the judge. However, those matters did not go to W's entitlement to continuing interlocutory relief (see p 318 *c* to *h*, post).

(3) Although in family proceedings the applicant for an interlocutory injunction was not normally required to give the usual undertaking as to damages, a Family Division court would, save in unusual or exceptional circumstances, require such an undertaking in cases where a wife sought to restrain the use of property which, at least on the face of it, was vested in a third party who had produced documents showing, on their face, that he had acquired the property as a purchaser for value. In such a case, there was no reason why the Family Division's approach should be any different from that which would be adopted as a matter of course in the Chancery Division or Queen's Bench Division. Accordingly, in the instant case, the continuation of the injunctive relief should be conditional upon W giving an undertaking in damages (see p 320 *h* to p 321 *d f g*, post).

Notes

For ex parte applications generally, the necessity for disclosing material facts on ex parte applications and undertakings as to damages, see 24 *Halsbury's Laws* (4th edn reissue) paras 963, 969, 982.

Cases referred to in judgment

A-G v Newspaper Publishing plc [1987] 3 All ER 276, [1988] Ch 333, [1987] 3 WLR 942, CA.

A-G v Times Newspapers Ltd [1991] 2 All ER 398, [1992] 1 AC 191, [1992] 2 WLR 994, HL.

Art Corp v Schuppan (1994) Times, 20 January.

Behbehani v Salem [1989] 2 All ER 143, [1989] 1 WLR 723, CA.

Brink's-MAT Ltd v Elcombe [1988] 3 All ER 188, [1988] 1 WLR 1350, CA.

Chappell v Davidson (1856) 8 De GM & G 1, 44 ER 289.

Colledge v Crossley (1975) Times, 18 March, CA.

Green v Green [1993] 1 FLR 326.

Hadjiloucas v Crean [1987] 3 All ER 1008, [1988] 1 WLR 1006, CA.

Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry [1974] 2 All ER 1128, [1975] AC 295, [1974] 3 WLR 104, HL.
Howard v Press Printers Ltd (1904) 74 LJ Ch 100, Ch D and CA.
Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd (1999) Times, 10 November.
Khreino v Khreino (No 2) (court's power to grant injunctions) [2000] 1 FCR 80, CA.
Midland Bank plc v Wyatt [1995] 3 FCR 11, [1995] 1 FLR 696.
Nicholas v Nicholas [1984] FLR 285.
Oberrheinische Metallwerke GMBH v Cocks [1906] WN 127.
Purba v Purba [2000] 1 FCR 652, [2000] 1 FLR 444, CA.
Seaward v Paterson [1897] 1 Ch 545, [1895–9] All ER Rep 1127, CA.
Smith v Day (1882) 21 Ch D 421, CA.
Snook v London & West Riding Investments Ltd [1967] 1 All ER 518, [1967] 2 QB 786, [1967] 2 WLR 1020, CA.
Wakefield v Duke of Buccleugh (1865) 11 Jur NS 523.
Z Ltd v A [1982] 1 All ER 556, [1982] QB 558, [1982] 2 WLR 288, CA.

Application

The applicants, X and B Co, applied to discharge an injunction, granted by Kirkwood J on 19 June 2000 on the ex parte application of the respondent, W, restraining them from disposing or dealing with the shares of B Co or B Prop, a property that was in issue in ancillary relief proceedings between W and her husband, H. The case was heard in private, but judgment was given in open court. The facts are set out in the judgment.

Stephen Smith QC (instructed by *Withers*) for X and B Co.
Mark Everall QC (who did not appear on the ex parte application before Kirkwood J) (instructed by *Sears Tooth*) for W.

Cur adv vult

12 July 2000. The following judgment was delivered.

MUNBY J. I give judgment in this matter in open court because the case raises points of practice in relation to the grant of ex parte injunctions in the Family Division. I have prepared the judgment in anonymised form and nothing must be published which might lead to the identification of the children involved in this case.

H and W are Saudi Arabians. They married on 29 September 1981. There are five children born respectively in 1982, 1984, 1985, 1988 and 1990. In the early 1990s the family started to live in this country. On 18 July 1996 W petitioned for divorce. By a Form M13 dated 16 September 1996 W applied for ancillary relief. I am told that in addition there is a supplemental petition and an application in Form A, both dated 31 May 2000.

W has some assets in this country. Her case, as I understand it, is that although H has assets outside the jurisdiction his only assets of any real value in this country are two valuable residential properties, one in London which I shall refer to as A Prop and the other, B Prop, in the Home Counties. I am primarily concerned with B Prop, which was acquired in 1993. B Prop is registered at HM Land Registry. It appears that at all material times, at least until recently: (i) the registered proprietor of B Prop was B Co, a company incorporated in the British Virgin Islands; (ii) B Co had two issued bearer shares held by Swiss lawyers, Messrs S, for the trustees of a Jersey trust, B Trust; (iii) the trustees of B Trust

were a Jersey trust corporation, J Trustco, and a Swiss trust corporation, S Trustco; and (iv) the beneficiaries of B Trust included H, W and their children. As I understand it, although I have not been shown any of the relevant documents, A Prop was, at least until recently, owned by A Co, an Isle of Man company, the shares in which were held by a Panamanian company, AA Co, of which H was on his own account (see para 10 of his affidavit sworn on 4 October 1996) 'the sole beneficial owner'.

On 13 November 1996, Bennett J made an order which included an undertaking by H to notify W of any intention by the trustees of B Trust to make a distribution of trust assets forthwith upon him becoming aware of such intended distribution.

On 6 April 2000 H and W went with the four younger children to France for the Easter holiday. On 16 April 2000, whilst W was visiting her brother in Lebanon, H abducted the four children and took them from France to Saudi Arabia. They have not been returned.

On 28 April 2000 Judge Rylands (sitting as a judge of the High Court) made the four children wards of court, ordered H to return the children to the jurisdiction and to the interim care and control of W by 4 May 2000, injuncted H from disposing of or dealing with A Prop and the shares in A Co, and injuncted the directors of A Co from disposing of or dealing with A Prop. The judge was not asked to grant any relief in relation to B Prop, B Co or B Trust.

H failed to return the children and on 9 May 2000 Judge Compston (sitting as a judge of the High Court) gave directions in relation to W's application for leave to issue a writ of sequestration. That application, I should make clear, was launched for a double purpose: first, by way of punishment for H's contempt in failing to return the children to the jurisdiction and as a means of exerting continuing pressure on him to comply with Judge Rylands' order; secondly, to protect W's claims for ancillary relief.

On 11 May 2000, Ms R, a solicitor acting for X, a Saudi Arabian, swore an affidavit asserting that all interest formerly held by H in the shares of B Co had passed to X on 6 May 2000. Exhibited to Ms R's affidavit were the following. (i) Copies of two land certificates showing that B Co is the registered proprietor of B Prop. (ii) A copy of a share purchase agreement made on 6 May 2000 between H, described as 'the Seller', and X, described as 'the purchaser', for the sale by H to X of all the issued share capital of B Co for SR 14,725,000. Clause 4 of the agreement provided for what was described as 'Closing' to take place on 6 May 2000 (the same day) in Jeddah. Clause 5 provided for payment of the purchase price 'in cash, by wire transfer, or by cheque' on closing. Clause 10 provided that the governing law was to be the law of Saudi Arabia. (iii) A copy of a document addressed to Messrs S, dated 6 May 2000, and signed by H and X directing Messrs S (a) henceforth to hold the two bearer share certificates of B Co for X absolutely and (b) to hold all the corporate documents of B Co and the documents relating to B Prop for and on behalf of B Co to the order of X. One of the corporate documents listed in the attached schedule was described as 'resolution re resignation and appointment of directors dated 6 April 2000'. (iv) A copy of a document dated 9 May 2000, headed with the name of B Co and addressed to H, whereby something called IA Ltd and describing itself as 'sole director' gave H notice terminating with immediate effect what was described as his licence to occupy B Prop.

According to Ms R, deposing on the basis of instructions from X, X had made the purchase to provide a home for himself and his family when visiting England

and as an investment, and at the time of the purchase had been totally unaware of the existence of the order dated 28 April 2000. *a*

Also on 11 May 2000, as I understand, although I have not seen it, a director of A Co swore an affidavit to the effect that although there had been declarations of trust with regard to the shares in A Co in favour of H, that was no longer the case. He did not say who was now the beneficial owner of the shares in A Co. A subsequent affidavit sworn in proceedings in the Isle of Man by another director *b* of A Co asserts that on 15 December 1999 nominee shareholders in A Co executed a declaration of trust in favour of someone I will call Y, with the consequence, so it was said, that H no longer had any interest in A Co and that the shares in A Co now belonged beneficially to Y.

W's application came before Bracewell J on 12 May 2000. W was represented *c* by junior counsel (not counsel who has appeared before me). X was represented by Mr Stephen Smith QC, who was permitted to be present in Her Ladyship's chambers for some but not all of the hearing. A Co was represented by junior counsel. Interestingly, in the light of the documents exhibited to Ms R's affidavit, Mr Smith explained that although he appeared on behalf of X, he was not at that stage formally instructed on behalf of B Co because 'the directors are in the *d* Middle East, in different countries'. No one has been able to explain in relation to the directors of B Co what it was that had happened on 6 April 2000 or how it was that, although the sole director on 9 May 2000 appears to have been IA Ltd, only three days later the situation was as described by Mr Smith.

Bracewell J quickly identified an important matter on which Ms R's affidavit *e* had been unclear, namely whether the sale of the shares in B Co to X had actually been completed. I can pick up the story from the transcript:

> 'BRACEWELL J: What was the basis of the transfer? Was it for value?
>
> MR SMITH: It was a sale, yes: 14m Saudi rials, which I understand is in the region of two to 2½m, I think, sterling, if not sterling, dollars, so a substantial *f* sum in any event, was agreed to be paid.
>
> BRACEWELL J: And has that sale been completed?
>
> MR SMITH: I believe so, yes.'

Her Ladyship returned to the matter a little later:

g

> 'BRACEWELL J: Has the money been paid?
>
> MR SMITH: I understand that a cheque has been handed over for the amount but it is the intention of the parties that the transfer will take place not via the cheque by directly, as it were, from account to account but my client is in the process of getting the money together to pay it, to make the *h* transfer. Completion in terms of the shares having been passed has happened, as your Ladyship will see in a second, and the cheque has been given over, as it were, as security for the purchase price.
>
> BRACEWELL J: For the whole amount?
>
> MR SMITH: The whole amount, I believe, my Lady, yes. Closing was to *j* be on 6 May in Jedda; your Ladyship can see that from cl 4 of the agreement. Then there were provisions as to payment, in cl 5: various indemnities. I do not think we need bother with the rest, other than to notice, in passing, the agreement was to be governed by Saudi law.
>
> BRACEWELL J: I am not clear whether on May 6 there has been actual passing, as contemplated by para 5.

MR SMITH: My Lady, can I say this? I appreciate it is not dealt with in this affidavit. This affidavit, as I have endeavoured to explain to your Ladyship, put together in some haste yesterday, to apprise your Ladyship of the position. If your Ladyship is in any doubt about the question of payment then I am sure we will be able to deal with that ...

BRACEWELL J: I am just wondering what stage the arrangement had reached.

MR SMITH: In terms of the shares having passed, my Lady, that can be seen from the document at the end of the exhibit.'

In the event Bracewell J made three orders. The first gave W leave to issue a writ of sequestration 'to sequester all the real and personal property of [H] in this jurisdiction'. The order also provided that W was to provide X's solicitors by 19 May 2000 with 'such information as relates to her belief that [H] has an interest in [B Prop]'. In a short judgment Bracewell J explained the basis upon which the order was made as follows:

'I am satisfied that the father of the two children is in contempt of the orders of this court in that he has failed to comply with the order of Judge Rylands and the order of Judge Compston (sitting as judges of the High Court) which required him to return the children to the jurisdiction of this court by a specified time and date. There was no extension of time by Judge Compston. The father has failed to comply with the orders and, indeed, has filed documentation setting out in the plainest terms that he has no intention of complying with the orders of the court in respect of the return of the children ... The children are currently in Saudi Arabia and the father intends that they should remain out of the jurisdiction. It is in those circumstances that the application has been made for permission to issue a writ of sequestration in respect of the real and personal property of the father in this jurisdiction. I am satisfied that it is appropriate to grant such permission.'

So far as concerned the position of X, B Co and A Co, Bracewell J said:

'There is plainly a dispute about what property (if any) the father has within this jurisdiction and counsel have appeared, both on behalf of A Co and X, to the effect that two properties are not in fact owned by H. That is a matter which is plainly in dispute and this court at the present time has no way of knowing the true position until any appropriate investigations take place ... It seems to me that any writ of sequestration does not require the identification of any particular property in that the duty lies on the sequestrators in order to identify any property and the extent of any interest in such property owned by the defendant ... Having granted leave to the mother to issue the writ of sequestration, I direct to the commissioners that they sequester all the real and personal property of the father and I do not propose to identify what such properly consists of; it is a matter for them.'

The second order made by Bracewell J, pursuant to s 37 of the Matrimonial Causes Act 1973, restrained H from 'completing the sale of [B Prop]' or from 'completing the sale of, or otherwise disposing of, any holding that he may have in [B Co]'. It also provided that:

'... in the event that at the date of this order [H] has completed the sale of [B Prop] or has sold or otherwise disposed of any holding that he may have

had in [B Co] he shall within seven days account to the solicitors for [W] for the proceeds of sale and bring them within the jurisdiction of this court.' *a*

It will be noticed that that order was directed only to H. It was not expressed as restraining either X or B Co or, for that matter, either J Trustco or S Trustco. Mr Smith appears to have been alert to the point. The transcript of the proceedings contains the following passage: *b*

'BRACEWELL J: I make a restraining order preventing him from completing the transaction and, if it has been completed, to account and bring the monies into the jurisdiction.

MR HOWARD: I am most grateful. I think my learned friend, Mr Smith, ought to know about the order that is being made and I ... *c*

BRACEWELL J: Yes, indeed.

MR SMITH: If it is an order against ...

BRACEWELL J: It is not an order against you.

MR SMITH: So it does not affect me.

BRACEWELL J: No, it does not affect you, it affects the father. *d*

MR SMITH: Yes, indeed.'

The order was sealed on 15 May 2000 and a copy was sent by W's solicitors to X's solicitors, apparently after close of business on 16 May 2000. The third order was a worldwide 'Mareva' injunction against H.

On 19 May 2000 W's solicitors wrote to X's solicitors setting out the matters *e* required to be disclosed pursuant to the first order. Apart from referring to what H had said in his affidavit of 4 October 1996 and stating, what X already knew, that B Co was the registered proprietor of B Prop, the only substantial information provided by W was to the effect that she:

'... will say that her husband has accepted verbally on many occasions that *f* he owns the property and that he regularly spent weekends there as did previously our client and the children.'

On 24 May 2000 solicitors acting for the sequestrators wrote to X's solicitors seeking, inter alia, details of the purchase price for the shares in B Co, how much *g* was paid, when it was paid and to whom. On 16 June 2000 X's solicitors replied, asserting that as the bearer shares in B Co 'are physically in the possession of Messrs [S] in Geneva who hold them for [X]' they are not as such property the subject of the sequestration order, and stating that payment had been made in full on 15 May 2000. In a further letter dated 20 June 2000 X's solicitors informed the sequestrators' solicitors that payment in the sum of SR 14,725,000 had been made *h* to H on 15 May 2000.

Meanwhile on 19 June 2000 W had issued two summonses. The first, returnable on 31 January 2001, seeks declarations pursuant to s 17 of the Married Women's Property Act 1882 (i) that H is the true beneficial owner of B Prop and A Prop and (ii) that 'the purported dispositions of the said properties or the shares *j* in the companies which purport to own the properties ... are shams'. Alternatively, in the event that the court determines that the dispositions are not shams, the summons seeks an order that 'the said dispositions be set aside pursuant to section 37 of the Matrimonial Causes Act 1973'. The second summons, returnable on 12 July 2000, seeks the joinder of X, of B Co, of Y and of A Co, injunctions restraining H, X and B Co from disposing of or dealing with B Prop or the

beneficial ownership of B Prop or the shares in B Co and similar injunctions restraining H, Y and A Co in respect of A Prop and the shares in A Co.

The same day (19 June 2000) W swore an affidavit setting out why, as she asserts, the transfer of the shares in A Co to Y is a sham and why, as she also asserts, the transfer of the shares in B Co to X 'if indeed it did formally occur, was a sham and/or designed to defeat the Orders for sequestration and my financial claim'. She asserted also that—

> 'despite the complex system of trusts and companies, [H] was the real owner of [B Prop]. Indeed he has told me on many occasion that he is and has continued to enjoy the property right up to April 2000 when he kidnapped the children and left for Saudi Arabia.'

She also deposed to the facts that X and Y are both very close and long-standing friends of H and that Y's wife is X's cousin. In the same affidavit she asserted that, since the transaction, as she would have it, was only completed on 15 May 2000, both H *and X* are in breach of the second of the three orders made on 15 May 2000 by Bracewell J (that is, the s 37 order).

The same day (19 June 2000) junior counsel for W (*not* the same counsel who had appeared for her before Bracewell J on 12 May 2000) applied ex parte to Kirkwood J. So far as concerns B Prop, B Co and X, the heart of counsel's submissions to Kirkwood J is to be found in the following passage in the transcript:

> 'Much of what has come to light, leading to today's application, is through the actions of the commissioners of sequestration in attempting to seize the husband's assets. On that occasion, on 12 May—you will see I have recorded just above the 12 May two affidavits of 11 May—there appeared before Bracewell J counsel on behalf of X. I think I record that—I am told that in fact they represent only X and not B Co—saying that X has bought B Co and so effectively has bought B Prop. We take notice that this transaction was said to have taken place on 6 May. You may have seen from the wife's affidavit for this application that it now emerges that the completion of that transfer did not take place until 15 May. I was not present myself, but it was not clear whether the cheque to make the payment had in fact cleared and, on enquiry, completion had not taken place, which is why Bracewell J made a s 37 order restraining the husband from completing the sale of B Prop, completing the sale of B Co or, if sold, to account to the wife for the proceeds, because that was not clear. It appears that it is in breach of that order that completion of transfer in fact took place.'

Kirkwood J made an order over 12 July 2000 (i) restraining X and B Co from disposing of or dealing with B Prop or disposing of or dealing with the shares in B Co, and (ii) restraining Y and A Co from disposing of or dealing with A Prop or disposing of or dealing with the shares in A Co.

It is to be noted that the order as sealed does not indicate what evidence was considered by Kirkwood J and contains no undertaking in damages. In a letter dated 20 June 2000 to W's solicitors, X's solicitors drew attention to this latter fact and sought clarification as to whether or not a cross-undertaking had been given. The response next day was that no cross-undertakings were ordered and 'indeed it is unusual to do so in the Family Division'. In a further letter dated 27 June 2000, X's solicitors drew attention to the omission from Kirkwood J's order of any reference to the evidence read and sought confirmation as to what evidence had

been before the court; they also sought details of all submissions made to the court on 19 June 2000, in particular the exact submissions made in relation to any allegation that X was in breach of any order of the court. So far as I am aware there has been no response to that letter.

It was in these circumstances that, on 29 June 2000, X and B Co gave notice of an application returnable on 5 July 2000, seeking the discharge as against them of the injunction granted on 19 June 2000 by Kirkwood J. That is the application which came before me on 5 July 2000 and again, following an adjournment, on 10 July 2000.

Mr Stephen Smith QC appeared again for X and also on this occasion for B Co. W was represented by Mr Mark Everall QC, who, I should make clear, had not appeared either before Bracewell J on 12 May 2000 or before Kirkwood J on 19 June 2000. H was neither present nor represented, nor were A Co or Y.

Three further affidavits were before me: (i) an affidavit of X sworn on 28 June 2000; (ii) a second affidavit of Miss R sworn on 30 June 2000; and (iii) a further affidavit of W sworn on 4 July 2000.

X says that he has known H as a friend and business acquaintance for 20 years. He says that he has visited H on several occasions at B Prop and recalls telling H on one such occasion in 1997 that he would be very interested in buying B Prop if H ever thought of selling it. He says that in January 2000 there was a serious discussion between them of the possibility of his buying B Prop from H and that on that occasion H produced for him a casual valuation of B Prop which he had obtained from local agents on 16 February 1999. That valuation, which X exhibited to his affidavit, suggested marketing the property at a guide price of £2,000,000. He says that on 19 April 2000 there was a conversation between them in Jeddah, in the course of which H told him that the value of B Prop after partial but incomplete renovations was between £2,500,000 and £2,750,000. They reached agreement the same day that X would buy B Prop and its contents for SR 14,725,000, H explaining that 'his company' B Co, was the registered proprietor, so the form of the transaction would be a transfer of shares in B Co. X says that H instructed his Swiss lawyers, Messrs S, to draft the necessary documentation and that on 2 May 2000 there was a telephone conference between H, X and Messrs S discussing the details of the agreement. He says that H 'was keen to complete our transaction'. He says they met in Jeddah on 6 May 2000. He says:

> 'At the completion I confirmed, a matter that I had previously explained to him, that it would take me a few days to complete raising the required sum of Saudi Arabian Riyals 14,725,000 which I was required to pay pursuant to the terms of the Agreement. This was acceptable to H provided that he would meanwhile hold a post dated cheque for Saudi Arabian Riyals 14,725,000. I should explain that it is the law in the Kingdom of Saudi Arabian that all cheques are payable on demand irrespective of a future date. Although H required my cheque on completion on 6 May 2000 he told me that he would not cash the cheque until the due date, 20 May 2000, in order to allow me the time I needed to raise the sum of Saudi Arabian Riyals 14,725,000. He signed an undertaking to me to this effect ... It was envisaged by both of us at completion that within a few days I would transfer funds from my bank by telegraphic transfer and at that stage my cheque would be returned to me. Having sorted out the method of payment in this way, we both signed the formal Agreement of 6 May 2000 and the letter of instructions to Messrs. S.'

He exhibits the cheque and H's undertaking.

X accepts that on 10 May 2000 he learned from Messrs S of the existence, and was sent copies, of the orders dated 28 April 2000 and 9 May 2000. He accepts also that on 12 May 2000 he was told by his solicitor, Miss R, of the existence of the first of the three orders made by Bracewell J on 12 May 2000, that is, the sequestration order. He says that he was specifically told by his solicitor that, as the bearer shares were outside the jurisdiction, they would not be subject to the sequestration order. Miss R in her second affidavit states that when reporting to X on 12 May 2000 she did *not* inform him of the fact that injunctions had been granted against H, nor was there, she says, any reason why she should do so.

X says that he paid H SR 14,725,000 on 15 May 2000 by bank transfer. He exhibits to his affidavit copies of the bank transfer and of a letter he wrote to H on 15 May 2000 seeking the return of his cheque, which letter was returned to him, together with his cheque, endorsed by H apparently on 20 May 2000 as follows: 'I acknowledge the transfer of the full amount. Attached is the cheque as requested.' H has failed to account for those moneys to W's solicitors as required by Bracewell J's order and, so far as is known, has not brought them into the jurisdiction.

According to both X and Miss R, basing this on information supplied by the Bank of England, the monthly average exchange rate for May 2000 was 5·654 SR to the pound, so that the amount remitted to H on 15 May 2000 was £2,608,772·50. Miss R exhibits a valuation of B Prop dated 28 June 2000 in the sum of £2,100,000, prepared by a FRICS who is an associate director of a well-known firm of surveyors and valuers. She says there is not and could not be any suggestion that X has acquired the shares in B Co at an undervalue.

X asserts he is simply the purchaser of the shares in B Co having paid what he believes to have been the full market price. He indignantly rejects any suggestion that he has breached any court order. He says:

> 'I am simply a purchaser who has in good faith acquired a property from a business colleague and friend, H at a full commercial value. It is quite wrong for the Petitioner and her advisers to read any alternative construction on my purchase because the date when the completion of the Agreement took place, 6 May 2000, was a "convenient" date for H. Having seen and considered a copy of the Orders dated the 28 April 2000 and the 9 May 2000, I can understand now why H might have wanted any transaction to complete before the 12 May 2000. But at the time, 6 May 2000, I did not know this.'

In her latest affidavit W sets out her case as follows:

> 'My case in essence is that at all times the beneficial owner of both B Prop and A Prop was the Defendant, albeit through shareholdings of companies set up by him or on his behalf, that the recent transactions involving B Prop and A Prop are shams and that he has done this through two close friends of his, X and Y who were aware that the Defendant had kidnapped the children and that he was seeking to dispose of his assets to defeat my claims and those of the sequestrator, and that neither are bona fide purchasers for value.'

W continues:

> 'Furthermore it is quite apparent from X's affidavit that, on his own case, the matter was proceeded with between him and the Defendant in unseemly haste, namely commencing on the 19th April. No reason has been given for

this speed. In my submission it is entirely consistent with the Defendant and X, knowing full well the position regarding the kidnapping of the children and my pending application and previous discussions regarding the question of a divorce, dealing with the matter so as to defeat my claims. I would also point out that X did not even get the surveyor's report until the 28th June of this year. In short, he says he completed the transaction without even getting the report regarding the value and condition of the property. There is a further point, and that is that the transactions purportedly done by the Defendant in relation to B Prop and A Prop should be looked at together. In this connection I refer to my affidavit sworn on the 19th June. The alleged transaction in relation to A Prop was said to have taken place in December 1999 but the mortgagees ... were aware of that transaction only after the Order of 12th May, namely on the 17th or 18th May 2000. I maintain that both transactions are shams and should not be looked at in isolation, and that the Defendant has conspiratorially, with X and Y, sought to divest himself of his assets with the intention of defeating my claims and that neither X nor Y are bona fide purchasers for value. I believe that until such time as the Court has been able to investigate both these transactions, first of all by joining the various parties as Defendants, and then for them to give evidence at the substantive hearing fixed for the 31st January, and for there to be full discovery of documents, the injunction should remain.'

She also says that she has not the slightest doubt that H would have told X about the fact that he had removed the children to Saudi Arabia.

Before I address Mr Smith's arguments as to why, as he would have it, I should discharge the injunctions against X and B Co, I ought to deal with a wider question canvassed by Mr Everall. This relates to the approach to be adopted in the Family Division in cases where assets which a wife says belong in truth and reality to her husband are, or appear to be, vested in some other person, or in some corporate or trust entity.

Mr Everall, referring me to *Nicholas v Nicholas* [1984] FLR 285, *Green v Green* [1993] 1 FLR 326, *Purba v Purba* [2000] 1 FCR 652 and *Khreino v Khreino (No 2) (court's power to grant injunctions)* [2000] 1 FCR 80, submits that the court adopts a robust approach in such cases and does not allow itself to be, to use Thorpe LJ's words in *Khreino*'s case (at 85), emasculated by over-refined or technical arguments based on strict principles of property law.

I readily accept that there is much force in Mr Everall's submission. Thus, as can be seen from *Nicholas'* case (at 287, 292), and *Green*'s case (at 337, 340), where property is vested in a one-man company which is the alter ego of the husband, the Family Division will pierce the corporate veil, disregard the corporate ownership and, without requiring the company to be joined as a party, make an order which has the same effect as the order that would be made if the property was vested in the husband. Indeed, the court can and will adopt this approach even where there are minority interests involved if they are such that they can for practical purposes be disregarded.

Moreover, as Thorpe LJ's forthright observations in *Purba*'s case (at 654–655), and *Khreino*'s case (at 85), show, the court will not allow itself to be bamboozled by husbands who put their property in the names of close relations in circumstances where, taking a realistic and fair view, it is apparent that the recipient is a bare trustee and where the answer to the real question—Whose property is it?—is that it remains the husband's property. Again, in such cases

there is no need for the third party to be joined. As *Purba's* case shows, where a transfer has been made post-separation to a close relative in order to defeat a wife's claims, the court can and will act without going through the formality of joining the third party or making setting aside orders under s 37. And as *Khreino's* case shows, the court can and in appropriate cases will grant Mareva injunctions against both the husband and his offshore company and the relative who holds the bearer shares in the company without requiring either the company or the relative to be joined as parties.

Nothing that I say should be taken as intended to water down in any way the robustness with which the Family Division ought to deal in appropriate cases with husbands who seek to obfuscate or to hide or mask the reality behind shams, artificial devices and similar contrivances. Nor do I doubt for a moment the propriety and utility of treating as one and the same a husband and some corporate or trust structure which it is apparent is simply the alter ego or creature of the husband. On the other hand, and as *Nicholas'* case itself demonstrates, the court does not—in my judgment cannot properly—adopt this robust approach where, for example, property is held by a company in which, although the husband has a majority shareholding, the minority shareholdings are what Cumming-Bruce LJ ([1984] FLR 285 at 287) called 'real interests' held by individuals who, as Dillon LJ (at 292) put it, are not nominees but business associates of the husband.

The fact is that the present case is very far removed from cases of the type exemplified by *Purba's* case and *Khreino's* case. Indeed, W herself, as we have seen, has applied for X and B Co to be joined as parties to the proceedings. In the present case W is seeking to recover property which, at least on the face of it, is vested in a third party, X, who produces documents which, if they are taken at face value, show that X has acquired the property as a purchaser for value—indeed, for what appears to be full value. Of course it may turn out that X is not at all what he claims to be and that W is fully justified in her allegation of sham and/or in her claim under s 37. But for all that I can know, W's case against X may fail at trial. The present case, as it seems to me, has to be approached on the footing that, at this interlocutory stage, X's claims have to be taken seriously and that the robustness of approach appropriate in cases such as *Khreino's* case would here be out of place.

W's case as put forward by Mr Everall is that, were X out of the picture and the matter simply one as between W and H, the court would treat B Co (and if need be B Trust) as H's alter ego. For present purposes I am perfectly willing to proceed on that footing. So far as concerns X, Mr Everall submits that, far from him being, as Mr Smith would have it, a bona fide purchaser for value, the alleged sale of the shares in B Co by H to X is simply a sham, alternatively, that it was entered into in circumstances satisfying the requirements of s 37 of the 1973 Act and thus in circumstances entitling W to have the transaction set aside as against both H and X. As I understand it, W's case against Y proceeds on very much the same basis.

'Sham' in this context seems to me to have a perfectly clear meaning, namely, as Diplock LJ put it in *Snook v London & West Riding Investments Ltd* [1967] 1 All ER 518 at 528, [1967] 2 QB 786 at 802:

> '... acts done or documents executed by parties to the "sham" which are intended by them to give to third parties or to the court the appearance of

> creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.' *a*

Or, as Mustill LJ put it in *Hadjiloucas v Crean* [1987] 3 All ER 1008 at 1018, [1988] 1 WLR 1006 at 1019:

> '...an agreement or series of agreements which are deliberately framed with the object of deceiving third parties as to the true nature and effect of *b* the legal relations between the parties.'

On the other hand, as was pointed out by the Deputy Judge in *Midland Bank plc v Wyatt* [1995] 3 FCR 11 at 22, a document will be a sham, even if it was entered into without any dishonest or fraudulent motive, if it was not intended to be acted upon but was entered into for some different or ulterior motive. *c*

So far as concerns s 37, there are two key questions. First, did H, when he entered into the transaction with X, intend to defeat W's claim for financial relief? Secondly, was the disposition of the shares in B Co to X a disposition—

> 'made for valuable consideration (other than marriage) to a person [that is X] who, at the time of the disposition, acted in relation to it in good faith and *d* without notice of any intention on the part of the other party [that is H] to defeat the applicant's [that is, W's] claim for financial relief?'

For present purposes, this being an application for interlocutory relief, the primary question for the court is whether W can establish a properly arguable case. Can she satisfy the court that there is a serious question to be tried (a) as to *e* whether H and X were, as she asserts, parties to a sham in the sense in which I have used that word and/or (b) as to (i) whether H's intention in entering into the transaction was to defeat her claim and, if so, (ii) whether X was a purchaser for value, acting in good faith and without notice of any improper intention on H's part? *f*

Before turning to consider this issue I should deal briefly with one matter which, perhaps not surprisingly in the circumstances, occupied a certain amount of time in argument; that is the date upon which the sale of the shares in B Co to X was completed and, related to that, the question of whether either H or X was in breach of, or otherwise guilty of a contempt of court in relation to, any of the *g* orders made by Bracewell J on 12 May 2000.

Mr Smith says that the position is quite clear. The transaction, he says, was completed, in the normal sense of the expression, on 6 May 2000, being the date on which (i) H transferred the shares in B Co to X and (ii) H agreed, notwithstanding the provisions of cll 4 and 5 of the share purchase agreement, to leave the purchase price outstanding, albeit on the security of a post-dated *h* cheque. Be that as it may, he says, it is quite clear that full *legal* title to the shares in B Co passed to X on 6 May 2000 for, he submits, title to bearer shares passes by delivery of the share certificates or by the acceptance of instructions by the person with physical custody of the share certificates to hold them to the order of a specific individual. On the assumption I have to make, there being no evidence *j* of foreign law before me, that all relevant foreign systems of law are the same as English law, I have to say I see the force of Mr Smith's arguments. Indeed I am prepared for present purposes to assume that they are probably correct. However, what is abundantly clear from the passages in the transcript to which I have already referred, is that for the purposes of the proceedings before Her Ladyship on 12 May 2000, Bracewell J was treating the crucial question as being

not whether legal title in the shares had passed to X on 6 May 2000 but rather whether X had or had not actually paid H the purchase price. Moreover, it is equally apparent that, in these circumstances, the words 'completing the sale' in para 1 of the s 37 injunction granted by Bracewell J on 12 May 2000, and the words 'completed the sale' in para 2 of that order, were intended and understood both by Bracewell J and by W's legal advisers as relating *not* to the process by which title in the shares passed to X—a process which, as I have said, occurred on 6 May 2000—but rather to the process by which X actually paid for the shares—a process which, as we have seen, did not take place until 15 May 2000. With the benefit of hindsight (and I readily acknowledge that it is all too easy to be wise after the event) it is perhaps unfortunate that the s 37 injunction was drafted using a form of words which appears to have meant different things to different people and that the form of the order did not came to the attention of X's legal advisers until 16 May 2000, that is, *after* payment of the purchase price on 15 May 2000.

So far as concerns breach and contempt, Mr Smith vehemently disputes that there is any proper basis for such allegations. He submits that the shares in B Co, being at all material times bearer shares physically located in Switzerland of a company incorporated in the BVI, cannot on any footing be described as being 'in this jurisdiction' as those words are used in the sequestration order. Accordingly, he submits, there can be no question of X either being in breach of or otherwise guilty of any contempt in relation to the sequestration order. I must emphasise that the issues of breach and contempt are not, as such, before me, but I am prepared to proceed for present purposes on the footing that on this point Mr Smith's argument is correct.

So far as concerns the s 37 injunction, Mr Smith says that there can have been no breach by anything done on 15 May 2000, because completion had already taken place on 6 May 2000. Alternatively, and even if completion is to be treated as having taken place on 15 May 2000, he says that what took place on that date did not involve any breach: X was not, says Mr Smith, restrained by the order from completing the transaction (indeed, he says, X was not restrained by the order at all), and H, who was restrained by the order, did not, says Mr Smith, do anything material on 15 May 2000. Not surprisingly he emphasises Bracewell J's clear statement that the s 37 injunction was an order against H, and not against X, and that it did not affect X.

I should make it clear that I am very far indeed from being persuaded that X has either breached the order or been guilty of any contempt of court. Indeed, it seems to me highly probable that he has done neither. On the other hand, it is, I think, possible for W to argue, with what realistic prospects of success I do not pause to consider, as in fact Mr Everall has argued on her behalf, that completion for the purposes of the order did not take place until 15 May 2000; that H breached the order merely by the act of receiving the moneys transmitted to him on 15 May 2000 by X; that X was sufficiently on notice of the making of the order; and, accordingly, that although X was not himself in breach of the order, he was none the less in contempt of court on the basis of that species of liability considered in cases such as *Seaward v Paterson* [1897] 1 Ch 545, [1895–9] All ER Rep 1127, *Z Ltd v A* [1982] 1 All ER 556, [1982] QB 558, *A-G v Newspaper Publishing plc* [1987] 3 All ER 276, [1988] Ch 333 and *A-G v Times Newspapers Ltd* [1991] 2 All ER 398, [1992] 1 AC 191.

Against this background I turn to consider Mr Smith's various complaints against the order made by Kirkwood J on 19 June 2000.

(I) First, Mr Smith disputes that W can establish even an arguable case. Her case, he submits, rests on surmise and conjecture based on no solid foundation. I do not agree.

In the nature of things W's case at this stage is based in large part on circumstantial evidence and inference. Individual strands in the rope may not be particularly strong; some points taken in isolation may not be particularly telling. But I have to look at the case in the round, assessing *all* the matters relied on by Mr Everall, with a view to deciding whether, in the light of *all* the material which is presently to hand, W can show that she has a fairly arguable case against X either of sham and/or on the basis of s 37. In my judgment she has demonstrated just that.

Mr Everall points to a number of features which, he says, establishes that W does indeed have a prima facie case. Thus he refers to the fact that H has used a complex system of offshore trusts, companies and shares to hold property in the United Kingdom. He submits that the attempt by H to put B Prop beyond the reach of the High Court has to be seen in the light of what he says was a similar attempt in relation to A Prop. In relation to that latter matter he points out that the transaction which purported to divest H of ownership of A Prop is alleged to have been a declaration of trust in favour of Y, on 15 December 1999, whereas the information first came to light after the abduction of the children on 16 April 2000. Moreover, he points out in this connection that in correspondence in February 2000 between W's solicitors and the solicitors at that stage acting for H, concerning, amongst other matters, A Prop, those solicitors did not disclose that H no longer had any interest in A Prop. He draws attention to the fact that Y is a close friend of H and knew of difficulties in the marriage in 1996, and also to the fact that X and H are, as I have already indicated, long-standing close friends and business associates. He points out, basing this submission on matter contained in part in para 5 of X's affidavit, and in part on material set out in para 5 of W's most recent affidavit, that X has on his own admission acted together with H in the past in relation to transactions where the true nature of the arrangement was concealed. He points to the timing of the agreement for the sale of the shares in B Co. He points out, tellingly as it seems to me, that the preliminary agreement made, as X would have it, on 19 April 2000, was only three days after H had arrived with the children in Saudi Arabia, having abducted them in the circumstances I have already described. He points out that the agreement was apparently made on 6 May 2000, only eight days after the court, on 28 April 2000, had made an order requiring H to return the children to England, preventing the disposal of A Prop, and furthermore, restoring the proceedings before the court on 9 May 2000, on which occasion the court was to consider the sequestration of H's assets if he had not complied with the order to return the children. He submits that the purchase by X of the shares in B Co at a price of no less than some £2·6m took place at what he describes as unnatural speed and without the inquiries which, as he would have it, were to be expected if the purchase had been genuine.

So far as concerns B Prop, Mr Everall points out, correctly so far as I can see, that X neither had nor obtained any current or, indeed, any formal valuation of B Prop, the only valuation at that stage being the casual valuation to which I have already referred; that X appears to have made no inquiry as to title in relation to B Prop; and that there was no survey report on condition, no inquiry or report as to the occupancy of B Prop, and no inquiry or report of any nature whatsoever in relation to possible encumbrances on B Prop.

So far as concerns B Co, Mr Everall points out that so far as currently appears, no inquiries were made by X either as to its liabilities or as to its assets. (I interpolate at this point to comment, as I did during the course of the hearing, that it would appear from documents in the bundle before me that X may inadvertently, and without knowing it, have acquired a Mercedes motor car as a result of his purchase of the shares in B Co.) Further, that X made no appropriate inquiries as to H's title to the shares in B Co. In this connection Mr Everall draws attention to the fact that the shares in B Co appear originally to have been held not by H, who was merely one of the beneficiaries under B Trust, but in fact by the trustees of B Trust, that is to say, J Trustco and S Trustco. He points out that pursuant to the order of Bennett J on 13 November 1996, H was subject to an undertaking to notify W of any distribution of the trust assets of B Trust but that W has in face received no such notification, either from the trustees of B Trust or from H himself. Mr Everall points out, correctly as it seems to me, that there is absolutely no evidence before the court as to how it came about that H was able to purport to sell the shares in B Co. Furthermore, there is the curious position to which I have already drawn attention in relation to the board of directors of B Co. And finally in this connection, Mr Everall draws attention to the fact that in the document executed on 6 May 2000 instructions in relation to the affairs of B Co were purportedly given by H and X to Messrs S in circumstances where such instructions could properly only be given by persons who were directors of B Co, and not, as appears to have been the case, by persons who either were or had been shareholders in B Co.

Finally, Mr Everall points out, again I think factually correctly, that X knew that B Prop was a matrimonial home of H and W.

I am very far from saying that W will be able to make good her case at trial. But it does seem to me that, as Mr Everall has, in my judgment, convincingly demonstrated, there are numerous aspects of the transaction between H and X which cry out for further investigation. I do not accept Mr Smith's submission that W's case is nothing more than surmise and conjecture. There is, as it seems to me, a solid foundation for real suspicion both as to the true nature of the transaction between H and X and as to whether X really was, as he asserts, acting at all times in good faith. At trial X may well establish his entire good faith, but I cannot at present be confident that he will. I think that W has proper grounds for arguing that he will not.

Mr Smith has, naturally, pressed me very strongly with the fact—for it would appear to be a fact—that, in contrast to Y, who appears to have been a volunteer in relation to the shares in A Co, X *did* on 15 May 2000 pay the full price for the shares in B Co. Implicit, however, in W's case of sham is the allegation either that X had previously been put in funds by H to make the payment or that the arrangement between them was that H would subsequently return the money to X—in other words, that the payment which undoubtedly was made on 15 May 2000 was merely part of a circular transaction, the other parts of which have not as yet been revealed. W may fail to establish that element in her case, but it none the less seems to me to be properly arguable. Accordingly, I accept Mr Everall's submission that W has established a good arguable case.

(II) Next Mr Smith submits that, even if I am persuaded, as I am, that W has a good arguable case, I should none the less set aside Kirkwood J's order and decline to grant W any further interlocutory relief because, as he asserts, W obtained that order from Kirkwood J in circumstances of non-disclosure and misrepresentation bringing into play the essentially penal principles set out in

Brink's-MAT Ltd v Elcombe [1988] 3 All ER 188, [1988] 1 WLR 1350 and *Behbehani v Salem* [1989] 2 All ER 143, [1989] 1 WLR 723.

Let me make it clear that the salutary principle of public policy set out in the long line of cases, of which the two I have mentioned are only two examples, is a principle as applicable in the Family Division as in any other place. In the Family Division as elsewhere, those who seek relief ex parte are under a duty to make full and frank disclosure of all the material facts. Those who fail in that duty, and those who misrepresent matters to the court, expose themselves to the very real risk of being denied interlocutory relief whether or not they have a good arguable case or even, as *Behbehani's* case [1989] 2 All ER 143 at 146, [1989] 1 WLR 723 at 726, shows, a strong prima facie case. On the other hand, as Balcombe LJ pointed out in the *Brink's-MAT Ltd* case [1988] 3 All ER 188 at 194, [1988] 1 WLR 1350 at 1358, this rule must not be allowed itself to become an instrument of injustice nor, as Slade LJ ([1988] 3 All ER 188 at 194, [1988] 1 WLR 1350 at 1359) pointed out in the same case, must the application of the principle be carried to extreme lengths. In every case the court retains a discretion to continue or to grant interlocutory relief even if there has been non-disclosure or worse. In deciding how that discretion should be exercised the court will have regard to all the circumstances of the case, including the degree and extent of the culpability with regard to the non-disclosure or misrepresentation: see the *Brink's-MAT Ltd* case [1988] 3 All ER 188 at 192, 193, [1988] 1 WLR 1350 at 1357, 1358, and *Behbehani's* case [1989] 2 All ER 143 at 147–149, [1989] 1 WLR 723 at 727–729.

Applying these principles I turn to consider the matters relied on by Mr Smith in support of his submission that there was material non-disclosure and misrepresentation before Kirkwood J. Mr Smith relies on five matters, which I can summarise as follows.

First, he alleges that there was misrepresentation both in the evidence and in the submissions at the hearing, to the effect that the payment on 15 May 2000, by X to H, was a breach of the order made on 12 May 2000, when he submits it clearly was not and was not intended by the court on 12 May 2000, to be.

Secondly, he complains of what he says was misrepresentation, both in the evidence and in the submissions, to the effect that the information obtained in the affidavit of W dated 19 June 2000, was information which the sequestrators have come across since the hearing on 12 May 2000, when in reality, he asserts, that information had either all been available on 12 May 2000, or had been foreshadowed in the submissions made to the court on that occasion.

Thirdly, he alleges that there was failure to disclose to Kirkwood J the transcript of the hearing before Bracewell J on 12 May 2000, even though that transcript had been received by W's solicitors on or about 9 June 2000. The significance of that transcript was, as he submits, first of all, that it set out Bracewell J's reassurance that the s 37 order did not apply to or affect X, and secondly, that it showed the disclosure to Bracewell J at that hearing of the fact that payment by bank transfer was intended to take place shortly.

Fourthly, he complains of what he characterises as a failure to address in oral submissions before Kirkwood J the issue of whether a good arguable case had been shown for the relief sought, and in particular, of what he says was the failure to draw the court's attention to the paucity of evidence for W's assertions.

Fifthly, and finally, he complains of failure to take Kirkwood J to Miss R's affidavit sworn on 11 May 2000, to the exhibits to that affidavit, and to the transcript of the hearing on 12 May 2000, in all of which he says X's position was clearly set out.

For reasons which I have already explained, the position in relation to the first of these matters was, in my judgment, nothing like as clear-cut as Mr Smith would have it. Nor am I particularly impressed by his fourth point. There is, on the other hand, some substance in his other points. In particular, I think it unfortunate that Kirkwood J was not taken through the transcript of the proceedings before Bracewell J on 12 May 2000, a transcript which, as Mr Smith says, was apparently in the hands of W's legal advisers by about 9 June 2000, and that greater efforts were not made to try and ensure that Kirkwood J recognised the need to read Ms R's affidavits and its exhibits in detail: cf *Rayden and Jackson on Divorce and Family Matters* (17th edn, 1997) vol 1, p 591, para 20.7, note 9, referring to *Art Corp v Schuppan* (1994) Times, 20 January. This point is all the more important given that, as appears from p 1 of the transcript of the proceedings before him, although Kirkwood J had 'looked' at the papers, he had gone on to say that 'on one reading it is difficult to grasp it all'.

None the less, although I do have some misgivings about the way in which matters were approached in front of Kirkwood J, I have absolutely no reason to think that those appearing before him were doing anything other than what they thought appropriate in all the circumstances to bring to his attention—as, in my judgment, they did—the essential gist of X's case. It is also to be borne in mind that this was not a case in which it can sensibly be said that material *facts* were not brought to Kirkwood J's attention.

I am quite satisfied that this was not on any view a case of wilful or culpable default. Although, as I have said, I do have some misgivings about the way in which matters were approached in front of Kirkwood J, I am wholly unpersuaded that the case is one in which I ought to exercise my discretion in favour of X and against W. To deny W the continuing protection to which she would otherwise be entitled would, in effect, be to drive her irrevocably from the judgment seat, to deny her any chance of making good her claim against X (leaving her with a claim against her legal advisers which, so far as I can see, would be speculative at best) and, in a word, to inflict upon her a penalty which, in my judgment, would in the circumstances work the very kind of injustice against which both Balcombe and Slade LJJ warned in the passages to which I have already made reference.

(III) Mr Smith next submits that I ought to exercise my discretion against W because of her failure, as he would have it, to seek against X on 28 April 2000 relief of the type that she sought and indeed obtained on that occasion as against Y. Mr Smith prays in aid the well-known maxim of equity that 'equity aids the vigilant and not the indolent': see *Snell's Equity* (30th edn, 2000) p 33. However, as the discussion in *Snell* goes on to show, what equity looks for is 'reasonable diligence'. Although I have had no particularly satisfactory explanation as to why it was that W did not seek relief against X on 28 April 2000, it is impossible to characterise her claim against X as 'stale', nor do I think that she can fairly be accused of any lack of reasonable diligence. If W would otherwise be entitled to interlocutory relief, as in my judgment she is, she is not, in my judgment, to be denied that relief merely because of her delay in moving the court between 28 April 2000 and 19 June 2000 or because of anything that happened between those two dates.

(IV) Mr Smith next complains at the omission from Kirkwood J's order of any recital of the evidence or other materials read by the judge. He complains particularly of what he says was the failure of W's legal advisers to comply with their obligation to provide X with the full note of the hearing before Kirkwood J which he says was required in the light of Lightman J's observations in *Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd* (1999) Times, 10 November.

It is, I think, most unfortunate that, as drawn, Kirkwood J's order contains no indication of what material had been read by the judge. That, and the absence of any attendance note of the proceedings, meant that X and his legal advisers were left in the dark as to what materials Kirkwood J had been shown. It also meant that a certain amount of time had to be taken up before me ascertaining what materials Kirkwood J did or did not have access to.

Mr Everall recognises that the order as drawn should have contained the relevant information. He submits, however, that the practice laid down by Lightman J as applicable in the Chancery Division has not hitherto been recognised as applying in the Family Division.

I am not persuaded that Lightman J's approach can simply be imposed without more ado in the Family Division. The circumstances in which ex parte relief is obtained in the Family Division vary very widely. Moreover, as cases such as *Khreino*'s case so vividly illustrate, such relief is often granted in the Family Division in circumstances very far removed indeed from any circumstances in which ex parte relief is ever normally granted in the Chancery Division.

For these reasons I do not propose even to attempt to formulate any rule of practice applicable in all cases: it would be wholly inappropriate to do so. What I can I hope usefully do is to indicate that, generally speaking, I think that: (i) any ex parte order containing injunctions should set out on its face, either by way of recital or in a schedule, a list of all affidavits, witness statements and other evidential materials read by the judge; (ii) the applicant's legal representatives should whenever possible liase with the associate with a view to ensuring that the order as drawn contains this information; (iii) on receipt of the order from the court the applicant's legal representatives should satisfy themselves that the order as drawn correctly sets out the relevant information and, if it does not, take urgent steps to have the order amended under the slip rule; and (iv) the applicant's legal representatives should respond forthwith to any reasonable request from the party injuncted or his legal representatives either for copies of the materials read by the judge or for information about what took place at the hearing. Persons injuncted ex parte are entitled to be given, if they ask, proper information as to what happened at the hearing. At the very least they are entitled to be told, if they ask, (a) exactly what documents, bundles or other evidential materials were lodged with the court either before or during the course of the hearing and (b) what legal authorities were cited to the judge. Given this, it would obviously be prudent for those acting for applicants in such cases to keep a proper note of the proceedings, lest they otherwise find themselves embarrassed by a proper request for information which they are unable to provide.

I hope that what I have suggested will serve to avoid for the future the problems which arose in the present case. So far as concerns this case, the difficulties which X and his legal advisers faced in ascertaining exactly what had taken place before Kirkwood J are not to be laid entirely at the door of W's legal representatives: unhappily the order as drawn by the court was not in what I would think a satisfactory form. Be that as it may, none of these matters in my judgment goes to W's entitlement to continuing interlocutory relief.

(V) Mr Smith's final complaint, and here it seems to me he is on very much stronger ground, is that Kirkwood J's order contained no undertaking in damages by W. This, he submits, was fundamentally unjust.

As is well known (see the judgment of Jessel MR in *Smith v Day* (1882) 21 Ch D 421 at 424, and the speech of Lord Diplock in *Hoffmann-La Roche (F) & Co AG v*

Secretary of State for Trade and Industry [1974] 2 All ER 1128 at 1149, [1975] AC 295 at 360) the undertaking in damages was invented by Knight-Bruce LJ whilst Vice-Chancellor of the High Court of Chancery from 1841 to 1851. Originally the undertaking in damages was inserted only in ex parte orders for injunctions. By degrees the practice of requiring an undertaking in damages was extended to all cases of interlocutory injunctions. In *Wakefield v Duke of Buccleugh* (1865) 11 Jur NS 523 at 524, Kindersley VC treated the decision in *Chappell v Davidson* (1856) 8 De GM & G 1, 44 ER 289 as having settled the practice. Indeed, in *Chappell's* case (1856) 8 De GM & G 1 at 2, 44 ER 289 at 289 Knight-Bruce LJ himself suggested that that had been the 'almost universal practice' for the previous 12 or 13 years. So settled was the practice by the 1870s, and so much a matter of course, that the undertaking in damages became an implied term in every order for an interlocutory injunction and the registrars of the Chancery Division were instructed always to insert it in the order whether or not it had been referred to in court: *Howard v Press Printers Ltd* (1904) 74 LJ Ch 100. By 1904 the practice had been extended so as to require a cross-undertaking in damages in cases where an undertaking was given in lieu of an interlocutory injunction: *Howard's* case, *Practice Note* [1904] WN 203, *Practice Note* [1904] WN 208. In consequence the court would enforce the implied undertaking or cross-undertaking as to damages even if it had for some reason been omitted from the order, unless the contrary had been agreed and expressed at the time: *Oberrheinische Metallwerke GMBH v Cocks* [1906] WN 127, a decision of that great master of Chancery practice, Kekewich J. Consistently with this, if in the drawing up of the order for an interim injunction the undertaking is inadvertently omitted, it will be inserted by the court afterwards: *Snell* p 735, referring to *Colledge v Crossley* (1975) Times, 18 March. Thus in the Chancery Division, and I think the practice is the same in the Queen's Bench Division, a claimant who wishes to protect himself from what would otherwise be the implied undertaking or cross-undertaking as to damages must, as *Practice Note* [1904] WN 208 makes clear, stipulate to the contrary and make sure that his reservation is expressly stated in the order. Indeed, as Mr Smith points out, that practice is now enshrined in para 5.1(1) of the Practice Direction in relation to Interim Injunctions supplementing CPR Pt 25, which provides that 'Any order for an injunction, unless the court orders otherwise, must contain [an undertaking as to damages]'. I note in passing that it appears to have been the practice of the Chancery Division to exact the usual undertaking in damages even when the injunction related to the custody or residence of an infant: see the form of order set out in *Seton's Judgments and Orders* (7th edn, 1912) vol 2, p 988.

Be all that as it may, the practice in the Family Division is different. In family proceedings the applicant for an interlocutory injunction is not automatically required to give the usual undertaking as to damages: *Rayden and Jackson* p 1111B, para 32.71, referring to *Practice Direction (Injunction: Interlocutory: Family Division)* [1974] 2 All ER 400, [1974] 1 WLR 576 issued by the President of the Family Division on 26 April 1974. As is said in the practice direction: 'An undertaking as to damages will not be incorporated in an order for an injunction unless it is specifically required by the court and has been expressly given.' So the practice in the Family Division is the precise opposite of that in the Chancery and Queen's Bench Divisions. In the Family Division it will be assumed that there is no undertaking as to damages unless it has been expressly given, whereas in the other Divisions it will be assumed that there is an undertaking unless the contrary is expressly stated.

The question then arises as to the circumstances in which it is appropriate, none the less, to exact an undertaking or cross-undertaking in damages in the Family Division. Let me make it clear that I do not propose to embark upon any general analysis of a question that probably requires and justifies more detailed consideration than has been necessary to enable me to dispose of the present case fairly and justly. Let me also make it clear that what follows is primarily directed to cases such as that which is actually before me.

I can well see that wholly different considerations will apply where the court is exercising its jurisdiction, whether statutory or inherent, in relation to children. As the practice direction states, undertakings in damages are 'unnecessary and inappropriate' in 'matrimonial and children's matters concerning personal conduct' and are 'likely' to be required by the court 'only when the injunction concerns property matters'. (I note in parenthesis that different, and as it seems to me difficult, questions may arise in cases where the court's inherent jurisdiction is invoked contra mundum to restrain the media; questions which, surprisingly, seem to have received little consideration in the past and which, once the Human Rights Act 1998 comes into force, may require to be considered in the context of art 6 and s 12 of that Act.)

Equally, I can well see that it will often not be appropriate—indeed, I would go so far as to say that typically it will be inappropriate—to exact an undertaking or cross-undertaking in damages, even if the matter does concern property matters, where the person sought to be injuncted is the other party to the marriage. This is because in such cases the court will typically be able by the exercise of its statutory discretionary powers to achieve that appropriate justice between the parties, and to protect the person injuncted from that risk of injustice identified by Lord Diplock in the *Hoffmann-La Roche (F) & Co AG* case [1974] 2 All ER 1128 at 1150, [1975] AC 295 at 360–361, which, in the absence of such powers, can otherwise be achieved only by exacting an undertaking or cross-undertaking in damages. That is, no doubt, why the practice direction draws a distinction between what it calls cases 'when the claim is to protect rights'—cases where it contemplates that an undertaking may be exacted—and cases where the applicant is invoking the court's discretionary powers—cases where it contemplates that an undertaking is unlikely to be exacted.

I should add that I have deliberately used the words 'often' and 'typically' to indicate that there will, of course, be cases even of the type which I have just mentioned where it will or may be appropriate to exact an undertaking or cross-undertaking in damages. In this area of practice, particularly I might add in the Family Division, there can be no rigid rules. Circumstances alter cases and, in the final analysis, every case must be considered on its own facts.

But the present case is very far removed from any of the types of case which I have just been considering. It is also, as I have already pointed out, very far removed from cases of the type exemplified by *Purba*'s case and *Khreino*'s case, cases in which, as it seems to me, it would be wholly inappropriate to require a claimant wife to give an undertaking in damages. In the present case a wife is seeking to restrain the use of property which, at least on the face of it, is vested in a third party who produces documents which, if they are taken at face value, show that he has acquired the property as a purchaser for value. Of course it may turn out that X is not at all what he claims to be and that W is fully justified in her allegation of sham and/or in her claim under s 37. But although W has established an arguable case to that effect, her case may fail at trial. In that respect W is in no

better position, and X in no worse position, than every other litigant at that point in the proceedings at which the question of exacting an undertaking in damages arises for consideration.

Speaking for myself, I have to say that I can see no reason why in the type of case of which the present case is an example the Family Division's approach to the question of an undertaking in damages should be any different from the approach which would be adopted as a matter of course in either the Chancery Division or the Queen's Bench Division. Why, in a case concerning property matters, if a wife seeks to injunct a third party outside the family, should the normal principles adopted in the other divisions not apply? Putting the same point rather differently, why should X not be entitled as against W to the undertaking in damages which the Chancery Division or the Queen's Bench Division would undoubtedly exact from the claimant if the claimant, rather than being W, was H's judgment creditor asserting as against X, in the same way as W asserts in the present case, that B Co was merely the alter ego of H and thus that B Prop was an asset of H's available to meet the judgment debt? I can see no sensible or satisfactory answer to either of these questions. The justice as between the parties which is recognised in other divisions as requiring an undertaking in damages as a matter of course in a case such as that which I have just described, seems to me equally to require that someone in the position in which X finds himself in the present case should, as a matter of fairness and justice, be protected by an undertaking in damages.

I emphasise that I am not purporting to lay down an inflexible rule. As I have already said, there can be no rigid rules, circumstances alter cases and, in the final analysis, every case must be considered on its own facts. That said, it would, I think, only be in unusual or exceptional circumstances that the court, in a case of the type I am currently considering, would decide not to exact an undertaking or cross-undertaking in damages.

In the present case I have no doubt that the grant of injunctive relief as against X and B Co should be made conditional upon W giving an undertaking in damages. The court cannot of course compel her to give an undertaking which she is not prepared to volunteer. All it can do in that event is refuse relief. Mr Everall indicated that, if I were minded to put her on terms, W would be prepared to give an appropriate undertaking in damages. I am satisfied that in all the circumstances of the case justice and fairness require that any continuation of the relief granted by Kirkwood J against X and B Co should be conditional upon W giving an undertaking in damages backdated to 19 June 2000 but otherwise in the usual terms.

X complains that the practical effect of any injunction will be to sterilise B Prop in the meantime. In particular, an injunction will prevent him completing the renovations which are currently in train, except at his own risk as to any further expenditure incurred by him. That may be, but it is a consequence characteristic of any case in which an interlocutory injunction is granted preventing the disposal of or dealings with landed property. I am not persuaded that in the circumstances of this case justice requires anything other than an undertaking in damages in the usual form.

It follows that the injunctions granted by Kirkwood J against X and B Co will continue, subject to an undertaking in damages by W, backdated to 19 June 2000 but otherwise in the usual form.

It will be recalled that the order made by Kirkwood J was only over 12 July 2000, that is, over today. Mr Smith recognises that in the circumstances the relief which I am minded to grant should extend until final determination of the substantive issues as between W and X. In the circumstances, and subject to any drafting amendments which Mr Everall or Mr Smith may propose, I therefore propose to order that, upon W giving an undertaking in the form I have indicated, the injunctions granted by Kirkwood J against X and B Co be continued until final determination of the substantive issues between W, X and B Co. a

Order accordingly.

Celia Fox Barrister.

Kelly v BBC

FAMILY DIVISION

MUNBY J

20, 21, 25 JULY 2000

Ward of court – Jurisdiction – Protection of ward – Freedom of publication – Media interview with ward – Child leaving home to join religious group and being made ward of court – Ward's guardian publicising case with court's leave – Broadcaster recording interview with ward – Whether media requiring court's leave before interviewing or broadcasting interview with child known to be a ward.

Child – Welfare – Ward of court – Welfare of child paramount consideration in determining questions with respect to 'upbringing' – Meaning of 'upbringing' – Children Act 1989, s 1(1)(a).

Practice – Family Division – Without notice orders – Guidance.

B, a 16-year-old boy, left his grandmother's care to join a religious group. On his grandmother's application, the court made B a ward of court, appointed the Official Solicitor to be his guardian ad litem and ordered certain named individuals to hand B over to the court's custody. As part of the efforts to find B, the Official Solicitor issued, with the court's leave, a press statement which generated extensive media interest in the case. Subsequently, the applicant broadcaster, the BBC, recorded an interview with B in which he stated that the media coverage should not have happened. Immediately after the interview, the BBC contacted the grandmother to inform her what had happened. She became concerned for B's welfare if he remained in the glare of publicity, and the court made an order restraining the publication of any interview or communications received or emanating from B or the religious group. On the BBC's application to discharge the injunction, the grandmother and the Official Solicitor contended that the interview (or its broadcast) was an important step in B's life which should not have taken place without the court's leave and which, since the BBC knew that B was a ward of court, amounted to a contempt of court. Accordingly, they submitted that the interview could not be broadcast without the court's leave. Alternatively, they contended that the case fell within the court's 'custodial' wardship jurisdiction in relation to the media rather than its 'protective' jurisdiction', that therefore the child's interests were paramount when the court was considering whether to continue the injunction, and that accordingly there was no room for the balancing exercise performed when the court was exercising the 'protective' jurisdiction.

Held – (1) The media did not require the court's leave to interview a ward of court or to publish or broadcast such an interview, even if the child was known to be a ward by those conducting, publishing or broadcasting the interview. In publishing or broadcasting, the media would have to take care to avoid any breach of the restraints imposed by s 12[a] of the Administration of Justice Act 1960

a Section 12, so far as material, is set out at p 338 *e*, post

and s 97(2)[b] of the Children Act 1989. If they did, however, they would not commit a contempt by interviewing a child who was known to be a ward of court, or by publishing or broadcasting the interview. Such an interview would not, as a matter of general impression, usually be considered an 'important' or 'major' step in a child's life, no matter how interesting or exciting it might be for the child. Moreover, the submission of the grandmother and the Official Solicitor fitted very awkwardly, at best, with the well-established principle that the publication of information about a ward was not in itself a contempt of court, even when the child was known to be a ward. It was also inconsistent with the right to freedom of expression enshrined in art 10[c] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. It followed in the instant case that the BBC was entitled to broadcast the interview unless injuncted by the court (see p 342 *b c*, p 343 *c d*, p 344 *c d* and p 345 *e* to p 346 *c*, post); *Re W (minors) (continuation of wardship)* [1996] 1 FCR 393 considered; dictum of Russell LJ in *Re T (AJJ) (an infant)* [1970] Ch 688 at 689 not followed.

(2) The 'custodial jurisdiction' would only be engaged where the court was concerned with media activities which either related directly to the child's 'upbringing', as that word was used in s 1(1)(a)[d] of the Children Act 1989, or which involved an exercise of parental responsibility by the child's parent. Moreover, 'upbringing' involved a process in which the parent, or other person in loco parentis, was the subject and the child was the object. Accordingly, s 1(1)(a) of the 1989 Act did not apply to those processes in which the child was the subject rather than the object. It followed that B's participation in the interview with the BBC did not raise any question with respect to his upbringing. The case therefore fell within the 'protective', rather than the 'custodial', jurisdiction, and thus it was necessary to carry out a balancing exercise, weighing the need to protect the ward against the right of the press to publish or comment. The burden was on those seeking to invoke the court's jurisdiction to establish convincingly, by proper evidence, that an injunction was necessary to protect B from clear and identifiable harm. Such harm had not been established, and the injunction would be discharged (see p 348 *a b f* to *j* and p 350 *a* to p 351 *a*, post); *Re Z (a minor) (freedom of publication)* [1995] 4 All ER 961 considered.

Per curiam. (1) The principles set out in *W v H (Family Division: without notice orders)* [2001] 1 All ER 300, governing the practice to be followed in the Family Division when without notice injunctions are granted against third parties in ancillary relief cases, apply equally to cases involving children, including cases where injunctive relief is sought against third parties or the world at large (see p 360 *b*, post).

(2) In urgent cases where there is no time to prepare comprehensive evidence in proper form, an undertaking should be given to swear and file an affidavit as soon as possible. Even if no such undertaking is given, it will normally be appropriate for the affidavit to be sworn and filed as soon as possible. That is particularly important in cases where an injunction is granted contra mundum restraining freedom of speech (see p 360 *c d*, post).

b Section 97(2) is set out at p 339 *e f*, post

c Art 10, so far as material, is set out at p 335 *a* to *c*, post

d Section 1, so far as material, provides: '(1) Where a court determines any question with respect to ... (a) the upbringing of a child ... the child's welfare shall be the court's paramount consideration.'

(3) At a without notice hearing, it is wrong for a judge to be given material which is not revealed at a later stage to the persons affected by the result of the application. Although that principle may be qualified to an extent in cases relating to children, the media have an unqualified right to see the material relied upon in obtaining an injunction against them. If, as will typically be the case, it is inappropriate for the media to see the material in the form in which it was originally filed with the court, the relevant material should be set out in a separate affidavit or affidavits which can be shown to the media. Such an affidavit should be prepared even if there appears to be no immediate likelihood of an application to discharge the injunction (see p 360 *e* to p 361 *b*, post).

Notes

For the wardship jurisdiction and the welfare principle, see 5(2) *Halsbury's Laws* (4th edn reissue) paras 763, 809.

For the Administration of Justice Act 1960, s 12, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 185.

For the Children Act 1989, ss 1, 97, see 6 *Halsbury's Statutes* (4th edn) (1999 reissue) 374, 505.

For the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 10 (as set out in the Human Rights Act 1998, Sch 1), see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 524.

Cases referred to in judgment

A v M (family proceedings: publicity) [2000] 1 FCR 1, [2000] 1 FLR 562.

A v UK (1997) 25 EHRR CD 159, ECt HR.

Abrams v US (1919) 250 US 616, US SC.

A-G v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545, [1990] 1 AC 109, [1988] 3 WLR 776, HL.

A-G v Guardian Newspapers Ltd [1987] 3 All ER 316, [1987] 1 WLR 1248, Ch D, CA and HL.

Company Securities (Insider Dealing) Act 1985, Re an inquiry under [1988] 1 All ER 203, [1988] AC 660, [1988] 2 WLR 33, HL.

C (a minor) (wardship: medical treatment), Re (No 2) [1989] 2 All ER 791, [1990] Fam 39, [1989] 3 WLR 252, CA.

C (a minor) (wardship: surrogacy), Re [1985] FLR 846.

C (a minor), Re (15 March 1990, unreported), Fam D.

Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935, [1985] AC 374, [1984] 3 WLR 1174, HL.

D (minors) (adoption reports: confidentiality), Re [1995] 4 All ER 385, [1996] AC 593, [1995] 3 WLR 483, HL.

Derbyshire CC v Times Newspapers Ltd [1992] 3 All ER 65, [1992] QB 770, [1992] 3 WLR 28, CA; *affd* [1993] 1 All ER 1011, [1993] AC 534, [1993] 2 WLR 449, HL.

Ex p Guardian Newspapers Ltd [1999] 1 All ER 65, [1999] 1 WLR 2130, CA.

F (a minor) (publication of information), Re [1977] 1 All ER 114, [1977] Fam 58, [1977] 3 WLR 813, CA.

G (minors) (celebrities: publicity), Re [1999] 3 FCR 181, CA.

H-S (minors: protection of identity), Re [1994] 3 All ER 390, [1994] 1 WLR 1141, CA.

Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd (1999) Times, 10 November, Ch D.

Khreino v Khreino (No 2) (court's power to grant injunctions) [2000] 1 FCR 80, CA.

L (a minor) (wardship: freedom of publication), Re [1988] 1 All ER 418.

M and anor (minors) (wardship: freedom of publication), Re [1990] 1 All ER 205, [1990] Fam 211, [1989] 3 WLR 1136, CA.

M v BBC [1997] 1 FCR 229.

Official Solicitor v K [1963] 3 All ER 191, sub nom *Re K (infants)* [1965] AC 201, [1963] 3 WLR 408, HL.

Official Solicitor v Newsgroup Newspapers [1994] 2 FCR 552.

Pickering v Liverpool Daily Post and Echo Newspapers plc [1991] 1 All ER 622, [1991] 2 AC 370, [1991] 2 WLR 513, HL.

R (a minor) (wardship: restrictions on publication), Re [1994] 3 All ER 658, [1994] Fam 254, [1994] 3 WLR 36, CA.

R v Central Independent Television plc [1994] 3 All ER 641, [1994] Fam 192, [1994] 3 WLR 20, CA.

Brind v Secretary of State for the Home Dept [1991] 1 All ER 720, [1991] AC 696, [1991] 2 WLR 588, HL.

R v Secretary of State for the Home Dept, ex p Simms [1999] 3 All ER 400, [1999] 3 WLR 328, HL.

Rantzen v Mirror Group Newspapers (1986) Ltd [1993] 4 All ER 975, [1994] QB 670, [1993] 3 WLR 953, CA.

Reynolds v Times Newspapers Ltd [1999] 4 All ER 609, [1999] 3 WLR 1010, HL.

Secretary of State for Defence v Guardian Newspapers Ltd [1984] 3 All ER 601, [1985] AC 339, [1984] 3 WLR 986, HL.

Sunday Times v UK (No 1) (1979) 2 EHRR 245, ECt HR.

Sunday Times v UK (No 2) (1991) 14 EHRR 229, ECt HR.

T (AJJ) (an infant), Re [1970] 2 All ER 865, [1970] Ch 688, [1970] 3 WLR 315, CA.

W (a minor) (wardship: freedom of publication), Re [1992] 1 All ER 794, [1992] 1 WLR 100, CA.

W (minors) (continuation of wardship), Re [1996] 1 FCR 393, CA.

W (wards) (publication of information), Re [1989] 1 FLR 246.

W v H (Family Division: without notice orders) [2001] 1 All ER 300.

X (a minor) (wardship: injunction), Re [1985] 1 All ER 53, [1984] 1 WLR 1422.

X (a minor) (wardship: restriction on publication), Re [1975] 1 All ER 697, [1975] Fam 47, [1975] 2 WLR 335, CA.

X Ltd v Morgan-Grampian (Publishers) Ltd [1990] 2 All ER 1, [1991] 1 AC 1, [1990] 2 WLR 1000, HL.

X v Dempster [1999] 3 FCR 757.

Z (a minor) (freedom of publication), Re [1995] 4 All ER 961, [1997] Fam 1, [1996] 2 WLR 88, CA.

Zamora, The [1916] 2 AC 77, PC.

Application

The British Broadcasting Corporation (the BBC) applied for the discharge of an injunction granted by Singer J on 18 July 2000 (set out in full on p 332 *h* to p 333 *a*, post) which had the effect of restraining it from broadcasting an interview with Bobby Kelly, a ward of court. The application was opposed by the ward's grandmother and by his guardian ad litem, the Official Solicitor. The facts are set out in the statement in open court and the judgment.

Gordon Murdoch QC and *Annemarie Harris* (instructed by *Kirby & Co*) for the BBC.
Michael Tugendhat QC and *Richard Parkes* (instructed by *Jaron Lewis*) for the grandmother.
Anthony Kirk (instructed by the *Official Solicitor*) for the Official Solicitor.

Cur adv vult

25 July 2000. The following statement was delivered in open court.

MUNBY J. I am grateful to you all for coming here this afternoon. Bobby Kelly, as you know, is 16 years old. He is missing and no one seems to know where he is. It is important that he should be found. In recent years he lived with his maternal grandmother, Ruth Kelly, at her home in Romford. By all accounts he was doing well at school and was planning to begin a course of higher education at a local college in the autumn.

On 27 June 2000 Bobby went shopping with his grandmother in Romford. Members of a movement known as the 'Jesus Christians' were there in the town centre proclaiming the movement's faith and beliefs. Bobby gave them a small donation and collected some literature. Later that same day he returned to the town to talk to members of the movement. Bobby resolved to leave home at once and to devote himself entirely to the philosophy and the way of life of the movement. Naturally enough his grandmother and other members of his family were extremely upset and puzzled by Bobby's sudden decision. It was, to them, very much out of character. They nevertheless hoped that given time Bobby would come home. He has not done so. That was four weeks ago.

Presented with further information that Bobby might accompany members of the movement abroad, his grandmother decided to prevent that happening by making Bobby a ward of court. As his grandmother, and someone who had been caring for him, she was clearly entitled to take that step. Bobby has therefore been a ward of court since 12 July 2000. Because he is a ward Bobby may not travel beyond England and Wales without the court's permission. Equally no important step in his life may be taken without the court's approval. That includes where and with whom he should live. Efforts have been made to ascertain Bobby's whereabouts and his true feelings in this matter, thus far to no avail.

On 13 July 2000 another judge of the Family Division, Sumner J, enlisted the help of the media and members of the public in tracing Bobby. The case received a lot of publicity in the national press, on radio and on television. Since then Bobby has communicated from time to time with members of the media and his grandmother by way of e-mail and telephone call. He has stated that he is happy enough and does not understand what all the fuss is about.

Bobby's actual whereabouts remain completely unknown, although he is still believed to be in this country. His grandmother is worried that, in reality, all is far from well. She is concerned that his views as stated have been coloured or influenced by members of the movement and that they might be exerting influence on him to avoid contact with the court. Her concerns are not going to go away until such time as Bobby does come forward to allay them and to let her know where he is living. She is, in my view, rightly concerned for his well-being; it would be extraordinary were the situation otherwise. Until such time as Bobby

is found this court has a very real difficulty in determining what it is that he actually wants.

The Official Solicitor, Mr Lawrence Oates, was appointed by the court to act as Bobby's legal representative on 12 July 2000. The Official Solicitor is a civil servant and has a staff of about 100. He is completely neutral and independent and has an unrivalled experience in representing teenagers in situations such as that in which Bobby finds himself. The Official Solicitor will give Bobby impartial and confidential legal advice and will put Bobby's own views before the court. Should Bobby so wish he could be represented by someone other than the Official Solicitor. There is no difficulty whatsoever in Bobby's views being fully presented to the court, including Bobby giving evidence, if he chooses to do so, whether orally, on paper, or both. Bobby will be permitted to play the fullest part in these proceedings, of that I can assure him. He should know that he has absolutely nothing to fear by coming forward at this stage. That is my very clear message to him.

His family will not be cross or upset, of that I am 100% certain. All that they want to know, as indeed I do, is that he is safe and well, and what he wants for the future. The Official Solicitor also needs to have this information to ensure that he is properly represented.

For my part, I now appeal to Bobby to come forward and to those who are presently caring for him to help him to do so. At the same time I ask you all to assist Bobby's grandmother, the Official Solicitor and the court to find Bobby as soon as possible. These courts rely on the willingness of the press and members of the public to comply with appeals of the sort that I have made today. That help has always unfailingly been given in the past, as I am sure it will be in this instance.

Doubtless there will be renewed debate in the media about the rights or wrong of young people aligning themselves with religious movements, just as there will be about the rights and freedoms of mature young people to decide to do so. Freedom to express and to practise one's own religious beliefs are important in any democratic society.

I am not presently concerned with any such debate. I am simply concerned that Bobby should be found as soon as possible in order that his true wishes and feelings can be ascertained.

Should you come into possession of any information relating to the whereabouts of Bobby, please contact the court on 0207-947-6713. Equally, Bobby, should you read or hear any part of this statement, I do urge you to make contact with your legal representative, the Official Solicitor. You have your own independent lawyer and her name is Miss Zoe De. Her details are as follows. The Office of the Official Solicitor, 81 Chancery Lane, London WC2A 1DD. Telephone: 0207-911-7114. Fax: 0207-911-7105. E-mail: dez@offsol.fsnet.co.uk. Until such time as you make contact with her, it is very difficult for me to address your grandmother's concerns properly.

That is all I have to say for the time being, except to say that I should be grateful if the media could give the widest possible publicity to the telephone and other numbers I have mentioned so that Bobby will know how to get in touch, if, as I very much hope, he decides to.

I repeat my thanks to you all for coming here today.

[After a short adjournment, the following judgment was delivered.]

MUNBY J. I am giving this judgment in open court for two reasons. It involves some important points of law and practice relating to the grant in the Family Division of injunctions restraining the freedom of the media to publish and broadcast. It arises in a matter which has already been the subject of widespread public interest and concern, namely the disappearance of Bobby Kelly, about whom I have just made a statement in open court to the press, the public and the media.

THE FACTS

Bobby Kelly was born on 5 April 1984 and is thus just over 16 years old. He has lived with his grandmother in Romford since February 1998. Very suddenly on 27 June 2000 he left home and has been missing ever since. I can best set out the story in his grandmother's own words:

> 'On 27 June 2000 Bobby came shopping with me in Romford. Outside Marks and Spencer he stopped to talk to a person who was handing out leaflets and gave him a small donation. I asked him what he was doing and he told me it was all right because the group was Christians. Bobby went back into Romford later that day to speak to these people again. Until 27 June 2000 they had never met Bobby before. That very afternoon Bobby returned home and informed me that he was going with them. He collected some food and clothing and left immediately. Since then he has telephoned me and informed me that he must give up everything, including his family. He was wanting to clear his room and give all his possessions away but I would not let him. He has telephoned me on several occasions and is sounding very strange and most unlike the Bobby I know. He has called at my home but he is always in the company of the group and I have been unable to speak to him alone.'

So far as I am aware Bobby has been with these people ever since. They are a religious group—some would call them a cult but I prefer for the moment to use the more neutral expression—called 'Jesus Christians'.

We do not know exactly what was in the leaflet but I have been shown part of their literature. It is a document headed 'Forsaking All'. After referring to the events recorded in the Gospel according to St Luke, ch 5, vv 2-11, and ch 9, vv 59-62, it continues as follows:

> 'God refuses to take second place to anything or anyone. He will not let you put any other gods before him, not your old job, or your old boss, nor even your old family and friends. God is now your Boss and he has a new job for you that will not wait. This is God's first test for every would-be disciple. To see if you love him enough to put him first by forsaking all immediately to follow him now.'

It seems that that is exactly what Bobby did. The document continues:

> 'God will not tolerate you putting anything else before him and his work. If you can bring the boss and business with you, fine. But quite obviously the disciples' father was unwilling to leave his boat and business and all those nice new fish and follow Jesus along with them—and we never really hear of him again. The father who stuck by the business vanished into oblivion,

> whereas his sons wandered off with a perfect Stranger and made history, helping millions of souls for eternity.' *a*

Then a little further on:

> 'Which are you? Who and what and are you going to put first? Why not ask the boss and family to come along with you? They could follow just as well, you know. If they are not willing they do not deserve you nor your *b* support. Which is more important: Serving them or saving the world? The time is Now! Tomorrow is too late.'

It seems that Bobby took this quite literally. The document concludes:

> 'How about you? Are you ready to give up everything in absolute loyalty *c* and full-time service to Christ? Do you want to be part of the last great spiritual revolution? If so, it requires 100 per cent dedication. Do or die! Amen.'

On Wednesday 12 July 2000 Bobby's grandmother applied to the court to have Bobby made a ward of court. The same day the President of the Family Division *d* made two orders. The first was a 'seek and find' order directing the Tipstaff of the High Court to seek and find Bobby and ordering certain named people forthwith to hand over Bobby into the custody of the Tipstaff on pain of immediate arrest in the event of non-compliance. The second was an order that Bobby be made a ward of court and inviting the Official Solicitor to act as Bobby's guardian ad litem. *e*

The next day, Thursday 13 July 2000, Sumner J made an order giving the Official Solicitor leave to give publicity about Bobby, including the disclosure of any photograph, to the press and to broadcasting companies for the purposes of tracing Bobby. The Official Solicitor promptly issued a press statement. This immediately generated, as it was intended to, considerable media interest. Thus, *f* although I have not necessarily been shown a complete set of relevant press cuttings, I have been shown copies of stories which appeared on Friday 14 July 2000 in the 'Daily Mail', the 'Daily Telegraph' and the 'Express', and the next day, Saturday 15 July 2000, in the 'Times', the 'Mirror', the 'Guardian', the 'Express' and the 'Birmingham Post'.

Also on the Saturday the BBC's 'Today' programme carried a debate *g* examining the nature of the Jesus Christians. Participating in this debate was the founder of the group, David Mackay. During the programme he was urged to return Bobby. Bobby has not been returned.

The next day, Sunday 16 July 2000, stories about Bobby appeared in both the 'Independent' and the 'Mail on Sunday'. The 'Mail on Sunday' quoted an e-mail *h* message purporting to have been sent by Bobby in which he said, if indeed the message was genuine, 'I've never been happier'. He was quoted as saying that he missed his mother and grandmother but was not being held against his will. He was quoted as saying: 'I believe there is something better to do with my life instead of working for money. Because I have joined the Jesus Christians, I can *j* work for God full-time.' The newspaper quoted the group as saying they would defy the court order to return Bobby. Mr Mackay was quoted as saying: 'If we were to support the court decision, we would be admitting Bobby is in danger because he is living with us. That is not true.' The same day, Sunday 16 July 2000, the Today programme decided to approach the Jesus Christians for an interview

with Bobby. I am satisfied that that decision was taken conscientiously and only after careful consideration. The BBC has explained its thinking to the court as follows:

> 'The decision was not taken lightly; paramount in our concerns were the public interest issue and the welfare of Bobby and the possible effect upon his family such an interview might have. We concluded that the interview was in the public interest for the following reasons:
>
> 1. Public concern about cults has now also become a matter of Government concern. There is enormous public interest-and-worry about the way such cults operate. Crucial to the issue of how to combat such cults is to understand the motives and aspirations of young people who join them and therefore to speak with them whilst they are still part of the movement.
>
> 2. Freedom of speech: Leading members of the Jesus Christians have spoken to the Media; so too had the boy's family and representatives for the boy's family. Bobby Kelly had been described in newspaper articles as "brain-washed". In such a situation the Today Programme felt he deserved the right to reply.
>
> 3. Fair play: Invidious though many people consider such cults to be, they are no less subject to the BBC's strictures on fair coverage than any other legal organisation. Part of that fair coverage involves hearing at first hand from the central character in the story.
>
> 4. Understanding: Through hearing the interview with Bobby Kelly the public at large would have a unique opportunity to judge the boy's state of mind. Everything they would have heard previously would have been merely claim and counterclaim.
>
> 5. Age: At 16 years old we felt he was sufficiently mature to explain his decision.
>
> Such an interview, however, would take place only under the following conditions: (i) that the boy's family would be approached for an interview; (ii) that the boy's family would be told of Bobby Kelly's interview and given full details about its contents in advance; (iii) that the interview would be pre-recorded; (iv) that no coercion or pressure of any kind would be placed upon the boy to take part; (v) that, when broadcast, the interview would be placed in context, not merely with the offer of an interview to a family member but also with experts able to interpret and analyse both what he said and the way in which he said it.'

Eventually, after a number of telephone calls to Mr Mackay, the BBC producer was told that Bobby had the BBC's telephone number and would telephone on Monday afternoon.

There was extensive coverage of the story in the media on Monday 17 July 2000, with stories in the 'Independent', the 'Daily Mail' and the 'Birmingham Post' (all of which published extracts from the e-mail in the previous day's 'Mail on Sunday'), the 'Express' and the 'Daily Telegraph'. The newspapers also contained extensive quotations from Mr Mackay. On Monday afternoon at about 5 o'clock Bobby telephoned the Today programme. He was immediately put through to the studio to the reporter who had been briefed for the interview. He said that he was in a phone box and that he was alone, although the person he had come down with was standing outside the box. The interview terminated when he ran out of money. He rang back about half an hour later to conclude the interview.

Immediately after the interview the BBC contacted Bobby's mother and grandmother to tell them what had happened.

I have both heard a tape recording of the interview and read and reread a transcript of it. I do not propose to quote at all extensively from it. There are just four matters which I think I ought to mention. In one place a comment Bobby makes seems to indicate a belief on his part that if he is to comply with the group's teaching he will not be able to live his life for God if he returns home. A little later he says that 'all the media coverage just shouldn't have happened', which suggests that it is not Bobby who has been courting all the publicity and does raise the question whether he really does welcome publicity. Later on he says: 'I'm very homesick ... I miss my mum, my mum and my nan and my sister and a lot of other friends quite a lot.' The fourth matter arises in this way. A considerable amount of material, much of it about Bobby, has been disseminated by the Jesus Christians, some by way of e-mails and some on the group's Internet website. One of these documents is headed 'Media Interviews' and appears to give advice to members of the group about how they should handle interviews with the media. It is apparent that Bobby must have been shown this document, or at least made aware by the group of its contents, because in the course of his interview with the BBC he gave by way of answer to a question from the reporter a form of answer suggested in the document.

On Tuesday 18 July 2000 the 'Belfast News Letter' published extracts from what were said to be answers given by Bobby in an e-mailed reply to questions which had been posed by PA News. He was quoted as saying: 'There is no way I am being held from home against my will.' Asked what had made him to decide to leave home, he said:

> 'I had two choices. The first was to follow my previous ambition to become an entrepreneur, or to give my life to God and work for Him full-time. There is more to life than money and fame. Obviously I have chosen the "God option", as well as having rewards like eternal life.'

Asked where he was now he wrote: 'Sector 1685 in the alpha Quadrant 1. The phone number is—I have forgotten.'

Meanwhile late on Monday 17 July 2000 the BBC's interview with Bobby had been brought to the attention of Singer J. Following what I am told was a series of telephone conversations conducted by Singer J with the lawyers acting for the Official Solicitor, the BBC and Bobby's grandmother, there was a six-way telephone conference which started at about midnight and went on until about 3 o'clock in the early morning of Tuesday 18 July 2000: those taking part were Singer J, the Official Solicitor's representative, counsel for the BBC, the BBC's solicitor, counsel for Bobby's grandmother and her solicitor. Eventually Singer J made an order in the following terms:

> 'An injunction is hereby granted restraining until 5 April 2002, or until further order in the meantime, any person, (whether by himself or by his servants or agents or otherwise howsoever, or in the case of a company whether by its directors or officers, servants or agents or otherwise howsoever) from publishing in any newspaper or broadcasting in any sound or television broadcast, or by means of any cable or satellite programme service or other computer network, the detail or substance of any report, interview or communications received from or by any means emanating

a from [Bobby, Mr Mackay or certain other named persons], being members or representatives of "Jesus Christians", and from the continuation of any such publication which has been published on any computer network or other medium.'

If anyone took any note of the proceedings I have not been shown it. It is b accordingly not altogether clear to me exactly what materials were available to Singer J. The only note I have of the reasons given by Singer J is the account given in an affidavit sworn by the grandmother's solicitor on Wednesday 19 July 2000. She says:

'Having heard submissions from all parties, the learned judge was satisfied c in particular upon two grounds, namely: (1) that to give any publicity by way of an interview with the young man would be giving a platform to the organisation to broadcast their views, to manipulate the public through the press to their point of view; and (2) if in fact there was a broadcast of an interview given, it would make it difficult for the Ward to go back on any d future occasion on the opinions which he expressed and to return to his grandmother or a safe placement. He expressed his view that the continuation of the publication of communications by the group would cause potential injury to the child. Also that he had concern that continuing press comment was potentially harmful to the exercise of the court's jurisdiction in Wardship.'

e In the same affidavit she sets out the grandmother's concerns. She says that since he left Bobby has telephoned his grandmother on several occasions and told her that he must give up everything including his family. His grandmother maintains that he is sounding very strange and unlike the Bobby she knows. She (Bobby's grandmother) is aware that these conversations are held in the presence f of others because she is able to hear whispering in the background. She is concerned for Bobby's welfare if he remains in the glare of publicity. She fears that he is currently being manipulated by the group who have him in their care and is being used by them for promoting their interests. She fears that a media circus has resulted in Bobby cutting off all telephone contact with her and going g further underground. She is frustrated by her inability to contact Bobby and advise him not to give interviews and be influenced by the people to whom he has entrusted himself. She is concerned that he is receiving advice solely from a group who thrive on publicity. Her sole concern is for Bobby's welfare. She firmly believes that he will suffer greater psychological harm if he is used by the group for the purposes of obtaining further media coverage.

h Amongst the materials about Bobby which have been disseminated by the Jesus Christians is an e-mail which contains a clear admission by Mr Mackay that members of the group have whispered advice to Bobby during telephone conversations with his grandmother and a statement posted on its website of the group's belief in what it calls 'civil disobedience' under certain circumstances. In j an update, dated 17 July 2000, the group admits to 'harbouring' Bobby but seeks to justify its stance as follows:

'Since he is not a criminal it seems a very Christian thing to do. Quakers were condemned in the United States during the days of slavery for harbouring slaves who were running away from their master. We feel that

we are following in that tradition with regard to the draconian measures being taken to rob Bobby of his rights as an individual.' *a*

On Wednesday 19 July 2000 the BBC applied on notice to discharge the injunction granted by Singer J. The application came before Sumner J on the same day and was adjourned until the following day, when it came on for hearing before me. I reserved judgment on Friday 21 July 2000. *b*

Mr Michael Tugendhat QC and Mr Richard Parkes appeared for the BBC, Mr Gordon Murdoch QC and Miss Annemarie Harris for Bobby's grandmother and Mr Anthony Kirk for the Official Solicitor.

I now, Tuesday 25 July 2000, give judgment. Immediately before doing so, and with the approval of the Official Solicitor, I made a statement in open court to the press, the public and the media, seeking the assistance of the media in finding Bobby and, addressing myself directly to Bobby, urging him to contact the Official Solicitor. *c*

FREEDOM OF SPEECH

Not surprisingly, and entirely properly, Mr Tugendhat puts freedom of speech *d* at the forefront of his submissions, though, as he points out, the present case involves also the right to respect for private life and freedom of religion. The starting point, he says, in a case involving children, religion and the media, is the principles of freedom of expression, protection of private life and freedom of religion, including (a) the right of the public to be informed through the press, (b) the right of Mr Mackay and the other persons named in Singer J's order to *e* express their views and (c) Bobby's right and the rights of others to freedom of religion. Any derogation from these rights must, he submits, be convincingly established.

For his part Mr Kirk makes clear that the Official Solicitor fully understands and respects the rights of Bobby, Mr Mackay and those others named in Singer J's *f* order to their freedoms of thought, conscience and religion and expression. He fully accepts that any derogation or interference with such freedoms must be no more than is necessary and proportionate.

The books are full of statements about the high value attributed to freedom of speech by our law and the vital role it plays in our democracy. The most recent, *g* the authoritative and one of the most eloquent is to be found in the speech of Lord Steyn in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 408, [1999] 3 WLR 328 at 337:

'Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. *h* It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market": *Abrams v US* (1919) 250 US 616 at 630 per Holmes J (dissent). Thirdly, freedom of speech is the lifeblood *j* of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country ...'

Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) provides as follows:

> '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

Well-known jurisprudence of the European Court of Human Rights establishes: (i) that the exceptions in para 2 must be narrowly interpreted; (ii) that if a restraint is to be justified under para 2 it must be 'necessary in a democratic society'—that is to say, the necessity for any such restriction must be 'convincingly established' by reference to the existence of a 'pressing social need', and the restriction must be 'proportionate to the legitimate aim pursued'; and (iii) that the restriction must be 'prescribed by law'—that is, the law must be 'adequately accessible' to the citizen and must be 'formulated with sufficient precision to enable a citizen to regulate his conduct': see *Rantzen v Mirror Group Newspapers (1986) Ltd* [1993] 4 All ER 975 at 990, [1994] QB 670 at 688, citing *Sunday Times v UK (No 1)* (1979) 2 EHRR 245 and *Sunday Times v UK (No 2)* (1991) 14 EHRR 229.

As Mr Tugendhat, in my judgment correctly, points out, the interests identified in para 2 of art 10 are not trump cards which automatically override the principles of open justice and freedom of expression. The derogations from art 10 (and from art 8), which he correctly recognises as being themselves important interests of a democratic society, only override the guaranteed rights when it is 'necessary' that they should do so. So, he submits, it is *not* a question of 'balancing' freedom of expression against one or more of the interests identified in para 2 of art 10. There is, he says, no balancing exercise. The question, he says, is whether those who seek to bring themselves within the protection of para 2 can demonstrate convincingly that they are. He relies on what was said by Lord Templeman in *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316 at 355–356, [1987] 1 WLR 1248 at 1297:

> 'The European Court pointed out that this House applying domestic law had balanced the public interest in freedom of expression and the public interest in the due of administration of justice. But the European Court—"is faced not with the choice between two conflicting principles but with a principle of freedom of expression which is subject to a number of exceptions which must be narrowly interpreted ... It is not sufficient that the interference involved belongs to that class of exceptions listed in Article 10 which has been invoked; neither is it sufficient that the interference was

imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms; the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it." (See 2 EHRR 245 at 281, para 65.) The question is therefore whether the interference with freedom of expression constituted by the Millett injunctions was, on 30 July 1987 when they were continued by this House, necessary in a democratic society in the interests of national security, for protecting the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary having regard to the facts and circumstances prevailing on 30 July 1987 and in the light of the events which had happened.'

He refers also to what Lord Griffiths said in relation to the same passage in *Re an inquiry under Company Securities (Insider Dealing) Act 1985* [1988] 1 All ER 203 at 210, [1988] AC 660 at 706:

'In this passage the European Court is not giving a restricted meaning to any of the exceptions but stressing that before interference with freedom of expression can be justified it must be shown to be necessary on the facts of the particular case.'

I agree with Mr Tugendhat's submissions on this point which, as it seems to me, are reinforced by what Hoffmann LJ said in *R v Central Independent Television plc* [1994] 3 All ER 641 at 651–652, [1994] Fam 192 at 202–203:

'There are in the law reports many impressive and emphatic statements about the importance of the freedom of speech and the press. But they are often followed by a paragraph which begins with the word "nevertheless". The judge then goes on to explain that there are other interests which have to be balanced against press freedom. And in deciding upon the importance of press freedom in the particular case, he is likely to distinguish between what he thinks deserves publication in the public interest and things in which the public are merely interested. He may even advert to the commercial motives of the newspaper or television company compared with the damage to the public or individual interest which would be caused by publication. The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. And publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which "right-thinking people" regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute. Furthermore, in order to enable us to meet our international obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), it is necessary that any exceptions should

satisfy the tests laid down in art 10(2). They must be "necessary in a democratic society" and fall within certain permissible categories, namely—"in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary." It cannot be too strongly emphasised that outside the established exceptions (or any new ones which Parliament may enact in accordance with its obligations under the convention) there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.'

Furthermore, says Mr Tugendhat, and I agree, if those who seek to bring themselves within para 2 of art 10 are to establish 'convincingly' that they are—and that is what they have to establish—they cannot do so by mere assertion, however eminent the person making the assertion, nor by simply inviting the court to make assumptions; what is required (and this even if the case involves national security) is proper *evidence*: see *The Zamora* [1916] 2 AC 77 at 108, *Secretary of State for Defence v Guardian Newspapers Ltd* [1984] 3 All ER 601, [1985] AC 339, *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 948, [1985] AC 374 at 406, and *Ex p Guardian Newspapers Ltd* [1999] 1 All ER 65, [1999] 1 WLR 2130.

The Human Rights Act 1998 is not yet in force. However, as Mr Tugendhat correctly observes, it has been established for some years now by numerous decisions of the House of Lords and the Court of Appeal that art 10 mirrors the English common law: see, for example, the *A-G v Guardian Newspapers Ltd* case, *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, [1990] 1 AC 109, *Derbyshire CC v Times Newspapers Ltd* [1992] 3 All ER 65, [1992] QB 770, CA; *affd* [1993] 1 All ER 1011, [1993] AC 534, the *Ex p Guardian Newspapers Ltd* case, *Simms'* case [1999] 3 All ER 400, [1999] 3 WLR 328 and *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [1999] 3 WLR 1010. It is also well established that recourse can properly be had to art 10 both in resolving any ambiguity in a statute or any uncertainty in the common law and in determining how the court should exercise any discretion which it has: see *Rantzen's* case referring to *Brind v Secretary of State for the Home Dept* [1991] 1 All ER 720, [1991] AC 696.

WARDSHIP

For their part Mr Murdoch and Mr Kirk equally understandably emphasise Bobby's welfare and rely on the fact that he is a ward of court.

So far as concerns the issues with which I am concerned the origins, history and ambit of the court's inherent parens patriae jurisdiction and its jurisdiction in relation to wards of court are fully set out in Ward LJ's judgment in *Re Z (a minor) (freedom of publication)* [1995] 4 All ER 961, [1997] Fam 1. For immediate purposes I observe only that wardship confers on the ward a *status* to which the law attaches certain incidents. Precisely what those incidents are is one of the matters which I have to determine.

At one time it was believed that the mere publication of information about a ward of court was contempt of court. Although that heresy was exploded by the Court of Appeal in *Re F (a minor) (publication of information)* [1977] 1 All ER 114, [1977] Fam 58, the belief seems to have lingered on well into the 1980s: see for example *Re C (a minor) (wardship: surrogacy)* [1985] FLR 846 at 849. Let it be said

clearly, once and for all: the publication of information about a ward, even if the child is known to be a ward, is not, of itself and without more ado, a contempt of court. In saying this I am doing no more than to repeat what was said by Booth J in *Re L (a minor) (wardship: freedom of publication)* [1988] 1 All ER 418 and by Connell J in *Official Solicitor v Newsgroup Newspapers* [1994] 2 FCR 552. As Lord Denning MR said in *Re F (a minor) (publication of information)* [1977] 1 All ER 114 at 120, [1977] Fam 58 at 86:

> 'The existence of wardship does not give the ward a privilege over and above other young people who are not wards. It does not give her exemption from comment on her activities, be they favourable or adverse, be they helpful to her or injurious. The remedy for defamatory remarks about a ward is the law of libel, not of contempt of court.'

See also to the same effect Scarman LJ ([1977] 1 All ER 114 at 125–126, 130–131, [1977] Fam 58 at 93, 99).

This was echoed by Millett LJ in *Re R (a minor) (wardship: restrictions on publication)* [1994] 3 All ER 658 at 672–673, [1994] Fam 254 at 271 when he said:

> '... the wardship court has no power to exempt its ward from the general law, or to obtain for its ward rights and privileges not generally available to children who are not wards of court ... Nor can it protect the ward from adverse publicity as such.'

Section 12 of the Administration of Justice Act 1960, as amended, provides, so far as material for present purposes, as follows:

> 'The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—(a) where the proceedings—(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors; (ii) are brought under the Children Act 1989; or (iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor ...'

At one time, and even after the Court of Appeal's decision in *Re F (a minor)*, there was widespread misunderstanding as to the ambit of s 12 and, in particular, as to the meaning of the critical words 'information relating to proceedings before [the] court sitting in private'. For long it was thought that the effect of s 12 was to prevent publication of any information whatever about wardship proceedings. Again it was only in the late 1980s that a true understanding of the limited ambit of s 12 emerged: see *Re L (a minor) (wardship: freedom of publication)* and *Re W (wards) (publication of information)* [1989] 1 FLR 246. This is not the place nor is there any need for me to examine in any detail the ambit of s 12. That is to be found mapped out in *Re W (wards) (publication of information)*, *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 1 All ER 622, [1991] 2 AC 370, *Re G (minors) (celebrities: publicity)* [1999] 3 FCR 181 and *X v Dempster* [1999] 3 FCR 757. It suffices for present purposes to say that, in essence, what s 12 protects is the privacy and confidentiality: (i) of the documents on the court file; and (ii) of what has gone on in front of the judge in his courtroom. (I might add that the confidentiality of documents held by the court is also protected by r 4.23 of the Family Proceedings Rules 1991, SI 1991/1247.) In contrast, s 12 does not operate to prevent publication of the fact that wardship proceedings are on foot, nor does it prevent identification of the parties or even of the ward himself. It does not

prevent reporting of the comings and goings of the parties and witnesses, nor of incidents taking place outside the court or indeed within the precincts of the court but outside the room in which the judge is conducting the proceedings. Nor does s 12 prevent public identification and at least some discussion of the issues in the wardship proceedings.

As was pointed out by Lord Bridge of Harwich in *Pickering's* case, there may be circumstances in which such discussion will involve contempt, not under s 12, but as interfering with or prejudicing the administration of justice. There is, of course, no suggestion of any such species of contempt in the present case. I therefore need say little on this topic. However, cases in which such contempts are committed are likely to be fairly rare in the context of wardship. As Mr Tugendhat pointed out, at common law such a contempt requires proof of a specific intention to interfere with the administration of justice. Moreover, as he pointed out, strict liability under s 2 of the Contempt of Court Act 1981 requires proof that the relevant publication 'creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced'—something which will probably not very often be established in relation to wardship proceedings tried by a judge, rather than a jury, and in which many of those typically involved—the Official Solicitor, court welfare officers, local authorities, panel guardians and others—will similarly be immune to outside pressures and distractions.

The fact that neither the common law nor s 12 prevented the identification of a ward of court was widely thought to be unsatisfactory. Indeed, it necessitated frequent recourse to the court's injunctive powers. Parliament has very recently intervened to cover this lacuna. Section 97(2) of the Children Act 1989, as amended by the Access to Justice Act 1999, provides that:

> 'No person shall publish any material which is intended, or likely, to identify—(a) any child as being involved in any proceedings before the High Court, a county court, or a magistrates court, in which any power under this Act may be exercised by the court with respect to that or any other child; or (b) an address or school as being that of a child involved in any such proceedings.'

The combined effect of ss 10(1) and 8(3)(a) of the 1989 Act is that the prohibition in s 97(2) applies to wardship and other proceedings under the inherent parens patriae jurisdiction. Section 97(4) empowers the court to dispense with the requirements of s 97(2). That of course is what Sumner J did in this case on 13 July 2000, with the consequence that for the next few days, and until Singer J made his order on 18 July 2000, the only restrictions on the media's reporting of the case were those restrictions—of comparatively limited scope—imposed by s 12 of the 1960 Act.

Growing appreciation of the limited restrictions imposed by the common law and s 12 led to increased recourse to the court's injunctive powers. At one time it was thought that the court had unlimited jurisdiction to grant injunctions to restrain the publication not merely of information about a ward of court but even of information not itself about the ward but which might be damaging to the ward if it came to his or her attention. That heresy was exploded by the Court of Appeal in *Re X (a minor) (wardship: restriction on publication)* [1975] 1 All ER 697, [1975] Fam 47 where an ultimately unsuccessful attempt was made to invoke the wardship jurisdiction to suppress a book describing the aberrant private activities

of a 14-year-old girl's dead father, publication of which would be 'psychologically grossly damaging' to the child and where the injury to her emotional psychological health would be 'very grave indeed'.

None the less, starting with Balcombe J's decision in *Re X (a minor) (wardship: injunction)* [1985] 1 All ER 53, [1984] 1 WLR 1422 (the Mary Bell case), increasing recourse was had to the court's asserted power to grant injunctions to restrain the publication of information about its wards or other children. (In parenthesis one may note the irony that the invention of this jurisdiction—a development of which Hoffmann LJ, in *R v Central Independent Television plc* [1994] 3 All ER 641 at 653, [1994] Fam 192 at 204, observed that 'the courts have, without any statutory or, as far as I can see, other previous authority, assumed a power to create by injunction what is in effect a right of privacy for children' was in large measure facilitated by the 'News of the World', the target of judicial attention in the Mary Bell case, which objected to being restrained unless the media as a whole was also restrained.)

Landmarks in the development and understanding of this novel jurisdiction—Balcombe J's order is the first reported example of the grant of such an injunction subsequent to the Court of Appeal's decision in *Re X (a minor) (wardship: restriction on publication)*—were *Re C (a minor) (wardship: medical treatment) (No 2)* [1989] 2 All ER 791, [1990] Fam 39, *Re M and anor (minors) (wardship: freedom of publication)* [1990] 1 All ER 205, [1990] Fam 211, *Re W (a minor) (wardship: freedom of publication)* [1992] 1 All ER 794, [1992] 1 WLR 100, *R v Central Independent Television plc* and *Re R (a minor) (wardship: restrictions on publication)* [1994] 3 All ER 658, [1994] Fam 254. The leading authority is now Ward LJ's judgment in *Re Z (a minor) (freedom of publication)* [1995] 4 All ER 961, [1997] Fam 1. (I note in passing that, as Mr Murdoch pointed out, an application by the mother to challenge the decision in *Re Z (a minor)* was ruled inadmissible by the European Commission of Human Rights as manifestly ill-founded: see *A v UK* (1997) 25 EHRR CD 159.)

As is well known the authorities in this field draw a distinction between the court's jurisdiction to grant so-called 'in personam' injunctions and its jurisdiction to grant so-called 'in rem' injunctions or 'injunctions contra mundum'.

The court has power, exercising normal equitable principles, to grant an injunction restraining a child's parents or other carers from misusing information which is properly confidential to the child: see *Re C (a minor) (wardship: medical treatment) (No 2)*, *Re Z (a minor)*. But quite apart from this equitable jurisdiction the court, as Thorpe LJ put it in *Re G (minors) (celebrities: publicity)* [1999] 3 FCR 181 at 187-188:

> '... has jurisdiction in personam to restrain any act by a parent that if unrestrained would or might adversely affect the welfare of the child the subject of the proceedings.'

This jurisdiction can be exercised and a parent can be restrained either by an in personam injunction or, where appropriate, as explained by Ward LJ in *Re Z (a minor)*, by a prohibited steps order under s 8 of the 1989 Act. Well-known examples of the exercise of this jurisdiction are to be found in *Re Z (a minor)*, *Re G (minors)* and *A v M (family proceedings: publicity)* [2000] 1 FCR 1. I say no more about this branch of the court's jurisdiction since it is common ground that I am concerned exclusively with an injunction contra mundum.

As is also well known the result of the analysis in *Re Z (a minor)* is that in relation to the media the exercise of the court's inherent parens patriae or

wardship jurisdiction is divided into three parts: the first part, in which the jurisdiction is not exercisable at all and the child is left to whatever remedies against the media the law would give an adult in comparable circumstances; a second part in which the jurisdiction is exercisable, but in circumstances where, because the court is exercising only its 'protective' jurisdiction, the child's interests are *not* paramount and where a so-called balancing exercise has to be performed; and the third part, in which, because the court is exercising its 'custodial' jurisdiction, the child's interests *are* paramount. Well-known examples of cases falling into the first category, where no injunction can be granted, are *Re X (a minor) (wardship: restriction on publication)*, *R v Central Independent Television plc* and *M v BBC* [1997] 1 FCR 229. Familiar examples of cases falling into the second category, where there is a so-called balancing exercise, are *Re M and anor (minors) (wardship: freedom of publication)* and *Re W (a minor) (wardship: freedom of publication)*. So far as I am aware, and none of the counsel appearing before me was able to identify any other example, *Re Z (a minor)* is the only reported case falling within the third category.

It is common ground before me, and I agree, that the present case is one in which the court *does* have jurisdiction to grant injunctive relief. The dispute is whether the case falls into the second or third category. Accordingly I do not need to explore in any detail what precisely is the feature that distinguishes cases in the first category and cases in the second category. For present purposes it suffices to note that, as explained by the Court of Appeal in *R v Central Independent Television plc*, the jurisdiction is exercisable only where the proposed publication is directly about a child whose care and upbringing are already being supervised by the court *and* is such as might threaten the effective working of the court's jurisdiction or the ability of the child's carers to carry out their obligations to the court for the care of the child.

I must return in due course to consider in more detail what distinguishes cases in the second category from whose in the third. For the moment I merely observe in general terms that it would seem from *Re Z (a minor)* that the 'custodial' jurisdiction will only be in play, and thus that the case can only fall into the third category, if the court is concerned with media activities which either relate directly to the child's 'upbringing', as that word is used in s 1 of the 1989 Act, or which involve an exercise of parental responsibility by the child's parent.

THE STATUS OF WARDSHIP

However, before I turn to deal with this point I must first return to consider the *status* which wardship confers on the ward and the incidents attached to that status.

As is well known, no 'important' or 'major' step in the life of a ward of court can be taken without the prior consent of the court. This is not some empty exhortation or mere platitude for, subject to proof of knowledge that the child in question is a ward of court, it is a contempt of court to undertake or facilitate any such step without the consent of the court.

Both Mr Murdoch and Mr Kirk submit that for the BBC to interview Bobby for the purpose of later broadcasting was an important step in his life which should not have taken place without the leave of the court and which, since the BBC knew that Bobby was a ward of court, in fact amounted to a contempt of court. Alternatively, it is said that even if the interview itself was not such a step the broadcasting of the interview would be. Accordingly, they submit, the BBC requires the leave of the

court before it can broadcast. Both Mr Murdoch and Mr Kirk accept that there is no authority directly in point. *a*

Mr Tugendhat for his part declines to seek such leave. He denies that there is any such rule as that asserted by Mr Murdoch and Mr Kirk and submits that, unless injuncted by the court, he is entitled to broadcast.

On this point I agree with Mr Tugendhat. I cannot accept Mr Murdoch and Mr Kirk's submissions, attractively though they were put. In my judgment the *b* media do not require the leave of the court either to interview a ward of court or to publish or broadcast such an interview. It makes no difference for this purpose that the child is known by those conducting, publishing or broadcasting the interview to be a ward of court. In publishing or broadcasting the media will of course have to take care to avoid any breach of the restraints imposed by s 12 of *c* the 1960 Act and s 97(2) of the 1989 Act (and for that matter by s 2 of the 1981 Act), but, so long as they do, no contempt as such is, in my judgment, committed by the media interviewing a child who is known to be a ward of court or publishing or broadcasting such an interview.

Understandably no one has ever sought to define what constitutes an 'important' *d* or 'major' step for this purpose. I certainly do not propose to do so. Mr Murdoch has helpfully referred me to the list set out in Hershman and MacFarlane *Children Law and Practice* (*Family Law*) (1999) vol 1, paras C 1060–1062. Other useful discussions can be found in chs 5 and 8 of Lowe and White *Wards of Court* (2nd edn, 1986) and in Borrie and Lowe *Law of Contempt* (3rd edn, 1996) pp 451–456. These show that included in the category of 'important' or 'major' steps for this *e* purpose are: marrying the ward; removing the ward from the jurisdiction; making a material change in the ward's education, residence or whereabouts (including placing the ward in secure accommodation, moving the ward between foster parents or placing the ward for adoption); instituting adoption proceedings or freeing for adoption proceedings with respect to the ward; changing the ward's *f* name; making an application on behalf of the ward to the Criminal Injuries Compensation Board; administering a police caution; or subjecting the ward to the more significant forms of medical treatment (for example, an abortion or a sterilisation).

Also included in the list, and perhaps of more relevance for present purposes, *g* are: a psychiatric examination for forensic purposes; interviews by an independent social worker; police interviews; and interviews on behalf of a defendant in criminal proceedings (see as to these *Practice Direction* (*child: independent welfare reports*) [1983] 1 All ER 1097, [1983] 1 WLR 416, *Practice Direction* (*minor: psychiatric examination*) [1985] 1 All ER 832, [1985] 1 WLR 360, *Practice Direction* (*minor: psychiatric examination: leave*) [1985] 3 All ER 576, [1985] 1 WLR *h* 1289, *Practice Direction* (*ward of court: witness in criminal proceedings*) [1988] 1 All ER 223, [1987] 1 WLR 1739 and *Practice Direction* (*ward of court: witness in criminal proceedings*) [1988] 1 All ER 1015, [1988] 1 WLR 989).

Mr Murdoch, supported in this submission by Mr Kirk, submits that, having regard to the principle illustrated by the various examples in this list, and *j* particularly by analogy to the examples set out in the last paragraph, media interviews—or at least certain types of media interview—constitute 'important' or 'major' steps in a ward's life which require the leave of the court. He refers to *Re T* (*AJJ*) (*an infant*) [1970] 2 All ER 865, [1970] Ch 688 at 689, where Russell LJ, giving the judgment of the Court of Appeal, which also included Cross LJ, said:

'But it must be borne in mind that the infant is a ward of court under the judge's order, and if anyone is minded to question or interview the infant they may well be at risk of being in contempt.'

Recognising, as I do, the vast experience of wardship which both Russell and Cross LJJ had in the days when wardship was still in the Chancery Division, I have to say that I share the same doubts and uncertainties as to what exactly it was they had in mind which are expressed in *Lowe and White* paras 5-28 and 8-11, *Borrie and Lowe* pp 230 and 456, and *Arlidge, Eady and Smith on Contempt* (2nd edn, 1999) p 723, para 11-320, none of whom seem to evince much enthusiasm for what Russell LJ said. It may also be not unimportant to remember that Russell LJ was speaking in 1970, before the decisions of the Court of Appeal in *Re X (a minor) (wardship: restriction on publication)* and *Re F (a minor) (publication of information)*, and long before the current understanding of matters had begun to emerge in the late 1980s.

A number of considerations drive me to the conclusion to which I have come.

(1) First, and as a matter of general impression, one would not in this age of media saturation usually consider an interview by the media an 'important' or 'major' step in a child's life, however interesting or exciting it may be for the child.

(2) Secondly, and comparing the other examples in the list, it is far from immediately obvious that there is any very compelling or helpful analogy. Even those particularly relied on by Mr Murdoch and Mr Kirk (interviews by independent social workers, the police or on behalf of a defendant in criminal proceedings) do not in my judgment provide any very compelling analogy. There is, as it seems to me, a substantial difference between an interview with the media, which may have nothing at all to do with the wardship proceedings, and more or less formal interviews in a forensic context where the child is being interviewed for the purpose of the proceedings and because he is or may be involved in those proceedings either as a witness or as the subject of the proceedings. Moreover, it is to be noted that each of those other cases is regulated by a specific practice direction; there is no practice direction regulating media interviews.

(3) This leads on to a third and, as it seems to me, very striking point. So far as I am aware, and neither Mr Murdoch nor Mr Kirk has been able to point me to any such case, with the sole exception of Russell LJ's comment *in Re T (AJJ) (an infant)*, there is not to be found in any of the numerous cases to which I have referred in this judgment, or indeed anywhere else in the reported case law, any judicial support for the proposition for which Mr Murdoch and Mr Kirk contend. That is, as it seems to me, a very striking silence, given that this is a very well-tilled field which has been subjected to such very close scrutiny in recent years. Particularly surprising if the argument is sound is that the point appears not to have been canvassed in *Re W (minors) (continuation of wardship)* [1996] 1 FCR 393, where four wards of court aged between nine and 14 had given an interview to a newspaper reporter, who plainly knew that they were wards of court, in circumstances which clearly troubled both the Official Solicitor, their guardian ad litem, who immediately applied for injunctions to restrain any repetition, and the Court of Appeal, which included Balcombe and Waite LJJ, both judges with vast experience of wardship in both the Chancery Division and the Family Division. There was, however, no suggestion that the interview itself amounted to contempt.

Interestingly, given some of the issues which arise in the present case, Balcombe LJ commented (at 403): *a*

> 'I accept that the representation of children in family proceedings, and the role of the Official Solicitor, are matters of public interest which can and should be discussed publicly. I also accept that a boy of 15 may be sufficiently mature to be able to speak directly to, and be interviewed by, representatives of the press or broadcasting media. However, there can be no public interest in identifying members of his family: that would be only public curiosity. Further, the three younger boys are unlikely to be of sufficient intellectual or emotional maturity to appreciate the dangers inherent in becoming involved in media publicity. In my judgment a proper balance between these conflicting considerations can be achieved by amending the order of 19 May 1994 ...' *b* *c*

(4) However, and this leads on to the fourth point, this silence is not as surprising as might otherwise be thought, given that, as it seems to me, Mr Murdoch and Mr Kirk's contentions fit at best very awkwardly with the established principles derived from the cases to which I have referred earlier in this judgment. *d* As I have already said, the publication of information about a ward, even if the child is known to be a ward, is not, of itself and without more ado, a contempt of court.

In his judgment in *Re F (a minor) (publication of information)* [1977] 1 All ER 114 at 119–120, [1977] Fam 58 at 86, Lord Denning MR, immediately before the passage which I have already quoted, gave the example of a newspaper reporting of a ward of court that she has just won a scholarship to Oxford. If it is not a contempt of court, as in my judgment it is not, for the local newspaper to report of a child prodigy whom it knows to be a ward of court that she has just won a place at the age of 15 to study mathematics at Oxford, the report containing a photograph of the ward and interviews with the child's schoolteachers, parents and elder siblings, I can see no sensible basis for saying that it is contempt to include in the article a very short quotation of what the ward herself has told the reporter. Nor, in my judgment, could it make any difference that the interview was published in a national newspaper. Understandably perhaps Mr Murdoch and Mr Kirk shrank from going quite this far. They suggested that it might be different if the interview were to be broadcast, particularly if it were to be broadcast nationally (as in the present case) rather than only locally. This cannot in my judgment be a sensible basis of distinction. Particularly in this era of rapidly emerging new communication technologies spreading news and information continuously throughout what is rapidly becoming a global village, the issue of contempt or no contempt cannot turn on distinctions between the local or national media or between the print and broadcast media. *e* *f* *g* *h*

Seeking to escape from this difficulty Mr Murdoch and Mr Kirk suggest that, even if an interview or broadcast which has nothing to do with the wardship proceedings does not, as in my judgment it does not, involve, of itself and without more ado, any issue of contempt, the case is different if the ward is interviewed (as in the present case) about matters relating to the wardship proceedings themselves. Of course, if what is done breaches the restraints imposed by s 12 of the 1960 Act or s 97(2) of the 1989 Act, there will be a contempt, but that will not be because the interview is with the ward. And, as has already been seen, the ambit of s 12 is fairly narrow. The difficulty with the *j*

suggestion that it makes all the difference that the interview with the ward touches on matters relating to the proceedings, whether or not it thereby breaches the restraints imposed by s 12, is this: if it is not, as on this hypothesis it is not, a contempt of court to conduct and publish the interview merely because the interview is with the ward, and if it would not be a contempt to publish the material contained in the interview with the ward if precisely the same material were contained in an interview with someone other than the ward, why should the mere combination of the two factors, neither of which taken on its own would constitute a contempt, make all the difference? I can see no sensible basis for concluding that if the mere act of conducting and publishing and broadcasting an interview with a ward of court is not, of itself, a contempt of court, as in my judgment it is not, and if the publication of material not subject to the restraints imposed by s 12 is not of itself contempt, as in my judgment it is not, the publication or broadcasting of such material if contained in an interview with the ward should, without more ado, constitute a contempt. This, as it seems to me, is a most compelling reason why Mr Murdoch and Mr Kirk's argument is not soundly based.

(5) Fifthly, Mr Tugendhat points out that the field of what might be called 'automatic restraint' in respect of the relationship between the media, on the other hand, and the court and its wards, on the other hand, is the subject of a scheme of statutory regulation—that is regulation by s 12 of the 1960 Act, s 97(2) of the 1989 Act and s 2 of the 1981 Act—and, moreover, a scheme of statutory regulation last adjusted as recently as the amendment of s 97(2) by the 1999 Act. So it would, he says, be inappropriate for the judges at this stage to be discovering hitherto unknown forms of non-statutory restraint. There is, as it seems to me, some force in this point.

(6) Finally, as Mr Tugendhat correctly points out, the argument put forward by Mr Murdoch and Mr Kirk raises serious issues in relation to art 10. Press conferences held by those who wish to attract attention to their views, and interviews conducted by the media, are both essential mechanisms for facilitating the exercise of the rights guaranteed by art 10. Both the press conference and the interview are means by which those wishing to disseminate their views exercise their convention right to 'impart' information and ideas and by which the media exercise their convention rights both to 'receive' and in turn to 'impart' information and ideas. Any rule of domestic law of the kind contended for by Mr Murdoch and Mr Kirk thus prima facie offends art 10 and must accordingly be justified under para 2. Given that on this issue there is, on any view, uncertainty as to what the rule of domestic law is, I am, in my judgment, required by the principle in *Rantzen's* case to which I have already referred, to have recourse to art 10 in resolving that uncertainty. This raises two questions.

(i) First, is the rule for which Mr Murdoch and Mr Kirk contend 'necessary in a democratic society' to safeguard the interests of wards of court? Is there a 'pressing social need' for such a rule in order to safeguard those interests? Would such a rule be 'proportionate to the legitimate aim pursued'? Mr Tugendhat says No. I agree. Such a rule would be taking a sledgehammer to crack a nut. There are other ways in which the legitimate interests of wards of court can properly be protected. In my judgment any rule which made it a contempt of court, of itself and without more ado, for the media to interview a ward of court without first obtaining the leave of the court, even if the rule were to be confined in the way in which ultimately Mr Murdoch and Mr Kirk agreed it would have to be

confined, involves far too serious an invasion of the art 10 rights both of the media and, I stress, of the ward himself, to pass muster under para 2.

(ii) Secondly, is it possible to formulate the rule for which Mr Murdoch and Mr Kirk contend with sufficient precision to enable citizens—in particular the media—to regulate their conduct? Mr Tugendhat, having observed their valiant attempts to do just that in the course of argument, submits that the answer is obvious. He asked rhetorically, to which part of the media is the rule to apply? Who for this purpose is to be treated as a journalist? With disarming forensic charm he hints that even Mr Murdoch and Mr Kirk do not know and cannot say. Nor do I. What if the editor of a school magazine publishes an article about a pupil who is known to be a ward? Or the editor of a parish magazine? On this ground also, it seems to me, the suggested rule fails to pass muster under art 10.

Accordingly, I reject the submission that the BBC requires the leave of the court before it can broadcast. I accept Mr Tugendhat's submission that, unless injuncted by the court, the BBC is entitled to broadcast. I agree with Mr Tugendhat that the major step in Bobby's life was his leaving home and joining the group, not his giving an interview to the BBC about it.

INJUNCTIVE RELIEF

I turn, therefore, to consider whether this is a case for injunctive relief. Mr Murdoch and Mr Kirk accept that the injunction granted by Singer J in the early hours of 18 July 2000 is too wide in its terms and requires to be revisited. They submit that I should grant an injunction in the following terms:

> 'IT IS ORDERED THAT:
>
> 1. and an injunction is hereby granted restraining until 5 April 2002 or until further order in the meantime any person (whether by himself or by his servants or agents or otherwise howsoever or in the case of a company whether by its directors or officers servants or agents or otherwise howsoever) from: (1) publishing in any newspaper or broadcasting in any sound or television broadcast or by means of any cable or satellite programme service or public computer network or any other public medium: (a) the detail or substance of any interview correspondence or communication emanating from, or purporting to emanate from, the minor Third Defendant Bobby Kelly and the continuation of any such publication which has already been made; (b) any comments made by any of the following persons in relation to the said minor ... being members or representatives of the "Jesus Christians". (2) soliciting or attempting to solicit any information relating to the minor: (a) from the minor, (b) from the Plaintiff, (c) from the minor's mother.
>
> PROVIDED THAT nothing in the order shall of itself prevent any person (i) publishing any particulars of or information relating to any part of the proceedings before any court other than a court sitting in private (ii) seeking or receiving information from any person who has previously approached the person seeking or receiving information with the purpose of volunteering information (iii) soliciting information relating to the child in the course of or for the purpose of the exercise by the person soliciting such information of any duty or function authorised by statute or by any court of competent jurisdiction.'

Mr Tugendhat says that there should be no injunction at all, alternatively, that any injunction should be much more narrowly drawn, in particular (i) so as to permit the BBC, even if it is to be prevented from broadcasting the sound recording of the interview, to report and comment on the content of the substance of the interview, and (ii) so as to permit the re-publication of material already in the public domain. As a quite separate matter he submits that there is no warrant for imposing any restraint on the persons identified in para (1)(b) of the draft.

There are, as it seems to me, four issues, which I propose to deal with in the following order. (i) Should the media be restrained by an injunction in rem or injunction contra mundum from publishing any, and if so what, communications from Bobby? (ii) Should the media be restrained by an injunction in rem or injunction contra mundum from publishing comments about Bobby made by the persons named in para (1)(b) of the draft? (iii) Should any such injunction be expressed to be subject to a proviso permitting the further publication of material already in the public domain? (iv) Should an order be made against the soliciting of information about Bobby from him, his mother or his grandmother?

First, however, I must deal with Mr Kirk's submission that I should not decide any of these matters at this stage but adjourn the matter until Bobby is found. He points out that the Official Solicitor is in the unusual position of never having met the child on whose behalf he is acting. He is therefore unable to take any of the steps he would usually take in order to ascertain the wishes of a boy of Bobby's age and, moreover, is greatly hampered in coming to any informed view as to where Bobby's best interests truly lie and what his true wishes really are. He says that any assessment of Bobby's welfare must in the circumstances be speculative. He says that there exist substantial concerns about Bobby's general welfare and whether or not the broadcast should go ahead in the light of those concerns without Bobby's express and specific agreement. He submits that the issues cannot properly be judged on the information presently available to the court and that the matter should therefore be adjourned until Bobby is found.

Whilst appreciating the difficulties in which both the Official Solicitor and indeed the court find themselves, I have come to the clear conclusion that it would be wholly wrong to accede to Mr Kirk's invitation. As I have said, I accept Mr Tugendhat's submission that, unless injuncted by the court, the BBC is entitled to broadcast. It is for those seeking to obtain an injunction to establish their case and to do so convincingly. If they cannot establish that case then the BBC is entitled to broadcast. It should not be deprived of that right by reason of the granting of an indefinite adjournment of its application to discharge an injunction which it asserts should never have been granted in the first place. To grant such an adjournment would in my judgment be to infringe its rights under art 10.

(i) *Injunctive relief in respect of communications with Bobby*

As I have already indicated, it is common ground before me, and I agree, that the present case is one in which the court *does* have jurisdiction to grant injunctive relief. The dispute is whether the case falls into the second or third of the three categories identified in *Re Z (a minor)*, that is to say, whether, because the court is exercising only its 'protective' jurisdiction, the child's interests are *not* paramount, so that the so-called balancing exercise has to be performed (which is what Mr Tugendhat asserts), or whether, because the court is exercising its

'custodial' jurisdiction, the child's interests *are* paramount (which at least in relation to this part of the case is what Mr Murdoch and Mr Kirk both assert). a

This raises the question, which is far from easy, as to what precisely it is that distinguishes cases in the second category from those in the third. The view which I have tentatively expressed in general terms is that *Re Z (a minor)* would seem to indicate that the 'custodial' jurisdiction will only be in play, and thus that the case can only fall into the third category if the court is concerned with media b activities which either relate directly to the child's 'upbringing', as that word is used in s 1 of the 1989 Act, or which involve an exercise of parental responsibility by the child's parent.

In *Re Z (a minor)* the child's mother had permitted the child to be filmed over a period receiving treatment in a specialist institution treating the child's complex c problems. She wished to co-operate in the making of a television documentary in which both the mother and the child would take part. In the course of a discussion of parental responsibility and prohibited steps orders, Ward LJ ([1995] 4 All ER 961 at 980, 981, [1997] Fam 1 at 26, 27), held that what he variously described as, 'giving permission for the making of this film' and the 'decision to permit this child to be filmed and to appear on television' quite clearly involved d an exercise of parental responsibility by the mother within the meaning of s 3(1) of the 1989 Act, entitling the court on that ground alone to make a prohibited steps order against the mother under s 8(1) of the 1989 Act.

That part of Ward LJ's analysis was directed primarily, of course, not to the grant of an injunction in rem or contra mundum but to the grant of relief in e personam against the child's mother. On that issue, as Ward LJ said ([1995] 4 All ER 961 at 984, [1997] Fam 1 at 30), the child's welfare was of course paramount. That, however, does not arise in the present case where, as I have said, it is common ground that I am concerned exclusively with an injunction contra mundum.

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So far as concerns relief in rem or contra mundum, I read Ward LJ's analysis as indicating that the child's welfare will be paramount *only* if the court is determining a question with respect to the child's upbringing: see the discussion at [1995] 4 All ER 961 at 982–983, [1997] Fam 1 at 28–29. That being so, the critical question then becomes, what is meant by 'upbringing'? As Ward LJ commented wryly: 'It is not always easy to decide when a question of upbringing is being g determined.' (See [1995] 4 All ER 961 at 982, [1997] Fam 1 at 28.) I agree with Mr Tugendhat when he submits that not everything a child does is a matter of upbringing. Ward LJ's conclusion was that 'a question of upbringing is determined whenever the central issue before the court is one which relates to how the child is being reared' (see ([1995] 4 All ER 961 at 983, [1997] Fam 1 at 29). The reference h to how the child is being 'reared' (which I observe reflects the dictionary meaning of the word 'upbringing') is revealing. Both words carry the connotation of the bringing up, care for, treatment, education and instruction of the child throughout childhood *by* its parents or *by* those in loco parentis. Upbringing thus involves a process in which the parent, or other person in loco parentis, is the j subject and of which the child is the object. In formal grammatical terms the statutory phrase 'upbringing of a child' is an objective genitive, not a subjective genitive. Section 1(1)(a) of the 1989 Act therefore applies only to those processes or actions of which the child is the object, and not to those in which the child is the subject.

That this is the sense in which Ward LJ understood the word 'upbringing' to be used in this context is, in my judgment, borne out by the important passage in which he explains why in *Re Z (a minor)* itself the child's upbringing was indeed implicated. He said:

> 'This case is not simply about some third person (the television company) publishing without parental involvement information about the way in which this child is being cared for and brought up, as in *Re M, Re N* ([1990] 1 All ER 205, [1990] Fam 211) and *Re W* etc. This is not a case where the parent stands by acquiescing in competent teenagers taking their story to the press as they did in *Re W and ors (minors)* ([1996] 1 FCR 393). If there was more than mere acquiescence and if there was active encouragement by the father in that case, it was not argued or presented on that basis. This is not a case like the transsexual father in *Re H-S,* who tells the family story but who does not require the children to participate in its telling. This case is one where the mother wishes her child to perform for the making of the film. This mother wishes to bring up her child as one who will play an active part in a television film. This is a case where the mother wishes to exercise her parental responsibility and waive the confidentiality which the child otherwise enjoys in keeping her medical treatment and/or education private. This is a case, quite unlike any of the other cases I have discussed, where the court is being asked to decide whether the child shall take part in the activity. The court is, therefore, required to determine a question with respect to the upbringing of the child.' (See [1995] 4 All ER 961 at 984, [1997] Fam 1 at 30–31.)

There are three things of importance which I derive from that passage. (1) First, as I read what he was saying, Ward LJ treated *Re W (minors) (continuation of wardship)*, where, it will be remembered, four wards of court had been interviewed by a journalist, as being a case which did *not* involve their upbringing. (I note in parenthesis that this agrees with the approach which was actually adopted by the Court of Appeal in *Re W (minors) (continuation of wardship)*; the court treated the case as involving the balancing exercise which is characteristic of cases in the second category.) This is because, as Ward LJ explained it, the boys had themselves taken their story to the press without their father's active encouragement and, at most, with his acquiescence.

(2) Secondly, and again as I read what he was saying, the reason why Ward LJ treated the facts of in *Re Z (a minor)* differently from the facts of *Re W (minors) (continuation of wardship)* was because Z's mother 'wishes her child to perform for the making of the film' because she 'wishes to exercise her parental responsibility' and, most significant of all, because she 'wishes to *bring up her child as one who* will play an active part in a television film' (my emphasis).

(3) Thirdly, and this follows from the other two points, when Ward LJ said of *Re Z (a minor)* that 'This is a case quite unlike *any* of the other cases I have discussed, where the court is being asked to decide whether the child shall take part in the activity' (see [1995] 4 All ER 961 at 984, [1997] Fam 1 at 30; my emphasis) it would seem to follow that he did not consider the mere fact of giving an interview to a journalist as amounting to 'taking part in an activity' for this purpose, or at least not in such a way as to involve any question with respect to the child's upbringing.

It follows, in my judgment, that Bobby's participation in the interview with the BBC—something done, I might add, without reference to either his mother or his grandmother—does not raise any question with respect to his upbringing. I agree therefore with Mr Tugendhat that the present case falls into the second and not the third category. As a consequence Bobby's welfare is *not* the paramount consideration.

Assuming that the present case does indeed fall into the second category, all counsel are agreed that the proper approach to the exercise of the court's discretion is that set out by Neill LJ in *Re W (a minor) (wardship: freedom of publication), Re* [1992] 1 All ER 794 at 797, [1992] 1 WLR 100 at 103:

> '(1) The court will attach great importance to safeguarding the freedom of the press. In *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 600, [1990] 1 AC 109 at 183 Sir John Donaldson MR explained the crucial position occupied by the press as follows: "It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less than that of the general public. Indeed it is that of the general public for whom they are trustees." (Sir John Donaldson MR's emphasis.) (2) The court will also take account of art 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), which is designed to safeguard the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority ..." (3) These freedoms, however, are subject to exceptions, which include restrictions upon publication which are imposed for the protection of children. (4) In considering whether to impose a restriction upon publication to protect a ward of court the court has to carry out a balancing exercise. It is to be noted, as Butler-Sloss LJ pointed out in *Re M and anor (minors) (wardship: freedom of publication)* [1990] 1 All ER 205 at 210, [1990] Fam 211 at 223, that: "In this situation the welfare of the child is not the paramount consideration." (5) In carrying out the balancing exercise the court will weigh the need to protect the ward from harm against the right of the press (or other outside parties) to publish or to comment. An important factor will be the nature and extent of the public interest in the matter which it is sought to publish. A distinction can be drawn between cases of mere curiosity and cases where the press are giving information or commenting about a subject of genuine public interest. (6) It is to be anticipated that in almost every case the public interest in favour of publication can be satisfied without any identification of the ward to persons other than those who already know the facts. It seems to me, however, that the risk of *some* wider identification may have to be accepted on occasions if the story is to be told in a manner which will engage the interest of the general public. (7) Any restraint on publication which is imposed is intended to protect the ward and those who care for the ward from the risk of harassment. The restraint must therefore be in clear terms and be no wider than is necessary to achieve the purpose for which it is imposed. It also follows that, save perhaps in an exceptional case, the ward cannot be protected from any distress which he may be caused by reading the publication himself.'

It will be observed that Neill LJ makes explicit reference to art 10. In my judgment it is clear that the Court of Appeal in that case was intending to give

effect to the convention jurisprudence to which I have already referred. That is clear, first, from Neill LJ's use of the word 'necessary' in the phrase 'The restraint must ... be no wider than is necessary to achieve the purpose for which it is imposed' and Balcombe LJ's use of the word 'essential' in the phrase 'essential to protect the ward from clear and identifiable harm' and, secondly, from Balcombe LJ's reference in that context to 'clear and identifiable harm'.

Consistently with convention jurisprudence and with what the Court of Appeal said in *Re W (a minor) (wardship: freedom of publication)* it seems to me, first, that the burden is on those who seek to invoke the court's jurisdiction to establish 'convincingly' by proper *evidence*, that an injunction is 'necessary' in order to protect Bobby from 'clear and identifiable harm', and, secondly, that any injunction granted must be 'proportionate' to that aim and no wider than is necessary. The need for proper evidence does not of course mean that the court cannot use its common sense. As Butler-Sloss LJ said in *Re M and anor (minors) (wardship: freedom of publication)* [1990] 1 All ER 205 at 212, [1990] Fam 211 at 226:

> 'It has also been suggested that the evidence to be presented to the judge, at least on the inter partes hearing, should include specific evidence of, for instance, psychological harm likely to be caused to the child by the publication proposed. Again, in my view, that is a misconception, both of the function of and the experience of those sitting in the Family Division. In *Re X (a minor) (wardship: restriction on publication)* [1975] 1 All ER 697, [1975] Fam 47 that evidence was available and rightly did not sway the decision. The evidence of child psychiatrists is invaluable in many of the difficult decisions to be made in child cases. In my view, it is not normally necessary in order to assist a judge in balancing the welfare of the child and the right to publish and whether the child and others in the proceedings should or should not be identified.'

What it is vital to appreciate, however, is that it is for those seeking to obtain an injunction to establish their case and to do so convincingly; it is not for the media to establish why it should be allowed to publish. Save in relation to matters the publication of which is regulated either by s 12 of the 1960 Act or by s 97(2) of the 1989 Act, the media, as I have already said, do not require the leave of the court to publish material about a ward of court. Mr Tugendhat does not come to court seeking leave to do anything at all. He comes to court asserting his *right* to broadcast. The only relief he seeks from the court is an order setting aside an injunction which, he says, should never have been granted in the first place.

This is an elementary point, but it is one which, I fear, none the less requires emphasis. As Hoffmann LJ said in *R v Central Independent Television plc* [1994] 3 All ER 641 at 653, [1994] Fam 192 at 204:

> 'In the area of human rights like freedom of speech, I respectfully doubt the wisdom of creating judge-made exceptions, particularly when they require a judicial balancing of interests. The danger about such exceptions is that judges are tempted to use them. The facts of the individual case often seem to demand exceptional treatment because the newspaper's interest in publication seems trivial and the hurt likely to be inflicted very great. The interests of the individual litigant and the public interest in the freedom of the press are not easily commensurable. It is not surprising that in this case the misery of a five-year-old girl weighed more heavily with Kirkwood J than

the television company's freedom to publish material which would heighten the dramatic effect of its documentary. This is what one would expect of a sensitive and humane judge exercising the wardship jurisdiction. But no freedom is without cost and in my view the judiciary should not whittle away freedom of speech with ad hoc exceptions. The principle that the press is free from both government and judicial control is more important than the particular case.'

The point was repeated by Thorpe LJ in *Re G (minors) (celebrities: publicity)* [1999] 3 FCR 181 at 191:

'As Hoffmann LJ rightly said in his judgment in *R v Central Independent Television plc* there is an inevitable tendency for the Family Division judge at first instance to give too much weight to welfare and too little weight to freedom of speech. That reality is reflected in the number of appeals in this field which succeed. Beyond that, as this case illustrates, all the advocates and the draftsmen before the court are equally child centred. Those who are to be bound by contra mundum orders have no opportunity to make submissions as to where the boundary should be drawn nor to contribute their expertise to the drafting. In my opinion consideration should be given to developing a procedure to meet this deficit.'

There is, I fear, a real danger that what Thorpe LJ refers to as the 'child centred' approach of those who are usually involved in the initial stages of such an application may on occasions lead not merely to the problems in drafting the appropriate injunction to which Thorpe LJ drew attention but also, and even more seriously, to a failure to assess whether those seeking relief really have convincingly established on the facts that the injunction they seek is necessary.

I shall return to the procedural implications of this at the end of my judgment.

There is a further point which emerges from the passages in *Re W (a minor) (wardship: freedom of publication)* to which I have just referred. As we have seen, the Court of Appeal in *Re X (a minor) (wardship: restriction on publication)* disavowed any power to prevent publication of a book which would be 'psychologically grossly damaging' to the ward and where the injury to her emotional psychological health would be 'very grave indeed'. That was a publication of material which related not to the ward herself but to her dead father. In *Re W (a minor) (wardship: freedom of publication)* that principle was extended to the case of publication of material relating to the ward himself. Both Neill and Balcombe LJJ seem to have been very doubtful about the power of the court to protect the ward from harm suffered by reading about himself in the publication in question—a power which neither was prepared to contemplate except (as Neill LJ said, 'perhaps') in an 'exceptional', or as Balcombe LJ put it a 'wholly exceptional' case. The striking fact is that in *Re W (a minor) (wardship: freedom of publication)* the Court of Appeal refused to prevent publication of a story which it was likely would be read by the ward himself in circumstances where there was cogent evidence that his placement might be jeopardised and that the article would have a 'devastating effect' on the ward, who was likely to be seriously affected both by the article itself and by his fear of the reaction of others to it ([1992] 1 All ER 794 at 797, [1992] 1 WLR 100 at 103).

Mr Tugendhat says that there is a clear public interest in the story which the BBC wishes to broadcast. He submits that, just as Lord Donaldson of Lymington MR

in *Re M and anor (minors) (wardship: freedom of publication)* [1990] 1 All ER 205 at 215, [1990] Fam 211 at 230 correctly identified the clear public interest in knowing more of why two young children living with long-term foster parents should have been 'spirited away' by a local authority from what had become their family between breakfast and supper without explanation or warning, so there is an equally clear public interest in knowing more of why Bobby should have been 'spirited away' by a religious organisation from what had become his home within a few hours of first having come into contact with them.

He says, furthermore, that there is a public interest in understanding how it is that someone in Bobby's position should apparently feel unable to turn for assistance to the court and the Official Solicitor—an argument, as it seems to me, which finds support in the observations of Balcombe LJ in *Re W (minors) (continuation of wardship)* to which I have already referred.

He points further, and tellingly, to the public interest which, he says, arises out of the fact that in this very case the court itself has, as it were, 'gone public', and invited the assistance of the media in finding Bobby. He says that if Bobby is encouraged to contact the media that is all to the good, because it might lead to him being found. Realistically he comments that the media cannot be expected to take quite the same interest in the story as would otherwise be the case if they are injuncted from saying anything that Bobby tells them. There is, in other words, he says, a clear public interest in the media being encouraged to assist the court in cases, such as this, in which the court has itself sought to enlist the media's assistance.

I agree with Mr Tugendhat. There is, in my judgment, a clear public interest in Bobby's story and in the interview with him obtained by the BBC.

Mr Murdoch and Mr Kirk point to a number of reasons why, as they would have it, the balance none the less comes down in favour of an injunction. They say that Bobby is a vulnerable and impressionable child who, on any view, has behaved in an extraordinary fashion, first, in leaving home in the circumstances I have described and subsequently in staying in hiding. They point to matters which I have already referred to as suggesting that Bobby is being used and manipulated by the group for its own ends and in a manner which disregards his welfare. They suggest that the group is seeking to use Bobby to win a public opinion battle and that the BBC is allowing itself to be drawn into a trial by the media of issues which are properly matters for judicial decision.

The Official Solicitor, having considered Bobby's interview with the BBC, questions whether it reveals him as expressing his views with any degree of mature independence and detachment. Mr Kirk questions whether Bobby really appreciates the implications of the interview being broadcast, for example, the risk that it may generate a substantial amount of secondary publicity presented in a more sensational fashion than the broadcast itself. He questions whether the interview accurately reflects what Bobby might say in a different context. He questions whether Bobby is actually himself seeking publicity at all.

Mr Murdoch also suggests that, unless a protective injunction is granted, prospective litigants who in future find themselves in the position of Bobby's grandmother may be deterred from approaching the court at all.

Their prime concerns are threefold. (1) First, that if publication of the interview is not injuncted Bobby will, they say, find it very much more difficult to return to his grandmother's home (or anywhere else) should he wish to do so. He has aligned himself with the views of the group and, says Mr Kirk, there is a

respectable argument that, if he is seen as committing himself any further to the group, Bobby will feel unable to extricate himself, or, at the very least, will feel extremely disloyal and under a degree of pressure in doing so. As Mr Murdoch puts it, he will see himself as fighting the cause for the group. If the interview is broadcast he will, they assert, become even more entrenched in his present position. (2) Secondly, says Mr Kirk, Bobby may feel inhibited in giving the Official Solicitor instructions that differ from the views that he will know have been made public. (3) Thirdly, the 'glamorising' of Bobby's situation and his being thrust further into the limelight may, they say, make it more difficult for him to resume a 'normal' life at a later stage and may cause him embarrassment with his peer group.

In answer to these submissions Mr Tugendhat points to the fact that Bobby is 16 and that it was he who telephoned the BBC. He points out that, in very large part because of the orders which the court itself has made, there has already been very wide publicity about Bobby and the predicament in which he finds himself. He points out that Bobby's views are already well publicised—in particular in the newspapers which published the extracts from the e-mail and the PA interview to which I have already referred. There is, he says, substantial material already in the public domain both about Bobby and about the views which he apparently holds. He says that, if there is any substance in the argument that Bobby may find himself in an entrenched position from which he cannot retreat, there is little reason to fear that broadcasting the BBC interview is going to make matters any worse. Bobby has already, says Mr Tugendhat, committed himself in public to the assertion that he is happy with the group.

He says that Bobby has the right to put over his point of view, if he wishes to outside court, by talking to the media. He says that at 16 Bobby's expression of his own position must be taken seriously. He says, correctly, that the proposed injunction would prevent *any* reporting of *anything* said either by Bobby or, in relation to Bobby, by the other named persons. This he submits is as great an interference with their rights as is possible, and it can, accordingly, be justified only by correspondingly strong evidence which *convincingly* establishes the need for such drastic restraints.

He submits that the reasons put forward for injuncting the media and preventing the BBC broadcasting the interview are speculative and have no solid evidential foundation. He says that it is equally, indeed he would say more, plausible to conclude that allowing the BBC to broadcast the interview will actually further Bobby's interests. If he feels that he is being listened to, that may make it easier for Bobby and give him the confidence to come forward; but if he feels that no one is listening to him and that what he wants to say is being ignored he may be driven even further into the laager and all the more easily persuaded by the group that his only recourse is to remain in hiding with them.

Mr Tugendhat points out that the BBC wishes to use the interview as part of a balanced debate—it is not simply going to broadcast the tape raw. He says that there is no reason to fear such secondary publicity as there may be. He points to the tone of the media reporting thus far which he says, correctly as it seems to me, has been balanced and not sensational in tone. He suggests that, if anything, the media is likely to be antagonistic towards rather than supportive of the group and that there is nothing in anything that has yet been published to suggest that the media is going to glamorise either Bobby or the group.

Directing myself in accordance with the principles which I have outlined above, and having regard to *all* the material in the case (including the impressions which I have formed listening to the tape and reading the transcript of the interview), I have come to the clear view that Mr Tugendhat is correct in his submission that this is not a case in which the need for injunctive relief has been established.

Given all the publicity there has already been, and given that Bobby's apparent views have already been widely reported, I do not think that any convincing case has been put forward that broadcasting the interview or further publicity of the sort it is reasonable to anticipate is going significantly to harm Bobby. There is, in my judgment, no 'clear and identifiable harm' established of the kind which alone would justify injunctive relief of the kind sought. On the contrary, the argument that further publicity of the kind which the proposed injunction would prevent might actually be in Bobby's best interests seems to me to be, in the unusual circumstances of this case, at least as plausible as the contrary argument put forward by Mr Murdoch and Mr Kirk. Furthermore, an injunction framed as widely as that which I am invited to make would, in my judgment, be wholly disproportionate to any aim that could legitimately be pursued on Bobby's behalf. Such a degree of restraint could, in my judgment, be justified only if there was much more compelling reason to fear than in my judgment there is a significantly greater degree of possible harm to Bobby than any which, in my judgment, is reasonably to be anticipated. Moreover, the public interest arguments identified by Mr Tugendhat seem to me to carry considerable weight. Such evidence as there is to suggest that Bobby's interests may be prejudiced if the injunction is not granted does not, in my judgment, come near to outweighing the clear public interests which, as it seems to me, have been correctly identified by Mr Tugendhat.

For these reason I have come to the clear conclusion that the case for injunctive relief has not been made out.

For the sake of completeness I should deal with two other matters. First, and quite apart from the reasons which I have already given for refusing to grant the injunction sought, Mr Murdoch and Mr Kirk would, as it seems to me, have great difficulty in overcoming the point made by Neill and Balcombe LJJ in *Re W (a minor) (wardship: freedom of publication)* that save perhaps in an exceptional case the court has no power to protect a ward from harm caused by reading about himself. This is an issue which was not explored fully in argument and on which accordingly I express no final view. There is no need for me to do so for, as I should like to make clear, this is *not* the basis upon which I have come to my decision in this case.

Secondly, and relying on passages in *Re M and anor (minors) (wardship: freedom of publication)* [1990] 1 All ER 205 at 212, 215, [1990] Fam 211 at 226, 230, Mr Kirk submits that this is a case in which the injunction should continue, even if no longer, at least until Bobby is found. I reject that submission essentially for the same reasons as those which I have already set out. Moreover, Mr Tugendhat submits with compelling force, as it seems to me, first, that news is an inherently perishable commodity and, secondly, that this particular story will never be published in the way in which the BBC would wish to publish it if it has to be delayed until Bobby is found; it is a story about a boy in hiding who is speaking out whilst still in hiding and *that* story will die as soon as Bobby is found.

(ii) *Injunctive relief against those named in para (1)(b) of the draft*

Mr Murdoch and Mr Kirk accept that on any view this injunction falls into the second and not the third category. I agree.

If there is to be, as I have ruled, no injunction to restrain the media publishing information about Bobby emanating from Bobby himself, I agree with Mr Tugendhat's submission that it would not be appropriate to restrain the media from publishing comments about Bobby emanating from the other named individuals. I do not treat the second point as simply following a fortiori from my ruling on the first point. But for very much the same reasons as those which I have already set out at some length I have come quite clearly to the conclusion that no proper case has been made out for injuncting those individuals, having regard to the principles set out in *Re W (a minor) (wardship: freedom of publication)*.

Both Mr Murdoch and Mr Kirk rely, however, on a further ground of justification for this injunction, namely that some at least of the persons named in para (1)(b) of the draft are, as they assert, in contempt of court, refusing to hand Bobby over to the Tipstaff and regulating the access to him not merely of the media but also of the court and its officers, and indeed also of Bobby's family and friends. Mr Kirk puts the point very eloquently when he submits that some at least of these people are aware that the court has made orders that require Bobby to be removed from their care: that they are in contempt of court; that their appropriate course of action would be to comply with the orders of the court and to seek to purge their contempt; that their proper recourse is to the court, and not to the media, if they disagree with the orders which the court has made; that they have gone out of their way to regulate Bobby's contact to the media and to his family in a way which is, says Mr Kirk, inimical to his welfare; that they have secreted him in a place where he cannot be located; that they know where he is; that they have refused to allow him access to independent representation in the proceedings through his guardian ad litem; and that so long as this state of affairs continues they should not be permitted to see or hear their views and opinions on Bobby's situation stated in the public domain.

Let all this be accepted, though as Mr Tugendhat urges no findings of contempt or other criminal behaviour have in fact yet been made against anyone. Yet, he says, none of this is any reason to deprive these persons of their rights under art 10, nor, more importantly from his point of view, to deprive the media of their right under art 10 to receive these persons' information and ideas. Mr Tugendhat does not, of course, represent any of these people but plainly the BBC has its own legitimate interest in arguing that none of them should be injuncted. It is not, Mr Tugendhat says, a question of not permitting these people to hear their views and opinions on the subject stated in the public domain, for they are not seeking any leave or other indulgence of the court. It is a question of whether Mr Murdoch and Mr Kirk can establish some proper ground for preventing them speaking. I agree.

There may, of course, be circumstances in which the court will decline to hear a contemnor until he purges his contempt: see *X Ltd v Morgan-Grampian (Publishers) Ltd* [1990] 2 All ER 1, [1991] 1 AC 1. But these persons are not seeking to be heard by the court—indeed, that is one of Mr Kirk's complaints. They are seeking no indulgence from the court. On the contrary they defy the court and threaten what they call civil disobedience. That is utterly deplorable, and the longer their defiance lasts, and the more contumelious it becomes, the more condign may be the punishment to which, if duly convicted, they will expose

themselves. But the punishment for contempt is a fine or imprisonment or both; deprivation of fundamental human rights, and that is what is in issue here, is not. Even a convicted contemnor is not an outlaw. It would, in my judgment, be the beginning of a very slippery and dangerous slope indeed to hold that persons in the position of those named in para (1)(b) of the draft could properly be restrained by the court from expressing their views in the manner contemplated here simply on the ground that they are—if indeed they are—guilty of very grave contempts of court. A convicted contemnor may find himself imprisoned for purposes both of punishment and coercion, his release being delayed until he has purged his contempt by complying with the court's orders. What Mr Murdoch and Mr Kirk are here arguing for comes very close to seeking to deprive these people of their civil rights as a means of coercing them to comply with the court's orders. I confess that the temptation to accede to their submission is very great. Viewed from one perspective the spectacle of those who publicly and loudly defy the court and preach the alleged virtues of civil disobedience is deplorable. The temptation to silence them is great, if only to deny them the oxygen of publicity for their lawless behaviour. But the temptation must be sternly resisted, for that way lies great peril. If these people are to be injuncted it can only be, in my judgment, if proper grounds for doing so are established by reference to the criteria in *Re W (a minor) (wardship: freedom of publication)*.

It follows that this is not a case for injunctive relief. Mr Tugendhat is entitled to have the injunction granted by Singer J set aside. I am not persuaded by Mr Murdoch and Mr Kirk that any other form of injunction can be justified.

(iii) *The public domain proviso*

A question was raised as to whether, if I granted an injunction in the terms of either limb of para (1) of the draft, it should be qualified by a proviso making it clear that the injunction does not of itself prevent the further publication of material already in the public domain.

In the light of my conclusions this question does not arise for decision, but it is, I think, appropriate that I should indicate my views on it.

In *Re C (a minor)* (15 March 1990, unreported) Sir Stephen Brown, the President, was concerned with an application for an injunction contra mundum the purpose of which was in part to prevent the re-publication in the media of material which had been the subject of extensive media coverage some 18 months previously. In his judgment the President said:

> '[Counsel] points out that a restriction on the publication of information already in the public domain directly raises the conflict between the interests of the person whom it is sought to protect and the interests of what is termed "freedom of speech". He has submitted that in carrying out a balancing exercise between these two competing interests, the court has to be very careful not to restrict too severely the publication of information which is already available. There is a risk that the minor C may suffer harm if the press or other organs of the media revive the publication of information, and more particularly pictures, which have already been published. On the other hand it would be taking a very strong line indeed if a court were to seek to restrict the media from publishing information which they have lawfully published in the past and which remains on their files and is readily available to members of the public, for example in libraries.'

And a little later he said:

> 'I do not find it possible to say that there should be a restriction on the publication of information or pictures already in the public domain. It has been urged upon me that certain passages in the speeches of their Lordships in the "Spycatcher" case *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, [1990] 1 AC 109 relating to the publication of information generally are not strictly relevant to this case, because the circumstances are very different. The important matter in this case which has to be borne in mind is that information which has already been published is already lawfully available to persons in this country. I do not think that it would be appropriate for the court to attempt to prevent the re-publication of such information, although it may deprecate the way in which that may be done. Nevertheless there is an important principle to be borne in mind concerning the preservation of freedom of speech.'

Following that judgment it became, as I understand it, a general, though by no means the invariable, practice to qualify injunctions contra mundum with a public domain proviso.

A similar point arose recently before Charles J in *A v M (family proceedings: publicity)* [2000] 1 FCR 1. That, as I have already observed, was not a case of an injunction contra mundum but a case where an injunction in personam was granted at the suit of one parent of the child against the other. Having said (at 5) that 'the repetition of material that has been placed in the public domain can be damaging to a child' Charles J declined to qualify the injunction which he granted with a public domain proviso, explaining (at 5 and again at 10), that the injunction he was granting was not based upon duties of confidentiality. It appears that Charles J was not referred to the President's earlier decision, where, it will be recalled, the President had in fact been addressed on the difference between the injunctions he was being invited to grant in that case and injunctions based on duties of confidentiality.

Mr Murdoch says I should follow Charles J. Mr Tugendhat, supported on this point by Mr Kirk, says that I should follow the President. Mr Kirk accepts that, if I am to grant an injunction, it should be qualified by a public domain proviso.

I am far from saying that there is necessarily any conflict between *Re C (a minor)* and *A v M*. The one deals with injunctions contra mundum, the other with an injunction in personam, and it may be that in this respect there is this distinction between them. Be that as it may, it seems to me, as it seemed to the President in *Re C (a minor)*, and for very much the same reasons, that an injunction in rem or contra mundum should normally be qualified with a public domain proviso. There is, after all, something rather odd about trying to restrain the world at large from publishing material which, being in the public domain, is already available to the world at large.

Accordingly, on this point I agree with Mr Tugendhat and Mr Kirk.

(iv) *Injunctive relief against solicitation*

Mr Murdoch submits, and I agree, that an order in this form is plainly within the court's jurisdiction. It is so often found in injunctions contra mundum that it can almost be considered as standard form. Its purpose is to protect the ward and those who care for him from harassment by the less considerate organs of the media and in particular from that form of harassment commonly referred to as 'doorstepping'. The limited effect of such an order is apparent when it is read in

the light of proviso (ii), the purpose of which is to preserve both the source's right to approach the media and the media's right to exploit to the full information supplied by anyone who *is* willing to speak to the media. I agree with Mr Murdoch that an order in these terms should be made for Bobby's protection.

PROCEDURAL MATTERS

Before concluding this judgment there are certain procedural matters to which I wish to refer.

Injunctions of the kind I have been considering are very frequently—in the case of injunctions contra mundum invariably—obtained ex parte or, as one should now say, without notice. The point is really very obvious but perhaps bears emphasis that, even if some organs of the media *are* represented when an injunction contra mundum is granted, the injunction will necessarily still have been granted ex parte, or without notice, to all the other organs of the media upon whom it may eventually be served. For the purposes of what follows *every* injunction contra mundum has to be treated as if it were an ex parte injunction granted without notice.

I very recently had to consider in the case of *W v H (Family Division: without notice orders)* [2001] 1 All ER 300, in which I gave judgment in open court on 10 July 2000, the practice to be followed in this division when injunctions are granted ex parte and without notice against third parties in ancillary relief cases. In that case I had been pressed with Lightman J's observation in *Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd* (1999) Times, 10 November. In relation to that submission I said this (at 318):

> 'I am not persuaded that Lightman J's approach can simply be imposed without more ado in the Family Division. The circumstances in which ex parte relief is obtained in the Family Division vary very widely. Moreover, as cases such as *Khreino v Khreino (No 2)* ([2000] 1 FCR 80) so vividly illustrate, such relief is often granted in the Family Division in circumstances very far removed indeed from any circumstances in which ex parte relief is ever normally granted in the Chancery Division. For these reasons I do not propose even to attempt to formulate any rule of practice applicable in all cases: it would be wholly inappropriate to do so. What I can I hope usefully do is to indicate that, generally speaking, I think that: (i) any ex parte order containing injunctions should set out on its face, either by way of recital or in a schedule, a list of all affidavits, witness statements and other evidential materials read by the judge; (ii) the applicant's legal representatives should whenever possible liase with the associate with a view to ensuring that the order as drawn contains this information; (iii) on receipt of the order from the court the applicant's legal representatives should satisfy themselves that the order as drawn correctly sets out the relevant information and, if it does not, take urgent steps to have the order amended under the slip rule; and (iv) the applicant's legal representatives should respond forthwith to any reasonable request from the party injuncted or his legal representatives either for copies of the materials read by the judge or for information about what took place at the hearing. Persons injuncted ex parte are entitled to be given, if they ask, proper information as to what happened at the hearing. At the very least they are entitled to be told, if they ask, (a) exactly what documents, bundles or other evidential materials were lodged with the court either before or during the course of the hearing and (b) what legal

authorities were cited to the judge. Given this, it would obviously be prudent for those acting for applicants in such cases to keep a proper note of the proceedings, lest they otherwise find themselves embarrassed by a proper request for information which they are unable to provide.'

Having considered what I said in that case, the Official Solicitor has indicated that he can see no reason why exactly the same principles should not apply in cases relating to children, including cases where injunctive relief is sought against third parties or against the world at large. That is my view. Accordingly the principles which I set out in *W v H* should be treated as applying equally to cases relating to children, including cases where injunctive relief is sought against third parties or the world at large.

The present case has highlighted two further points which I think need to be considered.

First, there may of course be cases—and the present was just such a case—where the urgency is such that there is no time to prepare comprehensive evidence in proper form. In such a case the court must—and will—act upon the information provided by counsel. But in every such case there should, as it seems to me, be an undertaking to swear and file an affidavit as soon as possible: see *Re M and anor (minors) (wardship: freedom of publication)* [1990] 1 All ER 205 at 212, [1990] Fam 211 at 226. Even if, for some reason no such undertaking is given, it will normally be appropriate for the appropriate affidavit to be sworn and filed as soon as possible. This is particularly important in cases where an injunction is granted contra mundum restraining freedom of speech.

The second point derives from the elementary principle of natural justice, that if one party wishes to place evidence or other persuasive material before the court the other parties must have an opportunity to see that material and to address the court about it. One party may not make secret communications to the court. It follows that it is wrong for a judge to be given material at an ex parte, or without notice, hearing which is not at a later stage revealed to the persons affected by the result of the application.

I recognise that, in the context of cases concerning children, that principle is qualified to an extent by the principle considered by the House of Lords in *Official Solicitor v K* [1963] 3 All ER 191, [1965] AC 201 and *Re D (minors) (adoption reports: confidentiality)* [1995] 4 All ER 385, [1996] AC 593, but I do not see how anything in those cases can be used as a justification for not making full disclosure to the media of the material on the basis of which an injunction contra mundum has been granted.

This may give rise to a practical problem, for very often the material relied upon in support of the application for such an injunction will be contained in affidavits or witness statements filed in the substantive children proceedings which contain a mass of other information which is of no relevance to the application for the injunction, which there is no need for the media or any other third party to see and which it is highly undesirable that they should be allowed to see.

That is, however, no reason for denying the media their right—and in my judgment it is their unqualified right—to see the material which has been relied upon against them. If, as will typically be the case, it is not appropriate for the media to see the material in the form in which it was originally filed with the court, the solution is not to deny them what they are plainly entitled to as a

matter of natural justice—and what, I might add, they will plainly be entitled to in accordance with art 6 of the convention once the 1998 Act comes into force—but rather to set out the relevant material in a separate affidavit or affidavits which *can* be shown to the media. Such an affidavit should be prepared even if there appears to be no immediate likelihood of there being any application to discharge the injunction. Otherwise there may be uncertainty—perhaps weeks or months later—as to the basis upon which the injunction was granted.

Application granted.

Celia Fox Barrister.

Re S (a child) (Family Division: without notice orders)

FAMILY DIVISION

MUNBY J

20, 27 OCTOBER 2000

Practice – Family Division – Without notice orders – Undertakings – Principles and guidance.

(1) When granting without notice injunctive relief in the Family Division, it is generally appropriate for the court to require the applicant (and, where appropriate, the applicant's solicitors) to give undertakings (i) where proceedings have not yet been issued, to issue and serve proceedings on the respondent either by some specified time, or as soon as practicable, in the form of the draft produced to the court or otherwise as may be appropriate; (ii) where the application has been made otherwise than on sworn evidence, to cause to be sworn, filed and served on the respondent as soon as practicable an affidavit or affidavits substantially in the terms of the draft affidavit(s) produced to the court or, as the case may be, confirming the substance of what was said to the court by the applicant's counsel or solicitors; and (iii) subject to the previous undertakings, to serve on the respondent as soon as practicable the proceedings, a sealed copy of the order, copies of the affidavits(s) and notice of the return date including details of the application to be made on the return date. Whether or not express undertakings have been given to that effect, but subject to any order to the contrary, an applicant who obtains without notice injunctive relief has an obligation to the court to carry out those steps. The applicant's solicitor owes such an obligation both to the court and to his lay client (see p 373 *e* to *g* and *j*, post).

(2) A person who has given an undertaking to the court is under a plain and unqualified obligation to comply to the letter with his undertaking. Where the undertaking is to do something by a specified time, then time is of the essence. A person who finds himself unable to comply timeously with his undertaking should either apply for an extension of time before the time for compliance has expired or pass the task to someone who has available the time in which to do it. It is unacceptable, least of all for a solicitor, to put forward the burden of other work as an explanation for non-compliance (see p 372 *c d* and p 373 *g h*, post).

Notes

For undertakings, see 24 *Halsbury's Laws* (4th edn reissue) para 865.

Cases referred to in judgment

Behbehani v Salem [1989] 2 All ER 143, [1989] 1 WLR 723, CA.

Brink's-MAT Ltd v Elcombe [1988] 3 All ER 188, [1988] 1 WLR 1350, CA.

D (minors) (adoption reports: confidentiality), Re [1995] 4 All ER 385, [1996] AC 593, [1995] 3 WLR 483, HL.

Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd (1999) Times, 10 November, Ch D.

Kelly v BBC [2001] 1 All ER 323.

M and anor (minors) (wardship: freedom of publication), Re [1990] 1 All ER 205, [1990] Fam 211, [1989] 3 WLR 1136, CA.
Memory Corporation plc v Sidhu (No 2) [2000] 1 WLR 1443, CA.
Murjani (a bankrupt), Re [1996] 1 All ER 65, [1996] 1 WLR 1498.
Official Solicitor v K [1963] 3 All ER 191, sub nom *Re K (infants)* [1965] AC 201, [1963] 3 WLR 408, HL.
Pamplin v Express Newspapers Ltd [1985] 2 All ER 185, [1985] 1 WLR 689.
W v H (Family Division: without notice orders) [2001] 1 All ER 300.
WEA Records Ltd v Visions Channel 4 Ltd [1983] 2 All ER 589, [1983] 1 WLR 721, CA.

Interlocutory proceedings

On 20 October 2000 Munby J discharged an order, granted on a without notice application by Holman J on 12 October 2000 and extended by Johnson J on 13 October 2000, restraining the parents of a child known as L from removing her from the jurisdiction and requiring L's mother to disclose her whereabouts to the Tipstaff and to deliver to the Tipstaff any passport or travel documents relating to herself and L. On the granting of the order, the father's solicitor had given an undertaking to issue an originating summons seeking an order in the same form by 4 pm on 13 October 2000. The solicitor failed to comply with that undertaking, and it therefore remained for Munby J to consider what steps to take to deal with that non-compliance. The case was heard in private, but an anonymised judgment, omitting the names of counsel and solicitors, was delivered in open court. The facts are set out in the judgment.

Cur adv vult

27 October 2000. The following judgment was delivered.

MUNBY J. This is the third occasion in recent months when I have had to consider the practice in the Family Division in relation to the grant of injunctions ex parte or, as one should now say, without notice. The first was on 12 July 2000 when I delivered judgment in *W v H (Family Division: without notice orders)* [2001] 1 All ER 300. The second was on 25 July 2000 when I delivered judgment in *Kelly v BBC* [2001] 1 All ER 323. The third, today 27 October 2000, is in a case in which, because it involves children, I have prepared this judgment in anonymised form so that it may be given in open court. Nothing must be published which might lead to the identification of the children involved in this case.

The facts

L was born in March 1995 and is now 5 years old. Her older brother A was born in August 1990 and is now 10 years old. Their parents were never married and have been separated for some time. On 21 October 1996 Judge Ryland ordered that the father should have parental responsibility for A and L. A lives with the father and L with the mother but both go to the same primary school, so the father sees L briefly most days when he goes to collect A from school even though, so he asserts, he is not allowed by the mother to have contact with L.

On Thursday, 12 October 2000, whilst collecting A from school, the father was told certain things by L, by L's child-minder, who was collecting her from school, and by someone at the school, that led him to believe that L was being taken out of school the next day and taken abroad by the mother to St Lucia, where her partner comes from.

The father instructed solicitors who made a without notice telephone application out of hours the same evening to Holman J, who was acting as urgent applications judge that week. The judge made a 'seek and locate' order in the standard form directing the Tipstaff to seek and locate L and ordering the mother, on pain of instant arrest in the event of non-compliance, to disclose L's whereabouts to the Tipstaff and to deliver to the Tipstaff any passports or travel documents relating to herself and L. Holman J also made an order in standard form prohibiting both parents from removing L from the jurisdiction. That order contained a recital in the following terms: 'UPON the said solicitors undertaking to issue by 4 pm on Friday 13th October 2000 an Originating Summons seeking an Order in the terms of this Order.'

The matter came before Johnson J the next day (Holman J not being available) when, in the absence of the mother, who was neither present nor represented, the judge extended the injunction granted by Holman J and adjourned the matter to Friday, 20 October 2000. The father on that occasion was represented by counsel. The court log shows that the hearing before Johnson J lasted four minutes.

Holman J's week of duty as urgent applications judge finished in the normal course of events at 4.16 pm on Friday, 13 October 2000, at which time I took over as duty judge for the next seven days. Shortly before 10 am on Tuesday, 17 October 2000 the Assistant Tipstaff asked to see me. I, of course, knew absolutely nothing about the case. She told me about the orders made by Holman J, reported that she had executed the 'seek and locate' order and found the mother entirely co-operative, and informed me that she understood the mother to be applying ex parte that morning for the return of her passport. She also told me that she had advised the father's solicitors the previous morning (Monday) that they should serve the mother with the proceedings without delay but had gained the impression that not merely had this not been done but that there seemed to be lacking any very great sense of urgency on the part of the solicitors. On my instructions the Assistant Tipstaff then telephoned the father's solicitors to inform them of the mother's ex parte application and to ask them whether the mother had yet been served, and if so when, and if not, why not and when it was proposed that she should be served. The response reported to me by the Assistant Tipstaff was that the mother had not yet been served and that it was proposed to do so later that day.

When the court sat the mother was present in person, as was the father. The father's solicitors were not present but he was represented by counsel—not the same counsel who had appeared before Johnson J the previous Friday. Counsel had no papers, having understandably in the circumstances been instructed at very short notice. The only papers I had were copies of the orders made by Holman J and Johnson J, a sealed copy of an originating summons bearing the official receipt of the court office showing that it had been issued at 3.01 pm on Monday, 16 October 2000, and copies of three letters produced to me by the mother: one from L's school, one from the child-minder and one from the mother's employers. Taken at face value (and I saw no obvious reason why not to) these showed that the mother had sent the school a note on Thursday, 12 October 2000 stating that she and L were going to Norfolk for the weekend and that L would accordingly be absent from school on Friday, 13 October 2000 and Monday, 16 October 2000, that neither the school nor the child-minder had said anything to the father about L going to St Lucia and that the mother was employed by a well-known company in the City of London in what was described as 'a senior financial position within our organisation'. The letter continued:

'Her position is such that she is obligated to report to our head office ... within France frequently. This therefore requires her to travel abroad three to four times per month on business. She is therefore required to have her passport to hand at very short notice.'

This material suggested two things: first, that the father might have 'got the wrong end of the stick'; and, secondly, that the mother had, on the face of it, legitimate reasons for seeking the return of her passport.

I was in the difficulty that, there being as yet no affidavit in support of the father's case, I did not know how the case had been put to Holman J. The father's counsel found his difficulties compounded by the fact that, as I understood it, he had no attendance note from his solicitor setting out what her client had told her prior to her application to Holman J and no attendance note recording what had happened in the course of that application. Effectively, he was acting on the basis of brief oral instructions which he had been given over the telephone. As the court log records, I stood the case out of the list a number of times during the day to enable the father's counsel to obtain further instructions. But by 3.55 pm he was to all intents and purposes in no better position than earlier in the day either to tell me exactly what had been said by those instructing him to Holman J the previous Thursday or to proffer any explanation for why, notwithstanding the undertaking they had given to issue the originating summons by 4 pm on Friday, 13 October 2000 it had not in fact been issued by the solicitors until 3.01 pm on Monday, 16 October 2000. In these circumstances, and without opposition from the father's counsel, I made an order that the mother's passport be returned to her, that the matter be adjourned to be heard by me on Friday, 20 October 2000, and that a representative of the father's solicitors was to attend that hearing. The mother gave me an undertaking not to remove L from the jurisdiction until 4 pm on Friday, 20 October 2000. Having told me that business commitments would make it difficult for her to attend the hearing that day I dispensed with her attendance.

On Friday, 20 October 2000 the matter came back in front of me. The mother, in accordance with the direction I had given on the previous occasion, was neither present nor represented. The father was present in person, as was the solicitor who had made the telephone application to Holman J, both represented by counsel—in fact the counsel who had appeared in front of Johnson J on 13 October 2000. Three affidavits were handed in: the first sworn by a process server on 18 October 2000 showing that the mother had been served at 8 pm on Tuesday, 17 October 2000 with copies of the originating summons and the order made by Johnson J on 13 October 2000 (though not with the order made by Holman J on 12 October 2000); the second sworn by the father on 19 October 2000 setting out the events which took place at the school when he went to collect A on 12 October 2000 and certain other matters which, taken in conjunction with the events of 12 October 2000, had, as he deposed, led him to form the firm belief that L was to be permanently removed to St Lucia by the mother; the third sworn on 20 October 2000 by the solicitor who had made the telephone application to Holman J setting out the instructions she had received from the father at approximately 4.30 pm on Thursday, 12 October 2000 and the steps she had taken to make the telephone application to Holman J.

Interestingly, especially when read in conjunction with the letters that the mother had handed me at the previous hearing, the father's affidavit reveals that it was L who had told him that she was going to St Lucia, and although he deposes

that both a teaching assistant at the school and the child-minder had told him that L was 'going away', he does *not* depose to either of them having said that L was going to St Lucia. I do not in any way blame the father who, if I may say so, appears to have acted throughout the last few days in an entirely understandable way and with complete propriety. It does seem, however, that he did indeed 'get the wrong end of the stick'. Be that as it may, at the hearing on Friday, 20 October 2000 the father indicated through counsel that he no longer wished to pursue the present proceedings. Accordingly I made an order giving the father leave to withdraw the proceedings. I also discharged all the undertakings given to and injunctions granted by Holman J, Johnson J and myself. This does not, of course, prevent either the father or the mother bringing proceedings in future to regulate the father's contact with or otherwise relating to L.

The solicitor's affidavit made no reference to anything that had happened following the making of Holman J's orders and, in particular, made no reference to, and proffered no explanation for, her failure to comply with the undertaking which she herself, as counsel accepted on her behalf, had given to Holman J.

On her behalf counsel produced a sealed application in Form C1 bearing the official receipt of the court office showing that it had been issued at 4.21 pm on Friday, 13 October 2000. Counsel explained on instructions that her solicitor had erroneously believed that her undertaking to Holman J required her to issue proceedings on Form C1 and that it was only when she arrived at the court office that she discovered her mistake—a mistake which she remedied by issuing the originating summons the following Monday. The explanation for the fact that the Form C1 was not issued until 4.21 pm even though her undertaking required issue of process by 4 pm was essentially—and I need not go into details—that the solicitor was busy on the Friday dealing first with the father's case and then with another client whose case was also in court that day and that the process of engrossing the Form C1 and taking it to the Principal Registry had taken longer than expected. Very responsibly and properly she accepted that this was no excuse for her failure to comply with the undertaking and proffered her apologies to the court.

The issues

In these circumstances the first matter which I have to consider is what, if anything, I ought to do in relation to the solicitor's admitted breach of undertaking. The case, however, raises wider issues which is why I have decided to give judgment in open court and to set out the history of the proceedings in some detail. In particular I am anxious to avoid for the future so far as realistically possible a repetition of the situation in which I found myself at the hearing on Tuesday, 17 October 2000 when, without the benefit of any affidavit evidence setting out the father's case, I was faced with the mother's ex parte application to discharge Holman J's order. As the history of this particular case illustrates: (a) because of the way in which urgent business necessarily has to be arranged by the court, there can be no guarantee that a case in which an ex parte injunction has been granted will come back in front of the same judge, even if the second hearing takes place the same week, and it is almost certain that it will come back in front of a different judge if the second or subsequent hearing takes place the following week; and (b) whether or not a return date has been fixed for the inter partes hearing, there is nothing to prevent the respondent (as, for convenience, I shall refer to the person against whom an ex parte injunction has been granted) applying at short notice, or even in emergency without notice, to have the

injunction discharged or varied. These practical points, as it seems to me, need to be borne in mind when considering desirable practice in such cases.

The law

I make no apology for beginning with what I said in *W v H (Family Division: without notice orders)* and *Kelly*'s case.

In *W v H* an ex parte freezing order had been made by Kirkwood J in an ancillary relief case. The order as sealed did not indicate what evidence had been considered by the judge and contained no undertaking in damages. The respondent applied to me to set aside the injunction. Amongst the matters of complaint canvassed before me there were three which I should mention: first, it was said that Kirkwood J's order should be set aside because, so it was said, although in the event I rejected the allegation, it had been obtained in circumstances of non-disclosure and misrepresentation bringing into play what I described as the essentially penal principles set out in *Brink's-MAT Ltd v Elcombe* [1988] 3 All ER 188, [1988] 1 WLR 1350 and *Behbehani v Salem* [1989] 2 All ER 143, [1989] 1 WLR 723. Commenting on that submission I said ([2001] 1 All ER 300 at 316):

> 'Let me make it clear that the salutary principle of public policy set out in the long line of cases, of which the two I have mentioned are only two examples, is a principle as applicable in the Family Division as in any other place. In the Family Division as elsewhere, those who seek relief ex parte are under a duty to make full and frank disclosure of all the material facts. Those who fail in that duty, and those who misrepresent matters to the court, expose themselves to the very real risk of being denied interlocutory relief whether or not they have a good arguable case or even ... a strong prima facie case.'

The burden on those who apply for ex parte relief is, as indicated in *Memory Corporation plc v Sidhu (No 2)* [2000] 1 WLR 1443, a heavy one. And, as the same case shows, the duty of full and frank disclosure is not confined to the material facts: it extends to all relevant matters, whether matters of fact or of law. As Lord Donaldson of Lymington MR said in *Re M and anor (minors) (wardship: freedom of publication)* [1990] 1 All ER 205 at 214, [1990] Fam 211 at 229, it cannot be too strongly emphasised that those who seek ex parte injunctions are under an obligation to make the fullest and most candid disclosure of all relevant circumstances known to them.

Secondly, complaint was made of the fact that, as I have said, Kirkwood J's order did not indicate what evidence had been considered by the judge, with the consequence, as I pointed out in the course of my judgment, that a certain amount of time had to be taken up before me ascertaining what materials Kirkwood J did or did not have access to. In this connection I was pressed with Lightman J's observations in *Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd* (1999) Times, 10 November, in relation to which I said ([2001] 1 All ER 300 at 318):

> 'I am not persuaded that Lightman J's approach can simply be imposed without more ado in the Family Division. The circumstances in which ex parte relief is obtained in the Family Division vary very widely. Moreover ... such relief is often granted in the Family Division in circumstances very far removed indeed from any circumstances in which ex parte relief is ever normally granted in the Chancery Division. For these reasons I do not

propose even to attempt to formulate any rule of practice applicable in all cases: it would be wholly inappropriate to do so. What I can I hope usefully do is to indicate that, generally speaking, I think that: (i) any ex parte order containing injunctions should set out on its face, either by way of recital or in a schedule, a list of all affidavits, witness statements and other evidential materials read by the judge; (ii) the applicant's legal representatives should whenever possible liase with the associate with a view to ensuring that the order as drawn contains this information; (iii) on receipt of the order from the court the applicant's legal representatives should satisfy themselves that the order as drawn correctly sets out the relevant information and, if it does not, take urgent steps to have the order amended under the slip rule; and (iv) the applicant's legal representatives should respond forthwith to any reasonable request from the party injuncted or his legal representatives either for copies of the materials read by the judge or for information about what took place at the hearing. Persons injuncted ex parte are entitled to be given, if they ask, proper information as to what happened at the hearing. At the very least they are entitled to be told, if they ask, (a) exactly what documents, bundles or other evidential materials were lodged with the court either before or during the course of the hearing and (b) what legal authorities were cited to the judge. Given this, it would obviously be prudent for those acting for applicants in such cases to keep a proper note of the proceedings, lest they otherwise find themselves embarrassed by a proper request for information which they are unable to provide.'

Thirdly, complaint was made that, as I have already mentioned, Kirkwood J's order contained no undertaking in damages. This led me to consider in some detail the circumstances in which it is, or is not, appropriate in the Family Division to exact such an undertaking. No such issue arises in the present case so I say nothing more about it.

In *Kelly*'s case a so-called injunction in rem or contra mundum restraining the media had been granted out of hours over the telephone early in the morning by the duty judge, Singer J. The BBC applied to me to set aside the injunction. Again, the order as sealed did not indicate what evidence had been considered by the judge and, as I mentioned in my judgment, it was accordingly not altogether clear to me exactly what materials had been available to Singer J. Having set out the passage from my judgment in *W v H* which I have quoted above I continued ([2001] 1 All ER 323 at 360):

'Having considered what I said in that case, the Official Solicitor has indicated that he can see no reason why exactly the same principles should not apply in cases relating to children, including cases where injunctive relief is sought against third parties or against the world at large. That is my view. Accordingly the principles which I set out in *W v H* should be treated as applying equally to cases relating to children, including cases where injunctive relief is sought against third parties or the world at large.'

That case also highlighted two further points in relation to which I made the following observations (at 360):

'First, there may of course be cases—and the present was just such a case—where the urgency is such that there is no time to prepare comprehensive evidence in proper form. In such a case the court must—and will—act upon the information provided by counsel. But in every such case there should, as it

seems to me, be an undertaking to swear and file an affidavit as soon as possible: see (*Re M and anor (wardship: freedom of publication)* [1990] 1 All ER 205 at 212, [1990] Fam 211 at 226). Even if, for some reason no such undertaking is given, it will normally be appropriate for the appropriate affidavit to be sworn and filed as soon as possible. This is particularly important in cases where an injunction is granted contra mundum restraining freedom of speech. The second point derives from the elementary principle of natural justice, that if one party wishes to place evidence or other persuasive material before the court the other parties must have an opportunity to see that material and to address the court about it. One party may not make secret communications to the court. It follows that it is wrong for a judge to be given material at an ex parte, or without notice, hearing which is not at a later stage revealed to the persons affected by the result of the application. I recognise that, in the context of cases concerning children, that principle is qualified to an extent by the principle considered by the House of Lords in *Official Solicitor to the Supreme Court v K* [1963] 3 All ER 191, [1965] AC 201 and *Re D (minors) (adoption reports: confidentiality)* [1995] 4 All ER 385, [1996] AC 593, but I do not see how anything in those cases can be used as a justification for not making full disclosure to the media of the material on the basis of which an injunction contra mundum has been granted. This may give rose to a practical problem, for very often the material relied upon in support of the application for such an injunction will be contained in affidavits or witness statements filed in the substantive children proceedings which contain a mass of other information which is of no relevance to the application for the injunction, which there is no need for the media or any other third party to see and which it is highly undesirable that they should be allowed to see. That is, however, no reason for denying the media their right—and in my judgment it is their unqualified right—to see the material which has been relied upon against them. If, as will typically be the case, it is not appropriate for the media to see the material in the form in which it was originally filed with the court, the solution is not to deny them what they are plainly entitled to as a matter of natural justice—and what, I might add, they will plainly be entitled to in accordance with art 6 of the Convention once the Human Rights Act 1998 comes into force—but rather to set out the relevant material in a separate affidavit or affidavits which *can* be shown to the media. Such an affidavit should be prepared even if there appears to be no immediate likelihood of there being any application to discharge the injunction. Otherwise there may be uncertainty—perhaps weeks or months later—as to the basis upon which the injunction was granted.'

I see no reason to resile from anything that I said either in *W v H* or in *Kelly's* case. But the unhappy events revealed in the present case prompt an elaboration of certain of the observations which I made in the earlier cases.

The starting point is the elementary principle of natural justice, now of course underpinned by art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), that cases have to be decided solely on the basis of evidence which is known to both parties and that it is therefore not right to give a judge information in an ex parte application which cannot at a later stage be revealed to a party affected by the result of the application: *WEA Records Ltd*

v Visions Channel 4 Ltd [1983] 2 All ER 589, [1983] 1 WLR 721. This is what Hobhouse J (as he then was) referred to in *Pamplin v Express Newspapers Ltd* [1985] 2 All ER 185 at 186, [1985] 1 WLR 689 at 691, as— a

> 'the principle of natural justice which applies wherever legal proceedings involve more than one person, and one party is asking the tribunal for an order which will affect and bind another. Natural justice requires that each party should have an equivalent right to be heard. This means that if one party wishes to place evidence or persuasive material before the tribunal, the other party or parties must have an opportunity to see that material and if he wishes submit counter-material and, in any event, to address the tribunal about the material. One party may not make secret communications to the court.' b c

Even outside the Family Division that principle is subject to certain narrow exceptions: see *Re Murjani (a bankrupt)* [1996] 1 All ER 65, [1996] 1 WLR 1498. Moreover, as I pointed out in *Kelly*'s case, it is also qualified in the context of cases in the Family Division concerning children by the principle considered by the House of Lords in *Official Solicitor v K* [1963] 3 All ER 191, [1965] AC 201 and *Re D (minors) (adoption reports: confidentiality)* [1995] 4 All ER 385, [1996] AC 593. However, none of these exceptions or qualifications is relevant for present purposes so I need say no more about them. d

It will be noted that, as Hobhouse J pointed out, natural justice requires amongst other things that a party adversely affected by an order must have an opportunity to see the material upon which his opponent relies and to address the court about it. This leads on to a second principle, namely that those who obtain ex parte injunctive relief are under an obligation to bring to the attention of the respondent, and at the earliest practicable opportunity, the evidential and other persuasive materials on the basis of which the ex parte injunction was granted. This no doubt is why para 5.1(2) of the practice direction in relation to interim injunctions supplementing Pt 25 of the Civil Procedure Rules 1998 provides that: e f

> 'Any order for an injunction, unless the court orders otherwise, must contain ... if made without notice to any other party, an undertaking by the applicant to the court to serve on the respondent the application notice, evidence in support and any order made as soon as practicable.' g

Furthermore, the example of a freezing injunction which is annexed to that practice direction contains forms of undertaking to be given to the court by the applicant (a) as soon as practicable to issue and serve on the respondent proceedings in the form of the draft produced to the court or, as the case may be, to serve the proceedings on the respondent, together with the order, (b) to cause an affidavit to be sworn and filed substantially in the terms of the draft affidavit produced to the court or, as the case may be, confirming the substance of what was said to the court by the applicant's counsel or solicitors and (c) where a return date has been given, as soon as practicable to serve on the respondent an application for the return date together with a copy of the affidavits and exhibits containing the evidence relied on by the applicant. h j

Now the Civil Procedure Rules as such do not apply to most proceedings in the Family Division, but in this respect, as it seems to me, they reflect not only what is the recognised practice in both the Chancery and Queen's Bench Divisions and the county court but also what ought, generally speaking, to be good practice elsewhere, including in the Family Division. Accordingly, it seems to me that,

generally speaking, it is appropriate when granting ex parte injunctive relief in the Family Division for the court to require the applicant (and, where appropriate, the applicant's solicitors) to give the following undertakings: (a) where proceedings have not yet been issued, to issue and serve on the respondent either by some specified time or as soon as practicable proceedings either in the form of the draft produced to the court or otherwise as may be appropriate; (b) where the application has been made otherwise than on sworn evidence, to cause to be sworn, filed and served on the respondent as soon as practicable an affidavit or affidavits substantially in the terms of the draft affidavit(s) produced to the court or, as the case may be, confirming the substance of what was said to the court by the applicant's counsel or solicitors; and (c) subject to (a) and (b) above, to serve on the respondent as soon as practicable (i) the proceedings, (ii) a sealed copy of the order, (iii) copies of the affidavit(s) and exhibit(s) containing the evidence relied on by the applicant and (iv) notice of the return date including details of the application to be made on the return date.

Although I recognise that, as the orders made not merely in this case but also in *W v H* and in *Kelly*'s case illustrate, this is by no means the settled practice in the Family Division, I do not think there is anything particularly novel in what I am saying. Thus in *Re M and anor (minors) (wardship: freedom of publication)* [1990] 1 All ER 205 at 212, [1990] Fam 211 at 226, Butler-Sloss LJ said (and with respect I entirely agree):

> 'Judges of the Family Division are accustomed to hearing urgent applications at short notice and ex parte on information often presented to them by counsel, where time genuinely does not permit of evidence being provided in time. Applications must in general be supported by affidavit or, on occasions, a draft affidavit with an undertaking to swear as soon as possible. As the judge himself pointed out in his judgment, in an emergency an undertaking to file an affidavit as soon as practicable should be given. But to require evidence on affidavit before urgent applications can be made to the judge would impede an essential part of the judge's function in acting swiftly for the welfare of the children coming before the High Court.'

Even if the court does not itself expressly require such undertakings, it seems to me, as I said in *Kelly*'s case, that it will normally be appropriate none the less for the appropriate affidavit to be sworn and filed as soon as possible. In the light of the circumstances disclosed in the present case I would go further. In my judgment, and whether or not express undertakings to this effect have been given, but subject of course to any order to the contrary, an applicant who obtains ex parte injunctive relief is under an obligation to the court, and the solicitor acting for the applicant is under an obligation both to the court and to his lay client, to carry out the various steps referred to in (a) to (c) above.

Quite apart from all other considerations there is, as the circumstances of the present case so vividly illustrate, a very practical reason why this should be so. As Lord Donaldson of Lymington MR commented in *Re M and anor (minors) (wardship: freedom of publication)* [1990] 1 All ER 205 at 215, [1990] Fam 211 at 229, the judges of the Family Division should always be ready and willing at short notice to consider any application by those affected to withdraw or modify an injunction, for example if, as in the present case, it has been granted, through no fault of the applicant, on a misapprehension of the facts. If, as happened in the present case, the application to discharge comes back to court before these essential steps have been taken the applicant may find himself gravely embarrassed

and possibly prejudiced in his attempt to maintain the ex parte injunction in place, particularly if, as happened in the present case, the application to discharge comes before a different judge who, because there is still no affidavit in support, knows nothing or virtually nothing of the applicant's case but is faced with a respondent putting forward an apparently credible case for discharge of the injunction. A solicitor who exposes his client to this entirely foreseeable and avoidable risk runs the risk of exposing himself in turn to a claim by his lay client.

The final point which requires emphasis is the fundamental principle that undertakings must be complied with. A person who has given an undertaking to the court is under a plain and unqualified obligation to comply to the letter with his undertaking. Where, as in the present case, the undertaking is to do something by a specified time, then time is of the essence. An undertaking to do something, as here, by 4 pm on Friday, is an undertaking to do that thing by 4 pm on Friday, not by 4.21 pm on Friday let alone by 3.01 pm the following Monday. A person who finds himself unable to comply timeously with his undertaking should apply for an extension of time before the time for compliance has expired. It is simply not acceptable to put forward—least of all for a solicitor to put forward—as an explanation for non-compliance with an undertaking the burden of other work. If the time allowed for compliance with an undertaking turns out to be inadequate the remedy is either to apply to the court for an extension of time or to pass the task to someone who has available the time in which to do it.

Without in any way seeking to water down the absolute obligation to comply with *any* undertaking given to the court, I should add that the court is likely to view with the very gravest concern any failure to comply with an undertaking given in connection with the grant of ex parte freezing (Mareva) or search (Anton Piller) orders or ex parte orders invoking the assistance of the Tipstaff in searching for or safeguarding missing children. The court does not hesitate to call for the assistance of the Tipstaff in such cases and to arm him with all appropriate powers. Typically, as in the present case, the Tipstaff is empowered to arrest an obstructive respondent. In appropriate cases he may be empowered to seize a child for the purpose of taking him to a place of safety. In appropriate cases he may even be empowered to enter private property, if need be using force, for the purpose of searching for a missing child and, if the child cannot be found, removing and taking into custody anything which may throw light on the missing child's whereabouts. When draconian powers of this kind are invoked it is absolutely imperative that the court should be confident that undertakings which it has taken from those invoking its powers will be meticulously complied with.

Summary

I can therefore summarise the relevant legal principles and the practice which in my judgment should be followed in the Family Division on applications for ex parte injunctions as follows.

(1) The circumstances in which ex parte relief is obtained in the Family Division vary very widely. What follows is not intended to be treated as a set of inflexible rules. In this area of practice, particularly in the Family Division, there can be no rigid rules. Circumstances alter cases and, in the final analysis, every case must be considered on its own facts.

(2) That said, generally speaking the following practice should be adopted both in ancillary relief cases and in cases relating to children, including cases where injunctive relief is sought against third parties or the world at large.

(3) This is subject to the need to recognise that in cases involving a child the court may have to act swiftly and decisively in order to safeguard the child's welfare.

(4) Those who seek relief ex parte are under a duty to make the fullest and most candid and frank disclosure of all the relevant circumstances known to them. This duty is not confined to the material facts: it extends to all relevant matters, whether of fact or of law. The principle is as applicable in the Family Division as elsewhere. Those who fail in this duty, and those who misrepresent matters to the court, expose themselves to the very real risk of being denied interlocutory relief whether or not they have a good arguable case or even a strong prima facie case.

(5) It is an elementary principle of natural justice that a judge cannot be shown evidence or other persuasive material in an ex parte application on the basis that it is not at a later stage to be revealed to the respondent. The respondent must have an opportunity to see the material which was deployed against him at the ex parte hearing and an opportunity, if he wishes to apply for the discharge or variation of the injunction either on the return day or earlier, to submit evidence in answer and, in any event, to make submissions about the applicant's evidence.

(6) It follows that those who obtain ex parte injunctive relief are under an obligation to bring to the attention of the respondent, and at the earliest practicable opportunity, the evidential and other persuasive materials on the basis of which the ex parte injunction was granted.

(7) Accordingly, generally speaking it is appropriate when granting ex parte injunctive relief in the Family Division for the court to require the applicant (and, where appropriate, the applicant's solicitors) to give the following undertakings: (a) where proceedings have not yet been issued, to issue and serve on the respondent either by some specified time or as soon as practicable proceedings either in the form of the draft produced to the court or otherwise as may be appropriate; (b) where the application has been made otherwise than on sworn evidence, to cause to be sworn, filed and served on the respondent as soon as practicable an affidavit or affidavits substantially in the terms of the draft affidavit(s) produced to the court or, as the case may be, confirming the substance of what was said to the court by the applicant's counsel or solicitors; and (c) subject to (a) and (b) above, to serve on the respondent as soon as practicable (i) the proceedings, (ii) a sealed copy of the order, (iii) copies of the affidavit(s) and exhibit(s) containing the evidence relied on by the applicant and (iv) notice of the return date including details of the application to be made on the return date.

(8) A person who has given an undertaking to the court is under a plain and unqualified obligation to comply to the letter with his undertaking. Where the undertaking is to do something by a specified time, then time is of the essence. A person who finds himself unable to comply timeously with his undertaking should either (i) apply for an extension of time before the time for compliance has expired or (ii) pass the task to someone who has available the time in which to do it.

(9) Whether or not express undertakings to this effect have been given, but subject to any order to the contrary, an applicant who obtains ex parte injunctive relief is under an obligation to the court, and the solicitor acting for the applicant is under an obligation both to the court and to his lay client, to carry out the various steps referred to in (7) above.

(10) Any ex parte order containing injunctions should set out on its face, either by way of recital or in a schedule, a list of all affidavits, witness statements and other evidential materials read by the judge. The applicant's legal representatives

should whenever possible liase with the associate with a view to ensuring that the order as drawn contains this information. On receipt of the order from the court the applicant's legal representatives should satisfy themselves that the order as drawn correctly sets out the relevant information and, if it does not, take urgent steps to have the order amended under the slip rule.

(11) Persons injuncted ex parte are entitled to be given, if they ask, proper information as to what happened at the hearing and to be told, if they ask, (i) exactly what documents, bundles or other evidential materials were lodged with the court either before or during the course of the hearing and (ii) what legal authorities were cited to the judge.

(12) The applicant's legal representatives should respond forthwith to any reasonable request from the respondent or his legal representatives either for copies of the materials read by the judge or for information about what took place at the hearing.

(13) Given this, it would be prudent for those acting for the applicant in such a case to keep a proper note of the proceedings, lest they otherwise find themselves embarrassed by a proper request for information which they are unable to provide.

Conclusions

I return to the facts of the present case.

As I have already said, I do not in any way blame the father who appears to have acted in an entirely understandable way and with complete propriety.

I should also like to make it clear that counsel (that is, both counsel who appeared before Johnson J on 13 October 2000 and again before me on 20 October 2000 and counsel who appeared before me on 17 October 2000) have acted throughout this unhappy matter with complete propriety. They are not in any way to blame for what has happened.

In fairness to her I should also make it clear that the solicitor acted with complete propriety down to the point at which she obtained the ex parte order from Holman J. In particular I should make it absolutely clear that I have no criticism at all of the manner in which she presented the case to Holman J. What went wrong was thereafter: first, the solicitor's failure to comply with her undertaking and, secondly, what does seem to me to have been the most unfortunate fact that the mother was not served with the proceedings until 8 pm on Tuesday, 17 October 2000 and that the affidavit evidence in support of the father's case was so long in the preparation that it was not available when the mother applied on Tuesday, 17 October 2000 to discharge the ex parte order made on Thursday, 12 October 2000 and, indeed, was not sworn until Thursday, 19 October 2000.

So far as concerns the breach of the undertaking I have already set out the explanations—which I accept—put forward by and on behalf of the solicitor. Although any breach by a solicitor of such an undertaking is a serious matter, I can, and in my judgement should, take a lenient view in this case. First, I am quite satisfied that the solicitor's failure to comply with her undertaking was not intentional or reckless and that she was doing her best to meet the deadline imposed by Holman J. It is obviously unfortunate that initially she issued the wrong form of process but this was, I am sure, an understandable slip on her part and not, as it seems to me, indicative of any conscious lack of care or attention on her part. Moreover, in all the circumstances, the fact that she was 21 minutes late in getting to the court office can, I think, properly be regarded as de minimis.

Furthermore, she has responsibly and frankly accepted that she has no excuse for her failure and has proffered her apologies. I wish to emphasise, however, that it is only the combination of these three factors which has persuaded me to this view. In particular, the mere fact that the delay in complying with an undertaking may be de minimis—even as little as 21 minutes—is not, of itself, any reason why a severe view should not be taken. Time, as I have said, is of the essence of such undertakings. Furthermore, apologies, however sincere and humble, will not of themselves always suffice to call forth the exercise of judicial mercy.

So far as concerns the delay in serving the mother and preparing the father's evidence, this was, as I have said, most unfortunate. In the solicitor's defence it needs to be recognised, however, that this did not involve her in breach of any undertaking, for none had been required of her in this regard, and that she, as I suspect others, may not have been so aware of her obligations as I hope the profession will be after having had the opportunity to study this judgment.

In all the circumstances I am satisfied that there is no need for me to take any further action of any kind in respect of the solicitor. Moreover, although I am giving this judgment in open court, I think it would in all the circumstances be unduly harsh to identify her.

It was for these reasons that, as I indicated to her at the end of the hearing on Friday, 20 October 2000, I do not propose to take matters further and see no reason why she should be named in this judgment or otherwise identified.

Celia Fox Barrister

Re Howglen Ltd

CHANCERY DIVISION

PUMFREY J

23 FEBRUARY 2000

Evidence – Bankers' books – Records of meetings – Whether records of meetings constituting bankers' books for purposes of disclosure – Bankers' Books Evidence Act 1879, s 9(2).

Discovery – Discovery against persons not parties to proceedings – Classes of documents – Principles governing applications for discovery against non-party in respect of classes of documents – CPR 31.17.

The Secretary of State brought disqualification proceedings against R, a director of H Ltd. On an application by R during the course of those proceedings, the registrar ordered the appellant bank, a non-party, to disclose various classes of documents, including notes of interviews between R and the manager of one of the bank's branches over a specified period, all internal memoranda kept or made by the manager during the same period, and all notes kept by the manager of interviews or conversations between himself and a firm of accountants relating to H Ltd over a certain period. The disclosure order was made under the Bankers' Books Evidence Act 1879 which provided, in s 9(2)[a], that 'bankers' books' included ledgers, day books, cash books, account books 'and other records used in the ordinary business of the bank'. On the bank's application to have the order set aside or varied, the court was required to determine whether the classes of documents sought by R could constitute 'other records' within the meaning of s 9(2) of the 1879 Act and, if not, whether it would be appropriate to order disclosure of any documents under CPR 31.17[b], the rule governing disclosure by a person who was not a party to the proceedings. Under r 31.17(3), such disclosure could be ordered only where the documents whose disclosure was sought were likely to support the applicant's case or adversely affect the case of another party to the proceedings, and disclosure was necessary to dispose fairly of the claim or save costs.

Held – (1) On the true construction of s 9(2) of the 1879 Act, the words 'other records' were not apt to cover records kept by a bank of conversations between its employees, however senior, and its customers. Rather, they covered records of the same kind as ledgers, day books, cash books and account books, which were the means by which a bank recorded day-to-day financial transactions. In the instant case, the records sought were essentially records of meetings. As such, they could not be properly regarded as entries in books kept by a bank for the purpose of its ordinary business within the definition in s 9(2). Accordingly, the registrar had not been entitled to order disclosure of those classes of documents under the 1879 Act (see p 380 *f* and p 381 *j* to p 382 *a*, post); *Williams v Williams, Tucker v Williams* [1987] 3 All ER 257 applied.

a Section 9(2) is set out at p 380 *h*, post

b Rule 31.17, so far as material, is set out at p 382 *d e*, post

(2) Where the court made an order under CPR 31.17 requiring a non-party to disclose a class of documents, it had to be satisfied that all the documents falling within the class satisfied the requirements of r 31.17(3) and that the documents did in fact exist. In such a case, it was not appropriate to leave the non-party, who had no access either to the pleadings or to such evidence as there might be, to determine whether or not they satisfied those requirements. Nor was it right to send him off on a search before he could satisfy himself that the documents did not exist. Rather, the court had to be satisfied (i) that there were documents falling within the specified classes, and (ii) that those documents were—not might be—documents whose disclosure would support the case of the applicant or adversely affect the case of another party to the proceedings. In the instant case, the classes of documents set out in the registrar's order were far too wide for an order under r 31.17. Accordingly, disclosure would be ordered only in respect of the records of three clearly identified meetings between R and the bank manager (see p 382 *h* to p 383 *d h*, post).

Notes

For the disclosure of bankers' books in evidence, see 3(1) *Halsbury's Laws* (4th edn reissue) paras 237–238.

For the Bankers' Books Evidence Act 1879, s 9, see 17 *Halsbury's Statutes* (4th edn) (1999 reissue) 141.

Cases referred to in judgment

Panayiotou v Sony Music Entertainment (UK) Ltd [1994] 1 All ER 755, [1994] Ch 142, [1994] 2 WLR 241.

R v Dadson (1983) 77 Cr App R 91, CA.

Williams v Williams, Tucker v Williams [1987] 3 All ER 257, [1988] QB 161, [1987] 3 WLR 790, CA.

Cases also cited or referred to in skeleton arguments

Barker v Wilson [1980] 2 All ER 81, [1980] 1 WLR 884, DC.

Deniz (DB) Nakliyati TAS v Yugopetrol [1992] 1 All ER 205, [1992] 1 WLR 437, CA.

Dunning v Board of Governors of the United Liverpool Hospitals [1973] 2 All ER 454, [1973] 1 WLR 586, CA.

Munkenbeck & Marshall (a firm) v McAlpine (1995) 44 Con LR 30, CA.

Parnell v Wood [1892] P 137, CA.

Pollock v Garle [1898] 1 Ch 1, CA.

Smith, Re, Williams v Frere [1891] 1 Ch 323.

South Staffordshire Tramways Co v Ebbsmith [1895] 2 QB 669, CA.

Application

By application dated 19 January 2000, HSBC Bank plc applied to set aside the order of Mr Registrar Rawson dated 4 October 1999, made on the application of the respondent, Christopher Paul Reynard, requiring the bank to disclose, under the Bankers' Books Evidence Act 1879, five classes of documents allegedly relevant in directors' disqualification proceedings brought by the Secretary of State for Trade and Industry against Mr Reynard. The facts are set out in the judgment.

Nigel Dougherty (instructed by *Norton Rose*) for the bank.

Ian McCulloch and *Caroline Bolton* (instructed by *Coles Milller*, Poole, agent for *Andrew Isaacs*, Bournemouth) for Mr Reynard.

PUMFREY J. This is an application by HSBC Bank plc (the bank) to set aside or vary an order made by Mr Registrar Rawson under the Bankers' Books Evidence Act 1879. The order was made in the context of proceedings under the Company Directors Disqualification Act 1986 which have been brought by the Secretary of State against Christopher Paul Reynard at whose application Mr Registrar Rawson made his order. Mr Reynard was the sole director of a company called Howglen Ltd, which traded in the provision of adventure holiday services for children and young people among others. The application under the 1986 Act is made pursuant to a notification to the Secretary of State by the administrative receivers appointed by the bank under a debenture. The appointment took place in early 1996.

In support of the Secretary of State's application, an affidavit has been sworn by one of the administrative receivers, Mr Peter Brian Buckle, setting out the heads by reference to which it is contended that Mr Reynard is unfit to be involved in the management of a company. The heads are as follows:

(a) that he caused and allowed the company to continue trading when creditors' claims were not being met as and when due;

(b) that he failed to ensure that the company provided holidays which had been paid for in advance;

(c) that he caused and allowed company monies to be misused;

(d) that he caused and allowed a company vehicle to be misappropriated;

(e) that he was in breach of his fiduciary duty to both the company and to its creditors;

(f) that he drew excessive remuneration and benefits from the company;

(g) that he failed properly to deal with income tax affairs;

(h) that he failed to ensure that the company complied with ss 221 and 222 of the Companies Act 1985 by failing to maintain adequate accounting records;

(i) that he caused and allowed the company to be in breach of trading standards legislation;

(j) that he caused and allowed the company to be in breach of health and safety requirements; and

(k) finally, that he failed fully to co-operate with the administrative receivers in the administrative receivership as required by s 235 of the Insolvency Act 1986.

The application to Mr Registrar Rawson was made under the 1879 Act for certain classes of documents, and the learned registrar made an order under the 1879 Act for the following classes of documents to be produced by the bank under that Act. (1) All notes of interviews between the branch manager of the bank and Christopher Paul Reynard concerning the bank account of the company and/or its conduct between 1 January 1995 and 18 January 1996—I add that 18 January 1996 was the date on which the company ceased to trade. (2) All internal memoranda kept by or made by the said manager for the said period. (3) All notes kept by the said manager for the said period of interviews or conversations between himself and Cooper and Lybrand relating to the affairs of the said company for the period between 1 September 1996 and the date of commencement of disqualification proceedings—I should add that the date of commencement of disqualification proceedings was 14 January 1998, and Mr McCulloch, who appears on behalf of Mr Reynard, disclaimed any desire to see any documents after 18 January 1996. (4) The like entries made by Mr Bob Dawe as in (1)–(3) above for the same period at the office of the central lending services of the bank. (5) The like entries and records kept at the central lending services by any of the

officials of the bank thereat during the period mentioned. Mr Bob Dawe is the man who became the branch manager for the company at the beginning of 1995.

The bank, who appear before me today by Mr Dougherty, object that this is an order which cannot properly be made under the 1879 Act. Secondly, the bank says that although it is willing to produce properly identified documents, it is not prepared to undertake a general discovery exercise and the classes of documents which are set out in Mr Registrar Rawson's order would be objectionable either as a class of documents to be produced pursuant to a witness summons to produce documents under CPR 34.2 or alternatively would be classes which are too wide to be the subject matter of an order for disclosure against a person not a party under CPR 31.17. Part of the discussion before me today has been directed to investigating the degree of overlap between these two provisions of the CPR.

Before turning to the statutory provisions and to the provisions of the rules, however, I think it is convenient to find out why it is Mr Reynard thinks he needs the documents and what documents he has identified as existing. In support of the application to Mr Registrar Rawson, Mr Reynard's solicitor, Mr Senior, swore an affidavit. Having referred to the affidavits in support of the Secretary of State's application, Mr Senior says that the complaints relevant to the present application under the 1879 Act relate to grounds (a), (c) and (f) of the grounds set out in Mr Buckle's affidavit to which I have already referred. Mr Senior continues: 'Mr Reynard denies these allegations in his affidavit sworn on 23rd of June 1998' and that is certainly true, and Mr Senior says:

> 'He also alleges, and these are my firm's instructions, that this application for his disqualification is malicious and that the bankers to the company, then known as Midland Bank plc, had no need to appoint receivers over its undertaking.'

Mr Senior continues:

> 'Thus these issues *inter alia* will arise in the application for disqualification. The evidence and documents sought from the bank on the present application are relevant to these issues, in particular to the appointment of the receivers and the knowledge of Mr Reynard as to the financial state of the company, and the support it could or could not expect from the bank in the circumstances in which it traded in the year 1995.'

Mr Senior then deposes that the evidence from the bank's records being the only, as he puts it, independent evidence of the history of the matter, makes it necessary that Mr Reynard be given facilities to inspect the documents and entries which are set out.

In relation to each of the grounds (a), (c) and (f), in the end it was accepted by Mr McCulloch, in my judgment absolutely rightly, that grounds (c) and (f) were not really capable of supporting an application for disclosure on any orthodox basis. I can therefore concentrate upon ground (a) as it is set out in Mr Buckle's affidavit, and this ground is simply a complaint of trading while insolvent. Mr Buckle refers to paras 21–40 of his affidavit as supporting this allegation. The paras 21–36 do not seem to me to have anything to do with the activities of the bank at all, and paras 37–40 all refer to the activities of the bank.

So it is said in para 37 that Mr Reynard met with a branch manager of Midland Bank, Mr Dawe, on 18 October 1995 at which it would seem, as Mr Buckle alleges, that Mr Reynard was told that the company was insolvent. In para 38 he refers

to a letter of 25 November 1996 written by one Mr Sargent, the then accountant to the company, which confirms, as Mr Buckle alleges, that the subject of insolvency had been raised by Mr Dawe, the then bank manager, and that Mr Reynard had been advised to review his current position in regard to his responsibilities as a director. Mr Buckle deposes that notwithstanding the meeting of 18 October 1995 and the other indicators of the company's financial difficulties, the company continued to trade, incur credit and receive deposits from creditors until January 1996. Indeed, he says, a schedule of deposit creditors at the date of his appointment shows deposits being accepted both on and after 18 October 1995 totalling something in excess of £150,000. Mr Buckle then refers to cashflow difficulties in the company and concludes this section of his affidavit by saying that:

> 'Further and in spite of these difficulties Mr Reynard caused and allowed the company to continue to take deposits from creditors, even after a meeting with the company's accountant and bank manager at which he was given advice on the financial state of the company, and given the Respondent's conduct in this manner he caused the company to trade at the risk of its creditors.'

Mr Reynard's answer to this is that not only did he not believe that the company was insolvent but that he believed he was trading at the material times if not with the active encouragement of the bank at least with the knowledge of the bank and without any warning as to the consequences of trading whilst insolvent. That is not a matter upon which I can make any comment at all.

It seems to me clear, however, that in the context of disqualification proceedings it is important that the respondent be given a proper opportunity to defend himself. It seems therefore to me as a matter of principle that it is desirable that relevant documents, wherever they may be, that are relevant to the case, be made available.

The real objection of the bank in the present case, as I have said, is that no such order as has been made could conceivably be made under the 1879 Act. With this contention I agree. My reasons are as follows. As is well known, by s 3 of the 1879 Act the copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of the entry, and of the matters, transactions and accounts therein recorded. The proof of the entry is an entry which is given either orally or by an affidavit and the copy can be verified in a similar manner. In the case of a banker's book, no subpoena duces tecum or like order can be made by virtue of the provisions of s 6 of the 1879 Act, and the definition of banker's book is provided by s 9(2) of that Act as follows:

> 'Expressions in this Act relating to "bankers' books" include ledgers, day books, cash books, account books and other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism.'

The more modern words having been added by amendment, I believe, most recently in the Banking Act 1979.

It is plain that none of the classes of documents in the order made by Mr Registrar Rawson include copies of entries in ledgers, day books, cash books, account books, and I am therefore concerned only with the meaning of the words 'other records used in the ordinary business of the bank' in its context in s 9(2) of

the 1879 Act. If the matter were free from authority, I should be inclined to the view that these words should be construed restrictively. It seems to me clear that the purpose of the statute is to provide a convenient mode of proof for documents inherently probative of particular facts, and for this purpose one can refer to ss 3, 4 and 5 of the 1879 Act. However, the matter is not free from authority.

In *R v Dadson* (1983) 77 Cr App R 91 the question arose whether letters in a bank's correspondence file were bankers' books within the definition of s 9(2) of the 1879 Act. In the judgment of the Criminal Division of the Court of Appeal Heilbron J said (at 93–94):

> 'Whilst the Bankers' Books Evidence Act enables evidence to be admissible in a court by the production of copies, rather than originals, it does so provided only that the book, one of the types referred to in that section, is one of the ordinary books of the bank, and the entry was made in the ordinary course of banking business. It is therefore manifest that these letters could not be brought within the clearly expressed language of that Act. They are not "bankers' books" and in the judgment of this Court they should not have been admitted. Furthermore, the emphatic references to those letters in the summing-up, were in effect an invitation to the jury, if they were so minded, to rely upon them as material evidence to prove that the appellant knew that he was not allowed to have an overdraft, and so to infer that he falsely and dishonestly represented that he was authorised and entitled to use the cheque card when issuing the various cheques and in our judgment they were misdirections, and the verdicts cannot stand.'

In *Williams v Williams, Tucker v Williams* [1987] 3 All ER 257, [1988] QB 161 Sir John Donaldson MR was confronted with the problem of a request for paid cheques and credit slips relating to specified accounts with a named bank. In his judgment, with which Parker LJ and Sir George Waller agreed, having reviewed the history of the 1879 Act and its amendment, he said this, after dealing with the bank in question's policy in relation to the retention of cheques and paying-in slips:

> 'In this situation counsel appearing for [the applicant] has to submit, and does submit, that the bundles of cheques and paying-in slips constitute bankers' books within the modern definition and that adding each cheque or paying-in slip to the bundle constitutes making an entry in those books. Whilst I would be prepared to accept that the cheques constitute part of the bank's records used in the ordinary business of the bank ... I am quite unable to accept that adding an individual cheque or paying-in slip can be regarded as making an "entry" in those records. Putting the matter in another way, "other records" in the new definition has, I think, to be construed ejusdem generis with "ledgers, day books, cash books [and] account books" and unsorted bundles of cheques and paying-in slips are not "other records" within the meaning of the Act.' (See [1987] 3 All ER 257 at 261, [1988] QB 161 at 168.)

I take this case as clear authority that the words 'other records' have to be construed to cover records of the same kind as ledgers, day books, cash books and account books, which are, as is well known, the means by which a bank records day-to-day financial transactions. The words are not, it seems to me, apt to cover records kept by the bank of conversations between employees of the bank, however senior, and customers. The records in the present case are essentially

the records of meetings, and it seems to me that those sort of notes of meetings cannot be properly regarded as entries in books kept by the bank for the purpose of its ordinary business within the definition of s 9(2) of the 1879 Act.

Accordingly, I have come to the conclusion that the order which was made by Mr Registrar Rawson was not an order which could have been made correctly in relation to these classes of documents under the 1879 Act as amended. However, I will not leave the matter here. Since the respondent is present, and since it is plain that the bank are willing to produce documents which are clearly identified, it seems to me that it is necessary to review the state of the evidence as it presently stands and to see what documents can be identified which, falling within the classes of Mr Registrar Rawson's order, it would be right to order the disclosure of under CPR 31.17. I am going to leave the question of the effect of CPR 34.2 to the end of this judgment.

CPR 31.17 provides for disclosure by a person who is not a party to the proceedings. It says an application for an order for such disclosure must be supported by evidence and by para 31.17(3):

> 'The court may make an order under this rule only where—(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.'

And by para 31.17(4):

> 'An order under this rule must—(a) specify the documents or the classes of documents which the respondent must disclose; and (b) require the respondent, when making disclosure, to specify any of those documents—(i) which are no longer in his control; or (ii) in respect of which he claims a right or duty to withhold inspection.'

Paragraph 31.17(5) deals with whether the respondent is also to state what happened to any of the documents no longer under his control and make provision for inspection.

Before looking at this provision in any more detail, it should also be noted that under CPR 48.1(2), which deals with costs in special cases, where an order is sought under s 34 of the Supreme Court Act 1981, which an order for discovery against a non-party is, then the general rule is that the court will award the person against whom the order is sought his costs of the application and of complying with an order made on the application.

It seems to me that, notwithstanding the provision as to costs, the jurisdiction to make an order against a non-party must be exercised with some caution. There is no doubt that an order in respect of specific documents presents no difficulties. However, in respect of a request for a class of documents it seems to me that notwithstanding the provision which I have read relating to the costs of the application and of compliance with any order made pursuant to it, it is none the less necessary to be satisfied that there are documents falling within the classes which are specified and those documents are—not may be—documents in relation to which disclosure will support the case of the applicant or adversely affect the case of one of the other parties to the proceedings.

It does not seem to me to be right in the case of a non-party to impose the additional duty of satisfying itself as to those matters when it has no access either to the pleadings in a case or to such evidence as there may be. In other words,

where the court makes an order for disclosure of a class of documents against a non-party under CPR 31.17 the court must be satisfied that all the documents falling within the class are documents which satisfy the requirements of para 31.17(3). It is not appropriate to leave the non-party with the duty of making up its mind whether they do or not.

Equally, it seems to me that the court must be satisfied that the documents do in fact exist, since it is not right to send the non-party off on a search before it can satisfy itself that no such documents do in fact exist.

In the present case, three occasions have been identified, looking at the evidence as a whole, in which it is clear that Mr Reynard was in contact with his local manager, who was probably Mr Dawe but may not have been. These occasions are, first, some date in July 1995, secondly, the 18 October 1995 meeting which is referred to in Mr Buckle's affidavit, and thirdly, the Friday before 20 November 1995, a date which can be ascertained by reference from a letter from Mr Dawe to Mr Reynard, exhibited to Mr Reynard's second affidavit in the proceedings. It seems to me that it is plain that the bank will have a record of each of those individual meetings. It seems to me plain that the bank ought to produce it. I am satisfied that to that extent at least an order for disclosure against the bank ought to be made.

However, I am equally satisfied that each of the classes of documents set out in the order of Mr Registrar Rawson is far too wide for an order under CPR 31.17. So far as the first class is concerned, other than the meetings to which I have referred, there is no evidence of there ever having been any other interview. The second class is all internal memoranda kept or made by the manager for the said period. That seems to me to be too wide. On the face of it, it relates to irrelevant matters, and is secondly a class of which it cannot be said with any certainty whether the documents either adversely affect the case of one of the parties to the proceedings or are likely to support the case of the applicant. It is therefore a class which is too wide under CPR 31.17 and is not an order which should be made.

The third class—all notes kept by the manager for the said period of interviews or conversations between him and Coopers and Lybrand relating to the affairs of the company—seem simply to fail again to satisfy the requirements of para 31.17(3). It cannot be said that either these documents support Mr Reynard's case or adversely affect the case of the Secretary of State. Such a class of documents is plainly a fishing class and is too wide.

The fourth class I do not need to deal with since the order was made upon the assumption that there was more than one bank manager than Mr Dawe. The fifth is a very wide class—like entries and records kept at the central lending services of the bank during the period mentioned—and for the same reason as I have given in relation to the other classes, it is too wide, does not satisfy the requirements of para 31.17(3) and is not an order which should be made. I come to the conclusion therefore that, whatever the outcome of the application under the 1879 Act, only the documents I have identified should be disclosed.

I now turn briefly to the question of a witness summons requiring the witness to produce documents. Such a summons is issued under CPR 34.2. It appears at first sight to be a summons which is to all intents and purposes the same as a subpoena duces tecum. It is made clear by the judgment of Sir Donald Nicholls V-C, as he then was, in *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] 1 All ER 755, [1994] Ch 142, that no order will be made in relation to a subpoena which involves the witness in an unduly burdensome effort in obtaining documents. Generally speaking, the principles applicable to a subpoena duces

tecum are the same, as I understand it, as those applicable to letters of request to a foreign court, and would be limited to specific identified documents. Accordingly, the provision of CPR 34.2 is probably narrower in its scope than the provisions relating to discovery against non-parties. a

Indeed, it is not clear to me in the light of provisions relating to discovery by non-parties why a summons under CPR 34.2 for the production of documents should be made, the more so since it is likely, as I understand it, that a witness attending under CPR 34.2 is likely only to obtain conduct money and his expenses and will not obtain an order for costs corresponding to the order for costs which will be obtained under CPR 48.1 to which I have referred. b

In fact the specific documents which I have identified would be suitable for an order either under CPR 31.17 or under CPR 34.2 but in my judgment it is preferable the order be made under CPR 31.17, which is what I propose to do. Accordingly, this application succeeds to the extent which I have mentioned, and there will be an order for disclosure of the specific documents which I have identified against the bank unless the bank will give an undertaking to produce them within a brief period. c

Order accordingly.

Celia Fox Barrister.

Birmingham City Council v Oakley

HOUSE OF LORDS

LORD SLYNN OF HADLEY, LORD STEYN, LORD HOFFMANN, LORD CLYDE AND LORD MILLETT

26 JUNE, 29 NOVEMBER 2000

Nuisance – Statutory nuisance – Premises in such a state as to be prejudicial to health – Lavatory in tenant's house lacking washbasin – Lavatory users having to wash hands in kitchen sink or go through kitchen to bathroom – Tenant bringing proceedings for statutory nuisance against landlord – Whether layout or lack of facility capable in themselves of rendering premises in such a state as to be prejudicial to health – Environmental Protection Act 1990, s 79(1)(a).

O and his wife were tenants of a house owned by the appellant local authority. Although the house's lavatory was in perfect working order, it had no washbasin and there was not enough space to install one. Anyone using the lavatory had to wash their hands in the kitchen sink or go through the kitchen to use the basin in the bathroom. As a result, it was difficult to ensure that the couple's children did not contaminate food. O brought proceedings against the authority for failure to abate a statutory nuisance, contending that the premises were 'in such a state as to be prejudicial to health' within the meaning of s 79(1)(a)[a] of the Environmental Protection Act 1990. That provision could be traced back, via various statutory reenactments, to mid-nineteenth century legislation dealing with the filthy or unwholesome condition of a building, the accumulation of offensive or noxious matter or the existence of a foul or offensive drain or privy. The magistrates upheld O's complaint, and ordered the lavatory to be moved to the bathroom. Their decision was affirmed by the Divisional Court which held that s 79(1)(a) applied where the way in which the premises were used was a direct result of their layout and that use was predictably so unhygienic as to create a health risk. The authority appealed to the House of Lords.

Held – (Lord Steyn and Lord Clyde dissenting) On the true construction of s 79(1)(a) of the 1990 Act, premises were not in such a state as to be prejudicial to health merely because they lacked a facility which would enable the occupants to avoid a risk to health, or because the layout of the premises rendered such a facility not readily accessible. A conclusion to the contrary would constitute an illegitimate extension of the meaning of that provision which had to be construed in the light of its legislative history. Like the earlier provisions, s 79 was designed to provide a means for the summary removal of noxious matters which were in themselves prejudicial to health. Thus the arrangement of rooms which were not in themselves insanitary so as to be prejudicial to health fell outside the scope of s 79(1)(a). In the instant case, there was nothing in the premises themselves which was prejudicial to health. Rather, the prejudice to health resulted from the failure to wash hands or the use of the sink or the basin after access through the kitchen. Accordingly, the appeal would be allowed (see p 392 *c* to p 393 *b*, p 395 *h* to p 396 *a j*, p 397 *c*, p 401 *d e j* to p 402 *a c*, post).

Ex p Saunders (1883) 11 QBD 191 distinguished.

Southwark London Borough v Ince (1989) 21 HLR 504 doubted.

a Section 79, so far as material, is set out at p 387 *a*, post

Notes

For matters constituting statutory nuisances, see 34 *Halsbury's Laws* (4th edn reissue) para 15.

For the Environmental Protection Act 1990, s 79, see 35 *Halsbury's Statutes* (4th edn) (1998 reissue) 850.

Cases referred to in opinions

Birmingham DC v Kelly (1985) 17 HLR 572, DC.
Coventry City Council v Cartwright [1975] 2 All ER 99, [1975] 1 WLR 845, DC.
Coventry City Council v Doyle [1981] 2 All ER 184, [1981] 1 WLR 1325, DC.
Dover DC v Farrar (1980) 2 HLR 32, DC.
Goodes v East Sussex CC [2000] 3 All ER 603, [2000] 1 WLR 1356, HL.
Greater London Council v London Borough of Tower Hamlets (1983) 15 HLR 54, DC.
Nottingham Corp v Newton [1974] 2 All ER 760, [1974] 1 WLR 923, DC.
R v Bristol City Council, ex p Everett [1999] 2 All ER 193, [1999] 1 WLR 1170, CA; *affg* [1998] 3 All ER 603, [1999] 1 WLR 92.
R v Ireland, R v Burstow [1997] 4 All ER 225, [1998] AC 147, [1997] 3 WLR 534, HL.
R v Parlby (1889) 22 QBD 520, DC.
R v Wheatley, ex p Cowburn (1885) 16 QBD 34, DC.
Salford City Council v McNally [1975] 2 All ER 860, [1976] AC 379, [1975] 3 WLR 87, HL.
Saunders, ex p (1883) 11 QBD 191.
Southwark London BC v Mills [1999] 4 All ER 449, [1999] 3 WLR 939, HL.
Southwark London Borough v Ince (1989) 21 HLR 504, DC.
Whitchurch, ex p (1881) 6 QBD 545.

Appeal

Birmingham City Council, the landlord of residential premises at 40 Hunslett Road, Quinton, Birmingham, appealed with permission of the Appeal Committee of the House of Lords given on 20 July 1999 from the order of the Divisional Court of the Queen's Bench Division (Simon Brown LJ and Astill J) on 18 December 1998 dismissing its appeal by way of case stated from the decision of the West Midlands justices sitting at Birmingham on 24 April 1998 upholding a complaint by the respondent tenant, John Oakley, that the premises were in such a state as to be prejudicial to health for the purposes of s 79(1)(a) of the Environmental Protection Act 1990 and accordingly a statutory nuisance. The Divisional Court certified that a point of law of general public importance was involved in its decision, set out at p 388 *b*, post. The facts are set out in the opinion of Lord Slynn of Hadley.

Timothy Straker QC and *James Findlay* (instructed by *Sharpe Pritchard*, agents for *Mirza Ahnad*, Birmingham) for the council.

Michael Supperstone QC and *John Stenhouse* (instructed by *McGrath & Co*, Birmingham) for Mr Oakley.

Their Lordships took time for consideration.

29 November 2000. The following opinions were delivered.

LORD SLYNN OF HADLEY. My Lords, s 79 in Pt III of the Environmental Protection Act 1990 provides:

a '*Statutory nuisances and inspections therefor.*—(1) ... the following matters constitute "statutory nuisances" for the purposes of this Part, that is to say—(a) any premises in such a state as to be prejudicial to health or a nuisance ...

(7) ... "prejudicial to health" means injurious, or likely to cause injury, to health ...'

b

The 1990 Act requires a local authority to investigate complaints of a statutory nuisance and itself to inspect premises in its area; it is empowered to serve an abatement notice, a failure to comply with which is an offence. In addition, by s 82, a person who is aggrieved by the existence of a statutory nuisance may bring a complaint before a magistrates' court which, if the nuisance exists, is to make c an order requiring the defendants to abate the nuisance and 'to execute any works necessary for that purpose'; it may further or alternatively prohibit a recurrence of the nuisance and require the carrying out of any works to prevent the recurrence. To make the order is obligatory though what is ordered to be done is discretionary.

d On 18 May 1996 Mr Oakley preferred an information that Birmingham City Council had failed to abate a statutory nuisance at 40 Hunslett Road, Quinton, Birmingham which is owned by the council and of which he was a tenant.

The magistrates heard the case on five different days. They found that Mr Oakley and his wife with three children aged 18, nine and four years respectively and a e grandson of 17 months had lived in the premises for three years, though it seems that they no longer do so. The ground floor of the house included a bathroom with a washbasin next to a kitchen which had a sink. On the side of the kitchen opposite the bathroom was a door which led into a lavatory. There was no washbasin in the lavatory and no room to put one. Anyone using the lavatory who wanted to wash his hands would have to do so in the kitchen sink or he f would have to go through the kitchen to the bathroom.

The magistrates were of the opinion that—

'7 ... (b) It is important to practice good hygiene practices especially with regard to the younger members of the household ... (d) It is unacceptable in the interest of hygiene having used the WC to expect persons to either: g (a) wash hands in kitchen sink or (b) cross kitchen to bathroom as both of these involve the risk of cross infection within the kitchen area. There is nothing the Respondent [Mr Oakley] can do to make it safe.'

The magistrates ordered that the lavatory be moved into the bathroom with h an extractor fan and that the door into the bathroom be re-sited.

On an appeal by way of case stated the magistrates asked '(a) Whether we were correct to find a statutory nuisance existed at [the house] by reason of the absence of a hand basin within the WC compartment' and if so whether the justices were correct to hold that the council was responsible and that the nuisance arose from j a structural defect. They also asked whether their findings were justified on the evidence.

The Divisional Court dismissed the appeal. Simon Brown LJ (with whom Astill J agreed) concluded 'not without hesitation' that—

'in cases like this the way the premises are used is the direct result of their layout, and if, as it was found here, that use is predictably so unhygienic as to

create a health risk, then it is the state of the premises which is injurious to health.' a

The Divisional Court dismissed the appeal but certified that a question of general public importance was involved, namely:

'Whether the premises in their original state but which contain a WC compartment without a wash hand basin and in respect of which WC compartment the nearest wash hand basin is in the kitchen or has to be accessed through the kitchen so as to give rise to a risk of disease or illness are capable of being found to constitute a statutory nuisance within the meaning of s 79(1)(a) of the Environmental Protection Act 1990.' b c

The facts are simple and homely but the question is important to the individual family and to the local authority. Your Lordships have been told that there are throughout the country, tens of thousands of homes (and 20,000 in the council's area alone) where the separate lavatory has no washbasin and that the decision of the justices and the Divisional Court will cause great financial problems and d interfere with the planned upgrading of older houses. I do not attach too much importance to the number as it stands. Your Lordships are only concerned with a case where the access to washing facilities is in the kitchen or through the kitchen. The absence of a washbasin in a lavatory in other parts of the house—a separate lavatory without a basin next to a bathroom or opposite to a bathroom on a bedroom floor—does not necessarily provide the same hygienic problems. e Moreover the immediate problem for local authorities, great as it is, need not be as great as is suggested if regard is had to the judgment of Lord Widgery CJ in *Nottingham Corp v Newton* [1974] 2 All ER 760 at 765–766, [1974] 1 WLR 923 at 929–930 (as approved by Lord Wilberforce in *Salford City Council v McNally* [1975] 2 All ER 860 at 864, [1976] AC 379 at 389–390) where he stressed the discretion of f the justices in what and when they ordered work to be done and the need to exercise common sense.

The arrangements found by the magistrates are by modern standards plainly unsatisfactory. The absence of a washbasin in the lavatory means that children (and others) are less likely to wash their hands. The need to wash in the kitchen sink or to go through a place where food is being prepared, to find a washbasin, g carries obvious hygienic risks. It is surprising, not that the Building Regulations 1991, SI 1991/2768 made the provision of a washbasin obligatory in new houses, but that it was not done earlier. None of this, however, resolves the present question. Although there can be no doubt that if 'the state' of the premises includes the arrangement in this house, the magistrates were fully entitled to the h opinion they expressed and in particular to their conclusion, that the arrangements were prejudicial to health. Moreover if there was a statutory nuisance it was clearly caused by the appellant council, and not by the respondent, Mr Oakley, as the magistrates found. The question, and I have found it difficult, is whether the arrangements here fall within the words 'the state of the premises'.

Taken literally, it can be said that 'the state of the premises' is capable of a j broad meaning to include a consideration of the layout, even unavoidable use within the layout. But a narrower meaning is equally possible. One must therefore look at the purpose of the legislation and for that consider the history of the legislation and the context of these words in the 1990 Act together with previous judicial interpretations.

The statutory history

The story begins with the temporary 1846 Act (9 and 10 Vict c 96) 'for the more speedy Removal of certain Nuisances'. Prosecution could follow a certificate by two doctors—

> 'of the filthy and unwholesome Condition of any Dwelling House or other Building, or of the Accumulation of any offensive or noxious Matter, Refuse, Dung, or Offal, or of the Existence of any foul or offensive Drain, Privy, or Cesspool ...'

and that 'the same is likely to be prejudicial to the Health of the Occupiers [or neighbours]'. The Nuisance Removal and Diseases Prevention Act 1848 (11 and 12 Vict c 123) was concerned inter alia with 'any Dwelling House ... [which] is in such a filthy and unwholesome Condition as to be a Nuisance to or injurious to the Health of any Person'.

It seems to me clear that the facts of the present case would not have fallen within either the 1846 or the 1848 Acts.

But the legislation continued to develop. In the Nuisances Removal Act 1855 (18 and 19 Vict c 121) as repeated in the Public Health Act 1875 (38 and 39 Vict c 55) nuisances were defined as including 'Any Premises in such a State as to be a Nuisance or injurious to Health'. There is thus a change from 'Condition' in 1848 to 'State' in 1855 and 1875. I accept that 'State' may be wider than 'Condition' in this context. It is also to be noted that in the 1846 and 1848 Acts the premises had to be in such a 'filthy and unwholesome condition' as to be injurious to health. The 1855 and 1875 Acts are more general. For there to be an offence, the premises have to be simply 'in such a State' as to be injurious to health.

Finally, in this particular legislation, the Public Health Act 1936, like the 1990 Act, defined statutory nuisances in s 92(1)(a) as including 'any premises in such a state as to be prejudicial to health or a nuisance' and defined 'prejudicial to health' in s 343(1) of the 1936 Act as 'injurious, or likely to cause injury, to health', the latter again being an extension of previous legislation.

In considering the meaning of the relevant words in the 1990 Act, the respondent's case is in my view not precluded by the fact that other regulatory powers exist—e g s 604 of the Housing Act 1985 which provides that a house is not fit for habitation if it does not have a 'suitably located water-closet'; s 64(1) of the Building Act 1984 which empowers a local authority to require a closet to be provided if it appears that closets in the building are 'in such a state as to be prejudicial to health or a nuisance and cannot without reconstruction be put into a satisfactory condition'. Similarly in s 1(1) of the 1984 Act, the Secretary of State is empowered for the purpose inter alia of '(a) securing the health, safety, welfare and convenience of persons in or about buildings' to make regulations 'with respect to the design and construction of buildings and the provision of services, fittings and equipment in or in connection with buildings'. In the 1991 regulations, replacing the Building Regulations 1985, SI 1985/1065 which came into force on 1 June 1992 in relation to the erection or extension of a building, 'Part G Hygiene' in Sch 1 provided as follows:

> '(1) Adequate sanitary conveniences shall be provided in rooms provided for that purpose, or in bathrooms. Any such room or bathroom shall be separated from places where food is prepared.
>
> (2) Adequate washbasins shall be provided in—(a) rooms containing water closets; or (b) rooms or spaces adjacent to rooms containing water

closets. Any such room or space shall be separated from places where food is prepared.'

Hot and cold water had to be provided for such washbasins.

These various statutory provisions are clearly dealing with the matters in dispute in the present case and they may be some indication as to the scope of the provisions of the 1990 Act, but in no way can it be said that they are conclusive that the facts of the present case cannot fall within s 79(1)(a). It is noted that in *Salford City Council v McNally* [1975] 2 All ER 860 at 863–864, [1976] AC 379 at 388–389, Lord Wilberforce distinguished between the test under the 1936 Act and the question under the Housing Act 1957, as to whether a house was 'unfit for human habitation'. The two tests are not the same.

Nor does it seem to me to be in any way relevant whether the landlord is in breach of his contractual obligations to the tenant.

The earlier decisions

In *R v Parlby* (1889) 22 QBD 520 at 525 the Queen's Bench Division said in relation to 'premises in such a state as to be a nuisance' in the 1875 Act:

> '... we do not attempt to define every class of case to which the first head applies [ie a nuisance], but we think it is confined to cases in which the premises themselves are decayed, dilapidated, dirty, or out of order, as, for instance, where houses have been inhabited by tenants whose habits and ways of life have rendered them filthy or impregnated with disease, or where foul matter has been allowed to soak into walls or floors, or where they are so dilapidated as to be a source of danger to life and limb.'

In *Coventry City Council v Cartwright* [1975] 2 All ER 99, [1975] 1 WLR 845, where it was said that a pile of refuse and building waste constituted a nuisance under s 92(1)(c) of the 1936 Act as being 'any accumulation or deposit which is prejudicial to health or a nuisance', Lord Widgery CJ said:

> 'I think that the underlying conception of the section is that that which is struck at is an accumulation of something which produces a threat to health in the sense of a threat of disease, vermin or the like.' (See [1975] 2 All ER 99 at 102, [1975] 1 WLR 845 at 849.)

In *Coventry City Council v Doyle* [1981] 2 All ER 184, [1981] 1 WLR 1325 the Divisional Court held that a statutory nuisance could exist even if at the relevant date (the hearing before the justices) the premises were unoccupied.

In *Birmingham DC v Kelly* (1985) 17 HLR 572 the Divisional Court accepted that a statutory nuisance could exist even if there was no breach of building regulations or other statutory requirements. There each of the flats was found to be seriously affected by mould growth. The court accepted that mould growth, because of inadequate heating, could constitute a statutory nuisance though it referred to *Dover DC v Farrar* (1980) 2 HLR 32 where a claim failed because the tenant did not make adequate use of the heating system so as to prevent condensation which caused the mould.

In *Southwark London Borough v Ince* (1989) 21 HLR 504 the Divisional Court accepted that a failure properly to insulate against noise made the premises 'in such a state as to be prejudicial to health' because of the entry of noise. Saville J said that premises may be in such a state as to be prejudicial to health 'for a whole variety of external factors, be they weather, noise, the incursion of sewage, or

indeed anything else'. A claim under the 1936 Act was still maintainable even if others had other legislative powers and duties to deal with the matter.

Turning to the recent cases, in *R v Bristol City Council, ex p Everett* Richards J ([1998] 3 All ER 603, [1999] 1 WLR 92) and the Court of Appeal ([1999] 2 All ER 193, [1999] 1 WLR 1170) held that in the light of earlier statutory provisions in identical terms, the danger of accidental or physical injury resulting from a steep staircase did not fall within the provision of s 79(1)(a) as being injurious to health. Richards J said:

> 'When one looks, however, at the legislative history summarised above, it seems reasonably clear that the expressions were not intended to be so wide in their scope. When powers to take action against premises that were "prejudicial to health" or "injurious to health" were conferred by the mid-nineteenth century statutes, the object of concern was plainly the direct effect on people's health of filthy or unwholesome premises and the like: in particular, the risk of disease or illness. There is nothing to suggest that the powers were intended to protect against the danger of accidental physical injury. Looking at the legislation as a whole it seems to me that that kind of problem fell outside the legislative purpose. I do not discern in the subsequent legislative history any material change in the legislative intention, such as to justify the attribution of an enlarged scope to the current powers, based as they are on essentially the same language as used in the original legislation.' (See [1998] 3 All ER 603 at 613, [1999] 1 WLR 92 at 102.)

A case said to be near to the present one is *Ex p Saunders* (1883) 11 QBD 191. There a 'defective water closet' existed in the centre of a house. The sanitary authority under s 94 of the 1875 Act required the nuisance to be abated and for that purpose required the owner to remove the closet from the centre of the house and to place it near the outer wall where there might be efficient ventilation; the soil pipe, drains and flushing arrangements were to be altered. Some of the work was done but the closet was left where it was and the soil pipe was not fixed on the outer wall. The justices found that although the nuisance had abated it was likely to recur and they ordered the water closet, soil pipe and drains to be moved and they further ordered that efficient ventilation be provided. The question in issue was not as to whether the premises were in such a state as to be a nuisance but whether the justices had power to order the particular works to be done. The court held that the justices had such power, distinguishing *Re Whitchurch* (1881) 6 QBD 545 where the justices had not merely required the nuisance to be abated but had also required a different type of closet to be built which it was held went beyond their powers.

For my part I do not think that *Ex p Saunders* really assists Mr Oakley. The nuisance clearly came from the smells and risks to health existing in the premises due to the defective drains, the lack of ventilation and the defective flushing facilities. There was no nuisance when the justices heard the case (ie they did not base their decision on the layout) but they thought that the nuisance (ie the smells and risk of disease) would recur and that the right way to prevent this was to move the closet.

The words in context

The council relies on the distinction in s 268(2)(a) of the 1990 Act between 'state' and 'use' in s 268(2)(b) in relation to tents or vans used for human habitation. I do

not get any assistance from that section which is dealing with a very special situation.

Section 79(1) of the 1990 Act lists other matters which constitute 'statutory nuisances'—smoke, fumes or gases emitted from premises, dust or effluvia from industrial premises, any accumulation or deposit, noise emitted from premises or caused by a vehicle in the street and any animal kept in a place, in each case so long as they could be shown to be 'prejudicial to health or a nuisance'.

If in this case 'the state of the premises' could include the arrangement of the rooms or the lack of a washbasin in the lavatory it would be nothing to the point that in 1846, perhaps even in 1920 or 1940 most people would not have regarded this as being prejudicial to health. Standards and attitudes change and the contemporary insistence on 'now wash your hands' would make the position clear as the justices found. The question is whether it is right to interpret the phrase in the way proposed on behalf of Mr Oakley.

I am influenced in the first place by the fact that the earlier statutes were dealing with a 'filthy and unwholesome Condition' of a house or the collection of noxious matter or a foul or offensive drain or privy. All of these were in themselves prejudicial to health because of germs or smells and the risk of disease. When the words 'in such a condition' or 'such a state' as to be prejudicial to health were added they are to be read as seeking to achieve the same objective. They are directed to the presence in the house of some feature which in itself is prejudicial to health in that it is a source of possible infection or disease or illness such as dampness, mould, dirt or evil smelling accumulations or the presence of rats. The state of the house must in itself have been prejudicial to health. This it seems to me is what the Divisional Court was saying in *R v Parlby* (1889) 22 QBD 520 and in *Southwark London Borough v Ince* (1989) 21 HLR 504 at 510 Woolf LJ said: 'The important feature to note with regard to section 92(1)(a) is that it is the premises which have to be in such a state as to be prejudicial to health or a nuisance.'

In the more recent legislation, the premises are not limited to dwelling houses but the matters listed in s 79 of the 1990 Act are still in themselves capable of being prejudicial to health—smoke or gases, dust or an accumulation or deposit. Subsection (1)(a) of course is not limited to the specific items listed in the other parts of the subsection but the other items do give an indication of the essential feature of the statutory nuisance which is being dealt with. There must be a factor which in itself is prejudicial to health. I do not think that the arrangement of the rooms otherwise not in themselves insanitary so as to be prejudicial to health falls within s 79(1)(a).

There is in the present case nothing wrong with the lavatory nor is any defect in the drain suggested; there is no defect in the hand washbasin. There is thus nothing in the premises themselves which is prejudicial to health. It is not sufficient to render the house itself 'in such a state' as to be prejudicial to health that the lavatory and the washbasin are in separate rooms or that to get from one to the other it is necessary to pass through the kitchen where food is prepared. The prejudice to health results from the failure to wash hands or the use of the sink or the basin after access through the kitchen. Undesirable though this arrangement is, it does not seem to me that it is permissible to give an extended meaning to the words in s 79(1)(a), however socially or hygienically desirable this might be. By reference to the building regulations there is much force in Mr Oakley's criticism of the arrangements but it is for Parliament, the government or the local authority to take steps to remedy the problem and not for the courts to give an unjustified extension to words which have a different meaning and a

different context. The object of s 79 as with the earlier provisions was to provide a means for the summary removal of noxious matters. The fact that to achieve that structural alterations may have to be made does not mean that in the absence of such noxious matters the premises before the structural alterations are in such a state as to be prejudicial to health. In the *Birmingham DC* case it was the mould which needed to be remedied by the provision of central heating and not the absence of central heating per se which made the state of the premises prejudicial to health. Where there is a defective drain or privy it is obvious that that in itself could constitute a statutory nuisance and render the premises in such a state as to be prejudicial to health. That is not the present case.

I consider therefore that this appeal must be allowed.

LORD STEYN. My Lords, I have carefully studied the opinions of the majority. On balance I am not persuaded by their reasoning. Like Lord Clyde, I take the view that, in the context of s 79(1)(a) of the Environmental Protection Act 1990, the positioning of facilities, or the lack of a facility, may depending on the circumstances cause the premises to be in 'such a state as to be prejudicial to health' and therefore a statutory nuisance. The appeal to Victorian social history, and legislative history going back more than a 150 years, is in my view not appropriate to the context. The 1990 Act must be given a sensible interpretation in the modern world. The distinction between layout and state of the premises is not to be found in the statute, and it is certainly not indicated by the language of the provision or the context. It is on analysis no more than a verbal technique to cut down the generality of the wording of the modern statute. The justices were entitled to find that the premises were themselves inadequate so far as health and hygiene were concerned. Acknowledging that it is not an easy question, I prefer the broader approach of Lord Clyde to the narrow view of the majority. For the reasons Lord Clyde gives I would dismiss the appeal.

LORD HOFFMANN. My Lords, on the surface, this does not look like a very momentous case. The question is whether Mr and Mrs Oakley's landlord should have provided them with a basin in the WC. The statute which they say made it necessary to install one is ambiguous. The language is capable of bearing such a construction. On the other hand, it is very unlikely that this was what Parliament intended. So the courts have a choice. If they say that Mr and Mrs Oakley should have had a basin, landlords of old houses and flats all over the country will have to install them. Local authorities and housing trusts will have to incur very considerable expense. Under the surface, therefore, the case raises a question of great constitutional importance. When it comes to the expenditure of large sums of public and private money, who should make the decision? If the statute is clear, then of course Parliament has already made the decision and the courts merely enforce it. But when the statute is doubtful, should judges decide? Or should they leave the decision to democratically elected councillors or members of Parliament?

My Lords, the facts of the case are very simple. In 1996 Mr and Mrs Oakley were tenants of the Birmingham City Council. They lived with their children in a three-bedroomed house. But Mrs Oakley was dissatisfied with the kitchen and toilet facilities. Access to the bathroom was from one side of the kitchen and access to the tiny WC from the other. There was no basin in the WC. Anyone who used it had then to cross the kitchen to wash his hands in the bathroom or

the kitchen sink. It was difficult to ensure that the children could not contaminate the food. a

Mr Oakley made a complaint to the Birmingham Magistrates' Court alleging that the premises were in 'such a state as to be prejudicial to health' and therefore a statutory nuisance within the meaning of s 79(1)(a) of the Environmental Protection Act 1990. The justices found that they were. They held that it was unacceptable in the interests of hygiene to expect a person who has used the b lavatory to pass through the kitchen to wash his hands. It gave rise to a risk of cross infection. So the absence of a hand washbasin in the WC meant that the state of the premises was prejudicial to health.

If a statutory nuisance is found to exist, s 82(2) of the 1990 Act requires that the magistrates should make an order for its abatement. The justices found that it c was not possible to install a basin in the existing WC. It was not big enough. So they made an order requiring the WC to be moved into the bathroom.

The council regarded the decision as having serious implications for its housing budget. It says that it has many other old houses in which the toilet facilities are similarly arranged. So do many other local authority and private d landlords up and down the country. It appealed to the Divisional Court (Simon Brown LJ and Astill J). The council argued that s 79(1)(a) applies only when the 'state of the premises' is prejudicial to health. But the premises themselves were no danger to health. They were not dirty or damp or verminous. The risk of infection arose from the use of the premises by the tenants. Simon Brown LJ rejected this distinction, which he said was a 'most imperfect antithesis'. The e reason why the use of the premises by the tenants and their children created a risk to health was not because they were doing anything unusual but because of the absence of a washbasin in the WC. And the absence of that facility, or the fact that the bathroom and WC were laid out in such a way that a basin was not readily accessible, was properly described as the 'state of the premises'.

Before your Lordships, Mr Straker QC presented the argument for the council f slightly differently. He challenged the premise on which the conclusion of the Divisional Court was based. He said that upon the true construction of s 79(1)(a), the term 'state of the premises' did not refer to the facilities provided or their layout. It meant that the premises were in an unhealthy state. They were, to quote the adjectives of Victorian legislation on the subject, filthy, unwholesome, g offensive, foul, noxious, verminous or damp. Mr Straker said that s 79(1)(a) was part of a complex structure of statutory provisions on housing and public health which went back more than 150 years. That legislation dealt separately with the state of the premises and the facilities which had to be provided. It was true that as a matter of ordinary language, the absence of a washbasin in the WC could be h said to be the state of the premises. But the words had to be read against the legislative background which pointed to a narrower meaning.

The recent case of *R v Bristol City Council, ex p Everett* [1999] 2 All ER 193, [1999] 1 WLR 1170 is authority for the proposition that the language of s 79(1)(a) must be construed in the light of its legislative history. In that case the words which j fell to be interpreted were 'prejudicial to health'. Mrs Everett complained that a steep staircase in her house was prejudicial to her health because she had an injured back and might stumble and fall. The Court of Appeal examined the legislative antecedents of s 79(1)(a) and said that although as a matter of ordinary language it could be said that something which created a risk of accidental injury was prejudicial to health, the history showed that Parliament was concerned

solely with the spread of disease. Accidental injury was altogether outside the scope of the mischief at which the legislation was directed.

So Mr Straker says that the words 'state of the premises' should be construed with regard to the legislative background. Section 79(1)(a) can be traced back to temporary emergency legislation rushed through Parliament in August of the unusually hot summer of 1846, when rumours of cholera and typhoid were rife. The long title of the 1846 Act (9 & 10 Vict c 96) said that it was to make provision for 'the more speedy Removal of certain Nuisances'. It gave power to magistrates upon complaint to make abatement orders if two medical practitioners certified the 'filthy and unwholesome Condition of any Dwelling House or other Building, or ... the Accumulation of any offensive or noxious Matter, Refuse, Dung, or Offal, or ... the Existence of any foul or offensive Drain, Privy, or Cesspool' and that the same was 'likely to be prejudicial to the Health of the Occupiers, or of the Persons whose Habitations are in the Neighbourhood'. The 1846 Act was renewed by the Nuisance Removal and Diseases Prevention Act 1848 (11 & 12 Vict c 123) and consolidated with amendments by the Nuisances Removal Act 1855 (18 & 19 Vict c 121). The 1855 Act, by s 8, defined 'nuisance' as, among other things, 'Any Premises in such a State as to be a Nuisance or injurious to Health'. This is substantially the same as the current definition in s 79(1)(a) of the 1990 Act, the precise language of which dates back to the consolidation effected by the Public Health Act 1936.

Statutory requirements as to the toilet facilities to be provided in dwelling houses date back to the Public Health Act 1848 (11 & 12 Vict c 63). Section 51 provided that it should not be lawful 'newly to erect any House ... without a sufficient Watercloset or Privy and an Ashpit, furnished with proper Doors and Coverings'. Later legislation gave local authorities power to make regulations or byelaws specifying the hygiene facilities to be installed in new houses. When the house occupied by Mr and Mrs Oakley was built, there was no requirement that the WC should have a washbasin. The Building Act 1984 transferred the power to make regulations to the Secretary of State, who made the Building Regulations 1985, SI 1985/1065. They provided in para G4 of Sch 1 that new houses should have sufficient sanitary conveniences 'in rooms separated from places where food is stored or prepared'. But there was no requirement that they should have washbasins. Such a requirement was introduced for the first time by the Building Regulations 1991, SI 1991/2768, Sch 1, para G1. And they do not of course apply to existing houses. Section 604 of the Housing Act 1985, which contains the criteria for determining whether an existing house is fit for human habitation, does not require the provision of a washbasin in the WC.

In my opinion Mr Straker is right in saying that the statutory origins of s 79(1)(a), together with the separate statutory code dealing with the toilet facilities required to be provided in dwelling houses, throw a clear light on what Parliament meant by the premises being 'in such a state as to be prejudicial to health'. The section contemplates a case in which the premises as they stand present a threat to the health of the occupiers or neighbours which requires summary removal. The person responsible may be served with an abatement notice under s 80(1) and commits a criminal offence if, without reasonable excuse, he fails to comply. But the facts found by the justices in the present case are consistent with the premises being in the highest state of disinfected cleanliness. What they lack is a facility which, if used, would make it more convenient for the occupants to avoid the risk that they might transmit infection from their own urine or faeces to the food which they or other members of the

household eat. In my opinion the absence of such a facility, or the layout of the premises so that it is not readily accessible, does not mean that the state of the premises is prejudicial to health. *Southwark London Borough v Ince* (1989) 21 HLR 504 is not directly in point but I would wish to reserve my position on whether it was correctly decided.

Mr Supperstone QC, who appeared for Mr Oakley, was unable to refer to any case in which the absence of some toilet or other facility which would enable the occupants to avoid a risk to health was held in itself to make the state of the premises prejudicial to health. In *Birmingham DC v Kelly* (1985) 17 HLR 572 the Divisional Court upheld an abatement order which required the council to install central heating. But the magistrates did not find that the absence of central heating was prejudicial to health. That finding was based upon the presence of mould growth which was liable to cause health problems and food poisoning. The installation of central heating was a way to remove the threat to health created by the mouldy state of the premises.

Mr Supperstone argued that s 79(1)(a) must be construed in the light of modern conditions. When it speaks of a 'state ... prejudicial to health', this does not mean a state which would have been so regarded in 1846. It requires the application of modern knowledge and standards of hygiene. The words must be construed as 'always speaking' in the sense used by Lord Steyn in *R v Ireland, R v Burstow* [1997] 4 All ER 225 at 233, [1998] AC 147 at 158–159. I quite agree that when a statute employs a concept which may change in content with advancing knowledge, technology or social standards, it should be interpreted as it would be currently understood. The content may change but the concept remains the same. The meaning of the statutory language remains unaltered. So the concept of a vehicle has the same meaning today as it did in 1800, even though it includes methods of conveyance which would not have been imagined by a legislator of those days. The same is true of social standards. The concept of cruelty is the same today as it was when the Bill of Rights 1688 forbade the infliction of 'cruell and unusuall punishments'. But changes in social standards mean that punishments which would not have been regarded as cruel in 1688 will be so regarded today.

This doctrine does not however mean that one can construe the language of an old statute to mean something conceptually different from what the contemporary evidence shows that Parliament must have intended. So, for example, in the recent case of *Goodes v East Sussex CC* [2000] 3 All ER 603, [2000] 1 WLR 1356, the House decided that the statutory duty of highway authorities to 'maintain' the highway did not include the removal of ice and snow. Although the word 'maintain' was capable of including the removal of ice and snow and such removal might be expected by modern road users, the contemporary evidence showed that the concept of maintenance in the legislation was confined to keeping the fabric of the road in repair. To require the removal of ice and snow would not be to apply that concept in accordance with modern standards (such as requiring a metalled surface instead of gravel) but would be using the word 'maintain' to express a broader concept than Parliament intended. Such a change would not be in accordance with the meaning of the statute. Likewise it seems to me in this case that an extension of the concept of 'premises in such a state as to be prejudicial to health' to the absence of facilities, as such, is an illegitimate extension of the statutory meaning.

My Lords, it seems to me that the temptation to make such an extension should be resisted for much the same reasons as your Lordships in *Southwark London BC v Mills* [1999] 4 All ER 449, [1999] 3 WLR 939 refused to extend the common law of

nuisance and quiet enjoyment so as to require landlords to install soundproofing. Parliament has dealt expressly with the obligation to provide toilet facilities in different sections and usually in different Acts. Until 1991 it did not require a basin to be installed in the WC even in new constructions. It has never done so in respect of existing buildings. For the courts to give s 79(1)(a) an extended 'modern' meaning which required suitable alterations to be made to existing houses would impose a substantial financial burden upon public and private owners and occupiers. I am entirely in favour of giving the 1990 Act a sensible modern interpretation. But I do not think that it is either sensible or in accordance with modern notions of democracy to hold that when Parliament re-enacted language going back to the nineteenth century, it authorised the courts to impose upon local authorities and others a huge burden of capital expenditure to which the statutory language had never been held to apply. In my opinion the decision as to whether or not to take such a step should be made by the elected representatives of the people and not by the courts.

I would therefore allow the appeal and dismiss the complaint.

LORD CLYDE. My Lords, the respondent in this appeal used to live at 40 Hunslett Road, Quinton, Birmingham, along with his wife, three children and a grandchild. He and his wife were the tenants of the house and the appellant council was their landlord. The ground floor of the house comprised a living room, kitchen, bathroom and WC compartment. The latter was accessed from the kitchen through an intervening ventilated space. There was no wash hand basin in the WC compartment, nor was there space to fit one there. Anyone using the WC could only wash their hands either in the kitchen sink or in the wash hand basin in the bathroom, which was situated at the opposite side of the kitchen from the WC compartment. The matter came before the local magistrates' court following on a complaint by the respondent under s 82(1) of the Environmental Protection Act 1990 that he was aggrieved by the existence of a statutory nuisance. On 24 April 1998 the justices found that the council's failure to provide a wash hand basin constituted a statutory nuisance under s 79(1)(a) of the 1990 Act as being prejudicial to health. The council appealed unsuccessfully to the Divisional Court.

The appeal concerns the construction of s 79(1)(a). This provision forms part of the definition of what may constitute a statutory nuisance for the purposes of the 1990 Act and reads as follows: '(a) any premises in such a state as to be prejudicial to health or a nuisance'. The phrase falls into three parts. First, it is necessary to identify the premises, and to be satisfied that one is dealing with premises for the purpose of the 1990 Act. The word is defined in s 79(7). But no question arises in the present case in that regard. Secondly the state of the premises has to be considered. That is the area of dispute in the present case and I shall return to it. The third matter is whether the state is such 'as to be prejudicial to health or a nuisance'. By sub-s (7) 'prejudicial to health' is defined as meaning 'injurious, or likely to cause injury, to health'. The justices found in fact that the requirement to wash hands in the kitchen sink or to cross the kitchen to wash hands in the bathroom involved in each case the risk of cross infection and that the failure to provide a wash hand basin for those using the WC was prejudicial to health. That factual finding is not challenged. Having found that there was a statutory nuisance the justices were bound to make a nuisance order, but they had a discretion as to the terms of the order which they could make (*Nottingham Corp v Newton* [1974] 2 All ER 760, [1974] 1 WLR 923). There is no

challenge to the terms of the order which was made in the present case. The sole issue accordingly relates to the construction of the word 'state'.

The council's first argument was that the word 'state' meant solely the actual physical condition of the premises and not the manner in which they were used. Such a distinction is hard to draw in relation to this provision and it was rightly rejected by the Court of Appeal. It would be wholly artificial to ignore the fact that the premises are being, or are to be, used, and, in so far as the statute is concerned with health of the occupiers, account must be taken of the fact that it is in the use by them of the premises that the injury to health may arise. Support for the proposed distinction was sought in s 268(2) of the Public Health Act 1936 as amended by the 1990 Act, Sch 15, para 4(4)(b), where in relation to tents, vans, sheds and similar structures used for human habitation a statutory nuisance shall exist if the structure is one:

> '(a) which is in such a state, or so overcrowded, as to be prejudicial to the health of the inmates; or (b) the use of which, by reason of the absence of proper sanitary accommodation or otherwise, gives rise ... to a nuisance or to conditions prejudicial to health ...'

It is true that this provision is made expressly for the purposes of Pt III of the 1990 Act but I do not consider that it supports the suggested distinction. Section 282(2) is dealing with certain kinds of structures which may or may not be used for habitation and the more elaborate provision for that class of subject becomes necessary for that reason. Nor does the suggested dichotomy appear clearly from the provision. Overcrowding, which is mentioned in the context of the state of the place, involves its use. And the absence of proper sanitary accommodation, which appears in the context of use, might be seen as a matter of the actual physical conditions. It is primarily the premises to which attention has to be directed, but in doing so the use that is made of them cannot be left out of account.

It is to the state of the premises themselves that attention is required to be paid and in approaching the matter of the state of the premises it is clear that an objective point of view is required. One should not be looking to the particular requirements of a particular occupier. Furthermore simply because premises may be considered to qualify as a nuisance does not bring them within the subsection. Thus in *R v Parlby* (1889) 22 QBD 520 it was recognised that 'premises' could not be construed as to include any premises on which a nuisance existed, and in particular a sewage works. Otherwise the list of particular kinds of nuisances which followed in the subsection would be unnecessary. Wills J observed (at 525):

> '... we do not attempt to define every class of case to which the first head applies, but we think it is confined to cases in which the premises themselves are decayed, dilapidated, dirty, or out of order, as, for instance, where houses have been inhabited by tenants whose habits and ways of life have rendered them filthy or impregnated with disease, or where foul matter has been allowed to soak into walls or floors, or where they are so dilapidated as to be a source of danger to life and limb.'

It is then to the premises themselves that attention is to be directed. There must be something about the state of the premises which is prejudicial to health or a nuisance. The provision is not concerned with matters of construction such as may give rise to accidental injury. In that respect the physical state of the

premises is not relevant. Nor is it concerned with mere matters of comfort or convenience which do not relate to any danger to health. But while it is matters of illness and disease rather than accidental injury or mere comfort which are relevant, that does not require the exclusion of consideration of the way in which the premises will ordinarily be used. And while in many cases no doubt the state may be one which has developed by a process of deterioration, I see no reason for excluding the situation where the probability of injury to health has existed from the outset or been brought about by some deliberate change to the premises.

A second argument was, however, developed that the word 'state' should be so construed as to exclude matters of layout or the lack of some particular facility. These, it was suggested, were matters for other legislation and were outside the scope of the Public Health Acts. The proposition was advanced that s 79(1)(a) was not concerned with the configuration or the layout of the house and the policy of the legislation did not require the movement of the lavatory in the present case. This may be seen as a narrow view of the scope of the legislation as compared with a broad view which would include the lack of facilities or the positioning of facilities which will or will be likely to cause injury to health.

In my judgment the broad view is to be preferred. It is important in the first place to take into account the purpose and intent of the legislation. One of the principal purposes of the public health legislation from the nineteenth century onwards has been to secure the prevention of illness and disease. As time has passed and new concerns have arisen regarding pollution and the protection of the environment the variety of the risks has increased but the basic purpose of ensuring that people may live and work in hygienic and sanitary conditions and that the risks of disease and ill-health may be minimised has remained unchanged. The concept of the 'statutory nuisance' is designed to identify the situations where risks to health may occur and the machinery provided in the successive enactments is designed to effect a simple and swift remedy wherever such a risk may be found to exist. The definition of what may be 'prejudicial to health' is formulated in wide terms. It covers what may be actually injurious as well as what may be likely to be injurious and in either case something over and above what may be seen as a 'nuisance', since s 79(1)(a) includes not only what is 'prejudicial to health' but also, in the alternative, what may be a nuisance. I find nothing in the 1990 Act which supports the adoption of a narrow construction of the word 'state' and the whole purpose of the legislation seems to me to point to a broad construction in the interests of the good health of the public. A narrow construction which would exclude consideration of a layout which was injurious to health, or the absence of a facility without which a risk to health would be likely to arise, seems to me to run counter to the intent and purpose of the past and the present legislation.

It is of course important to take account of the history of the legislation and how it has been understood in the past. But I have not been persuaded that the past history of the legislation or its application by the courts justifies the proposed restriction. Two cases under the Public Health Act 1875, whose s 91(1) corresponds with s 79(1)(a) of the 1990 Act, may be mentioned. In *R v Wheatley, ex p Cowburn* (1885) 16 QBD 34 although the actual order which was made was held in its terms to be invalid as too vague, the existence of an untrapped drain was recognised as a nuisance. The lack of a trap on the drains gave rise to a health hazard. Closer to the present case is that of *Ex p Saunders* (1883) 11 QBD 191. In that case the nuisance arose from the existence of a water closet which was situated in the centre of the house. It seems that there was no, or at least inadequate, ventilation.

The justices ordered that the closet be removed from the centre of the house and be placed near an outer wall where there should be efficient ventilation. As I read the report of the case, there appears to have been nothing defective about the closet other than its situation. The defect in ventilation was resolved by moving the same closet to another location. The court distinguished the case of *Ex p Whitchurch* (1881) 6 QBD 545 where an order to substitute a different kind of closet had been held to be invalid and held that the order to move the water-closet was within the powers of the justices. AL Smith J observed (11 QBD 191 at 194) that the case would not have been arguable but for the decision in *Ex p Whitchurch*:

> 'There an order was made to erect a particular kind of closet. Here the order is not for the erection of a particular kind of closet where no closet existed before, but there being already a closet the order is for its removal to a place where it will not be a nuisance. It seems to me that this order is clearly within the terms of the Act.'

If the premises in these cases were viewed as new and unoccupied, even if they were spotlessly clean, it could be thought that they constituted no risk to health. But when account is taken of them being occupied and used the hazard becomes evident.

The more recent cases seem to me also to support the broader view. The failure to provide proper ventilation, insulation and heating was held in *Greater London Council v London Borough of Tower Hamlets* (1983) 15 HLR 54 to constitute a statutory nuisance. In *Birmingham DC v Kelly* (1985) 17 HLR 572 a nuisance order was approved which required the provision of fixtures, fittings and facilities not present at the commencement of the tenancy. It seems to me that a failure to provide adequate washing facilities for use with a WC, or the failure so to site the WC as to enable the user to have proper access to a hand basin are within what has always been recognised to be the scope of the statutory provision and a proper subject matter for an order by the justices. The order in the present case does not involve any new or enlarged meaning to be given to the word 'state' but is in line with the broad meaning which has earlier been recognised.

Concern for public health in general and the prevention of illness and disease in particular lies behind a variety of legislative measures even although their principal focus may be directed to different topics. The Building Act 1984 is an obvious example. More particularly under s 1 of that Act regulations may be made for the purposes of securing the health, safety, welfare and convenience of persons in or about buildings. So it is not surprising that there should be an overlap of statutory provisions which may be directed to the avoidance of some recognised potential cause of ill-health. The precise provisions and the statutory procedures for the achievement of the common aim will differ, but I see no necessity to allocate a particular situation to some particular statutory provision where the language of several provisions is reasonably capable of embracing it. That a particular situation is or is not matter of express provision in the current building regulations does not assist in determining whether or not it falls under the public health legislation. In the present case the fact that a requirement for a wash-hand basin in a room containing a water-closet originally was not, but then came to be (in the Building Regulations 1991, SI 1991/2768), a matter of express requirement under the building regulations should not in my view determine the question whether the absence of such a washbasin can or cannot qualify as a factor in the state of premises for the purposes of s 79 of the 1990 Act. The same situation may rank both as a statutory nuisance and as a failure in meeting the

standards of a building regulation. In *Southwark London Borough v Ince* (1989) 21 HLR 504 the existence of special legislation dealing with the problems of noise did not exclude the application of the legislation on public health in the provision of a remedy.

The remedy which was invoked in the present case under s 82 is designed as a summary proceeding and the room for fine distinctions should be avoided so far as may be possible. Eventually the issue comes to be one of fact on which the good sense of the justices may be relied upon for a sensible and practical conclusion. In the ordinary use of language it seems to me that the state of premises may include a deficiency due to the absence of a facility or a particular positioning of the facilities. In the present case the use of one or other of the washing facilities in the kitchen or the bathroom was inevitable so far as anyone using the WC was concerned. Thus there was clearly something inadequate with the premises themselves so far as health and hygiene were concerned. The remedy was to do something to the premises. It was a matter for the justices to determine whether the risk was sufficient to constitute a statutory nuisance. In the circumstances it seems to me that the justices were entitled to hold that the risk of cross infection which they feared was due to the state of the premises. I would dismiss the appeal.

LORD MILLETT. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Slynn of Hadley and Lord Hoffmann, with which I am in full agreement. In my view the Public Health Acts are concerned with the *state* of the premises, not with their *layout* or with the facilities which ought to be installed in them. In the present case the risk to health can be variously ascribed to the layout of the premises (because the lavatory was poorly sited) or to the absence of a desirable facility (a washbasin in reasonable proximity to the lavatory). But it does not derive from the *state* of the premises.

The cases on which Mr Oakley relied do not, in my opinion, support his argument. *R v Wheatley, ex p Cowburn* (1885) 16 QBD 34 was concerned with untrapped drains. The drains formed part of the premises and constituted a health risk. The case is quite different from the present. The health risk derived from the presence of the drains, not from the absence of a trap. That was not in itself a health risk, but it made the drains one. A modern lavatory in good working order is not a risk to health, and the absence of a washbasin in the vicinity does not make it one. *Ex p Saunders* (1883) 11 QBD 191 and *Ex p Whitchurch* (1881) 6 QBD 545 were both concerned with defective privies which were themselves a risk to health.

In *Ex p Saunders* the privy was situated in the centre of the house and lacked ventilation. The justices ordered it to be removed, placed near an outer wall and provided with efficient ventilation. They also ordered the soil pipe to be fixed outside the walls, the drains to be examined and if necessary relaid, new joints to be provided and new flushing arrangements made. The privy and drains were expressly characterised as defective (see (1883) 11 QBD 191). It seems that the location of the privy was not the only risk to health, though it aggravated the problem and made it likely to recur.

I do not doubt that the presence of a defective drain or lavatory lacking ventilation on the premises is capable of rendering the state of the premises a danger to health. But I do not consider that the complete absence of a lavatory (or a bath or kitchen), however inconvenient, could be said to render the state of the premises injurious to health. There was nothing wrong with the lavatory in

the present case except its location. It was not a danger to health. Any danger to health arose from the absence of a washbasin in its vicinity. Whether the law should require washbasins to be installed near lavatories is a matter for Parliament, but the Public Health Acts are not a suitable vehicle. They are concerned with the state of premises and not with their physical layout or the facilities to be provided in them. These are matters for building regulations, which can distinguish between new constructions and old.

It is, of course the case that, where the state of the premises is prejudicial to health, the danger may sometimes be remedied by the provision of additional facilities not already present. Premises which lack proper ventilation are damp. Premises which are damp are in a state which is injurious to health. This may be remedied by the provision of ventilation or the installation of heating appliances. But it does not follow from the fact that the risk to health in a particular case may be remedied by the provision of additional facilities that the risk is due to the state of the premises.

I agree with my noble and learned friend Lord Hoffmann that the decision in *Southwark London Borough v Ince* (1989) 21 HLR 504 (absence of sound insulation) may require reconsideration.

I would allow the appeal.

Appeal allowed.

Dilys Tausz Barrister.

Whistler International Ltd v Kawasaki Kisen Kaisha Ltd

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD HOBHOUSE OF WOODBOROUGH

16 NOVEMBER, 7 DECEMBER 2000

Shipping – Time charterparty – Employment clause – Charterparty requiring master to follow orders of charterers and to prosecute voyage with utmost despatch – Charterparty incorporating provision exempting owners from liability for any act, neglect or default of master in navigation – Charterers instructing master to follow shorter route – Master deciding to take longer route before commencement of voyage – Whether instructions as to route orders as to employment or navigation of vessel – Carriage of Goods by Sea Act 1971, Sch, art IV, r 2(a).

W Ltd was the disponent owner of a vessel time-chartered by K Ltd under an amended NYPE form. W Ltd undertook by cl 1 that the vessel when delivered would be seaworthy and in every way fit for charter service and that she was to be so maintained throughout the service. Clause 8 required the captain to prosecute his voyages with the utmost despatch, and placed him under the orders and directions of the charterers as regarded 'employment' and agency. By cl 17, disputes were referred to arbitration in London in accordance with English law. Clause 26 provided that the owners remained responsible for 'navigation', and cl 50 incorporated the Hague-Visby Rules (as set out in the Schedule to the Carriage of Goods by Sea Act 1971). Article IV, r 2(a)[a] of those rules exempted the carrier and the ship from liability in respect of any damage caused by the act, neglect or default of the master in the navigation of the ship. On two trans-Pacific voyages from Canada to Japan, K Ltd ordered the master to cross the Pacific by the 'great circle' route. That route was recommended by a specialist organisation which provided advice as to the most favourable ocean routes. In both cases, however, the master decided before the commencement of the voyage to take the less direct 'rhumb line' route because of bad weather conditions which he had experienced on a previous voyage on the 'great circle' route. As a result, both voyages took longer than they would have done if K Ltd's instructions had been followed. Accordingly, K Ltd deducted hire in respect of the additional days at sea and the cost of extra bunkers consumed, contending that such deduction represented damages for breach of the master's obligations to follow orders as to employment and to proceed with the utmost despatch. In subsequent arbitration proceedings, the arbitrators held that the master's decision to disregard K Ltd's instructions as to the course which he was to take on the two voyages was unjustifiable. Accordingly, the arbitrators found that W Ltd was in breach of its obligations under the charterparty to ensure that the master prosecuted the voyages with utmost despatch and followed the charterers' orders regarding the employment of the vessel. The arbitrators went on to reject W Ltd's defence of

a Article IV, r 2(a), so far as is material, provides: 'Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship ...'

an error in navigation, concluding that the planning of the voyage was not a matter of 'navigation'. W Ltd appealed to the court, which reversed the decision of the arbitrators, holding that the dispute related to matters of navigation and not to matters of employment. That decision was upheld by the Court of Appeal, which found that the ocean route to be followed by a vessel was a matter of navigation for the master and not a matter of employment on which the charterers could give the master orders. K Ltd appealed to the House of Lords.

Held – The arbitrators had not erred in law. W Ltd had already agreed in the charterparty that the vessel was fit to sail and the arbitrators had found as a matter of fact that the vessel was fit to sail by the 'great circle' route. It was therefore no excuse for W Ltd to say that the shortest route would take the vessel through heavy weather, which she was designed to encounter. A voyage was not prosecuted with the utmost despatch where the owners or the master had unnecessarily chosen a longer route which caused the vessel's arrival at the destination to be delayed. Moreover, on the findings of the arbitrators, K Ltd, by ordering the vessel to proceed by the shortest and most direct route, had required nothing more than was the contractual obligation of the owners. The word 'employment' in a time charter pertained to the economic aspects of operation of the vessel, while the word 'navigation' referred to matters of seamanship. It followed that the choice of ocean route was, in the absence of some overriding factor, a matter of the employment of the vessel. However, it would be erroneous to proceed from the fact that that the master had to choose how much of a safety margin to leave between his course and a hazard or how and at what speed to proceed up a hazardous channel to the conclusion that all questions as to the route of the vessel were questions of navigation. The courts below had been wrong to set aside the award of the arbitrators and accordingly the appeal would be allowed (see p 411 *f* to *j*, p 417 *g* to *j*, p 419 *a*, p 421 *h* to p 422 *a h* to p 423 *a*, post).

Decision of the Court of Appeal [1999] 4 All ER 199 reversed.

Notes

For the Hague-Visby Rules and for employment clauses in charterparties, see 43(2) *Halsbury's Laws* (4th edn reissue) paras 1454, 1527.

For the Carriage of Goods by Sea Act 1971, Sch, art IV, see 39 *Halsbury's Statutes* (4th edn) (1995 reissue) 379.

Cases referred to in opinions

Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd [1958] 1 All ER 725, [1959] AC 133, [1958] 2 WLR 688, HL.

Canada Shipping Co v British Shipowners' Mutual Protection Association (1889) 23 QBD 342, CA.

Carmichael & Co v Liverpool Sailing Ship Owners' Mutual Indemnity Association (1887) 19 QBD 242, CA.

Good v The London Steam-Ship Owners' Mutual Protecting Association (1871) LR 6 CP 563.

Larrinaga Steamship Co Ltd v R [1945] 1 All ER 329, [1945] AC 246, HL.

Lord (owners) v Newsum, Sons & Co Ltd [1920] 1 KB 846.

Newa Line v Erechthion Shipping Co SA, The Erechthion [1987] 2 Lloyd's Rep 180.

Reardon Smith Lines Ltd v Black Sea and Baltic General Insurance Co Ltd, The Indian City [1939] 3 All ER 444, [1939] AC 562, HL.

Reefer Express Lines Pty Ltd v Cool Carriers AB (24 January 1996, unreported), International Court of Arbitration.

Renée Hyaffil, The (1915) 32 TLR 83; *affd* (1916) 32 TLR 660, CA.
Stag Line Ltd v Foscolo Mango & Co Ltd [1932] AC 328, [1931] All ER Rep 666, HL.
Steamship Knutsford Ltd v Tillmanns & Co [1908] AC 406, [1908–10] All ER Rep 549, HL; *affg* [1908] 2 KB 385, CA.
Suzuki & Co Ltd v T Beynon & Co Ltd (1925) 24 Ll L Rep 49, HL.
Torvald Klaveness A/S v Arni Maritime Corp, The Gregos [1995] 1 Lloyd's Rep 1, HL.
Weir v Union Steamship Co Ltd [1900] AC 525, HL.
White Rose, The, AB Helsingfors Steamship Co Ltd v Rederiaktiebolaget Rex [1969] 3 All ER 374, [1969] 1 WLR 1098.

Appeal

Kawasaki Kisen Kaisha Ltd (the charterers), time charterers of the vessel Hill Harmony, appealed with the leave of the Appeal Committee of the House of Lords from the decision of the Court of Appeal on 20 May 1999 ([1999] 4 All ER 199, [2000] QB 241) to dismiss an appeal from the decision of Clarke J on 20 February 1998 ([1998] 4 All ER 286, [1999] QB 72), allowing an appeal by Whistler International Ltd (the owners), the disponent owner of the Hill Harmony, from the decision of arbitrators (Christopher Moss and William Robertson; Graham Clark dissenting) given on 7 April 1997, whereby they refused to award the owners a sum in respect of hire charges deducted by the charterers. The facts are set out in the opinion of Lord Hobhouse of Woodborough.

Timothy Young QC (instructed by *More Fisher Brown*) for the charterers.
Nicholas Hamblen QC (instructed by *Holman Fenwick & Willan*) for the owners.

Their Lordships took time for consideration.

7 December 2000. The following opinions were delivered.

LORD BINGHAM OF CORNHILL. My Lords, I am in full agreement with the opinion of my noble and learned friend Lord Hobhouse of Woodborough, which I have had the opportunity to read in draft. I gratefully adopt his summary of the facts, the history of these proceedings and the submissions of the parties.

A time charterparty such as the present represents a complex commercial bargain between owner and charterer. The owner undertakes for the period of the charter to make his vessel available to serve the commercial purposes of the charterer. To this end the hull, machinery and equipment of the vessel are to be in a thoroughly efficient state, the capacity and fuel consumption of the vessel are specified and the vessel is to be ready to receive the charterer's intended cargo. The owner undertakes these obligations in consideration of the charterer's undertaking to pay for the hire of the vessel at an agreed rate.

The charterer agrees to pay hire for the vessel because he wants to make use of it. Crucial to the bargain, for him, are the terms which require the master to prosecute his voyages with the utmost despatch, which provide that the master (although appointed by the owner) shall be under the orders and directions of the charterer as regards employment and which require the charterer to furnish the master from time to time with all requisite instructions and sailing directions.

The complexity of a time charterparty derives partly from the fact that ownership and possession of the vessel, which remain in the owner, are separated from use of the vessel, which is granted to the charterer, and partly from the

peculiar characteristics and hazards of carriage by sea. As one would expect, the safety and security of the vessel, her crew and her cargo are treated as matters of the highest importance. The charterers may only (under the present charter) send the vessel to safe berths, safe ports and safe anchorages, always afloat and always within Institute Warranty Limits, and the parties in this case agreed a long list of further exclusions. The owners are to remain responsible for the navigation of the vessel. The scope of this last, very important, stipulation is the main issue argued in this appeal.

The starting point in the present case is, in my opinion, the master's obligation to prosecute his voyages with the utmost despatch. Irrespective of any express orders by the charterer, that would ordinarily require him to take the route which is shortest and therefore quickest, unless there is some other route which is usual or there is some other maritime reason for not taking the shortest and quickest route. Helpful guidance on the correct approach in law was given by Lord Porter in *Reardon Smith Lines Ltd v Black Sea and Baltic General Insurance Co Ltd, The Indian City* [1939] 3 All ER 444 at 457, [1939] AC 562 at 584, a case concerned with deviation under a voyage charterparty:

> 'The law upon the matter is, I think, reasonably plain, though its application may from time to time give rise to difficulties. It is the duty of a ship—at any rate, when sailing upon an ocean voyage from one port to another—to take the usual route between those two ports. If no evidence be given, that route is presumed to be the direct geographical route, but it may be modified in many cases, for navigational or other reasons, and evidence may always be given to show what the usual route is, unless a specific route be prescribed by the charterparty or bill of lading.'

The majority arbitrators referred to evidence before them that in the period 1 March to 31 May 1994 Ocean Routes had provided advice to some 360 vessels routed from the Pacific north-west of North America to northern China, Korea or Japan, all of which had sailed on a northern route save for vessels heading for destinations far to the south of Japan. From that it would seem that the great circle route, which was the shortest and quickest route, was the usual route, although the arbitrators made no express finding to that effect. There was (so far as we know) no evidence to suggest that the rhumb line route was the usual, or a usual, route, and no finding to that effect. So, in the absence of what Lord Porter called 'navigational or other reasons' for not taking the shortest and quickest route, the master was contractually obliged to take it.

The majority arbitrators concluded that the master had no good reason for not taking the shortest and quickest route. The dissenting arbitrator concluded that because the master was influenced by his previous bad experience of the great circle route and by his concern for safety he was 'absolutely entitled' to decide as he did. The majority, however, in para 21 of their reasons—

> 'considered that the Disponent Owners were prima facie in breach of their obligation under Clause 8 to ensure that the Master prosecuted his voyages with the utmost despatch ...'

In para 24 of their reasons the majority arbitrators again referred to 'the Master's breach in failing to prosecute the voyage with due despatch'. With those conclusions, on the findings of the majority arbitrators, I agree. In the absence of evidence that the rhumb line route was the usual route or a usual route, and in the absence of

any satisfactory navigational or other reason for taking a longer and slower route, the master's obligation of utmost despatch required him to take the shortest and quickest route. This conclusion is in my view inescapable irrespective of any express orders given by the charterers.

But the decisions at all three levels below, and the argument at all levels including the House, primarily concentrated not on the master's duty of despatch but on the legitimacy of the charterers' express instructions to the master, following advice from Ocean Routes, to take the great circle route. Relying on cll 11 and 8, the charterers contended that these were instructions concerning the employment of the vessel which they were entitled to give and with which the master was bound to comply. The owners relied on their responsibility, under cl 26, for the navigation of the vessel and on their exemption, under cl 16, from liability for errors of navigation, as grounds for resisting the charterers' contention.

The majority arbitrators concluded that the master had no good reasons for rejecting the charterers' instructions to take the great circle route. Impliedly, therefore, they accepted that the charterers were entitled to give such instructions. They did not find that the navigation exception availed the master, since he 'had decided at the outset not to follow the course recommended by the weather routing service'. The dissenting arbitrator did not find that the charterers' instructions did not relate to the employment of the vessel but held that the master was entitled not to comply because he 'has to have the ultimate decision and responsibility for navigation'.

Oral argument before the judge no doubt led to a refinement of the issues, and his conclusion ([1998] 4 All ER 286 at 292, [1999] QB 72 at 82) was clear and unequivocal:

> 'In my judgment these considerations lead to the conclusion that a decision whether to proceed across the Pacific by taking the great circle route or the rhumb line route or course would also be a decision in and about the navigation of the vessel and not in and about her employment.'

The merits of that decision did not matter because 'it was not, in my judgment, a decision as to the employment but as to the navigation of the vessel'. In the Court of Appeal, Potter LJ was more guarded than the judge, but held that since the master's reasons for taking the rhumb line route were based on the safety of the vessel and were not shown to be other than bona fide (despite his lack of candour concerning his reasons for taking the rhumb line route on the second disputed voyage) it was a decision as to navigation ([1999] 2 All ER (Comm) 1 at 17, [2000] QB 241 at 261).

The judge's decision was trenchantly criticised by the late Mr Brian Davenport QC in an article ('Rhumb Line or Great Circle?—That is a Question of Navigation' [1998] LMCLQ 502) which brings home the loss which English commercial law has suffered by his death and the cruelty of an affliction which denied him the judicial eminence he would surely have achieved. Both the judge's decision and that of the Court of Appeal were criticised as 'regrettable' by Mr Donald Davies, now the doyen of London maritime arbitrators: 'Right to Routes' [1999] LMCLQ 461. In *Reefer Express Lines Pty Ltd v Cool Carriers AB* (24 January 1996) New York arbitrators considered a charterparty containing clauses similar to cll 8 and 11 of the present charter, it being accepted that the master was the final authority with respect of matters of navigation and safety. On facts indistinguishable from the present, save that the master had somewhat better reasons for refusing to comply

with the charterers' instructions to take the great circle route from Seattle to northern China, the arbitrators unanimously held that the master had breached his duty under the charterparty by not following the charterers' directions.

Clause 8 of the present charterparty, providing that the master (although appointed by the owners) shall be under the orders and directions of the charterers, gives the charterer his key right under the contract: to decide where the vessel shall go and what she shall carry, how (in short) she shall be used, always subject to the terms of the charterparty. The language used is general, and the power correspondingly wide.

Caution is called for in reading earlier authorities in which the meaning of 'navigation' has been considered, since the expression has been construed in different contracts and different factual contexts, but the cases none the less give valuable guidance. In *Good v The London Steam-Ship Owners' Mutual Protecting Association* (1871) LR 6 CP 563 a sea-cock and a bilge-cock were left open, permitting the entry of water which damaged cargo. A claim was made against the owners of the vessel by consignees of the cargo, and the question was whether the damage had been caused by improper navigation, against which the owners were entitled to be indemnified. Willes J said (at 569):

> 'Improper navigation within the meaning of this deed is something improperly done with the ship or part of the ship in the course of the voyage.'

In *Carmichael & Co v Liverpool Sailing Ship Owners' Mutual Indemnity Association* (1887) 19 QBD 242 damage was caused to cargo because water entered the vessel through a port in the side of the vessel which had not been securely closed. It was held to have been caused by 'improper navigation of the ship'. A different conclusion was reached in *Canada Shipping Co v British Shipowners' Mutual Protection Association* (1889) 23 QBD 342 where cargo was contaminated through failure to clean the hold after a previous cargo. Bowen LJ said (at 344):

> 'Navigation must mean something having to do with the sailing of the ship; that is, of course, the sailing of the ship having regard to the fact that she is a cargo-carrying ship. Here the damage was caused by something which had nothing to do with the sailing of the ship.'

The Renée Hyaffil (1915) 32 TLR 83; *affd* (1916) 32 TLR 660 concerned a vessel bound for London from Gandia with a cargo of fruit and vegetables. The master put into Corunna where he remained for 23 days, for several reasons, including his reluctance to face the Bay of Biscay in winter. It was held that damage to the cargo had not been caused by a neglect, default or error of judgment in the navigation or management of the vessel within the meaning of the exceptions in the bills of lading.

In *Lord (owners) v Newsum, Sons & Co Ltd* [1920] 1 KB 846 the dispute was between owner and charterer. The master had decided to remain in port for some time, despite advice to continue the voyage by a prescribed route. Bailhache J held that the master's deliberate choice, while in harbour, of one of two routes to be pursued could not be an error in the management or navigation of the ship within the meaning of an exception in the charterparty. While the judge, in my opinion, erred in his formulation of principle, I would not question his conclusion. The decision is inconsistent with the view that the choice of route from one port to another is a navigational matter within the sole discretion of the master.

a The time charterers in *Suzuki & Co Ltd v T Beynon & Co Ltd* (1925) 24 Ll L Rep 49 complained that the master had not prosecuted a voyage with the despatch required by cl 9 of the charterparty, apparently through insufficient consumption of coal. The issue was whether the master's failure fell within cl 14 exempting the owner from liability for negligence or default of the master in the management or navigation of the steamer. There was a difference of opinion in the Court of b Appeal and in the House of Lords. Lord Sumner said (at 54):

> 'I see no ground for bringing the captain's action or inaction under the head of navigation. I speak with humility after what has just been said, but I still think that there is a real field in which the captain's shortcomings would not fall within the exception clause (14), and yet would constitute a breach c of his obligation to use dispatch under Clause 9. The maintenance of full speed may often be part of the duty which those responsible for navigation have to perform, directly or by others, as, for example, in order to save a tide at a bar or to correct excessive leeway or deflection by currents, or to make the ship quick to answer her helm, or to make a course good against head winds, or what not. Here, however, it is not pretended that the ship was d handled in an unseamanlike manner or that either ship or cargo was imperilled by the navigation that took place. The term "management" may better fit the present case, but it is not a term of art; it has no precise legal meaning and its application depends on the facts as appreciated by persons experienced in dealing with steamers. There is a management which is of e the shore, and a management which is of the sea. I do not think the award states the facts sufficiently to enable us to say that the evidence is all one way to show mismanagement of the steamer in the sense of Clause 14, and without more facts before us we could not in any case deal with the question as a practical matter. Clause 9 is emphatically a merchants' clause. Its object is to give effect to the mercantile policy of preferring a saving of time to a f saving of coal.'

The facts of *Larrinaga Steamship Co Ltd v R* [1945] 1 All ER 329, [1945] AC 246 were unusual. The vessel, discharging at St Nazaire, was ordered by charterers to return to Cardiff. Despite severely deteriorating weather conditions a sea transport officer instructed the vessel to sail on completion of discharge to Quiberon Bay to join a g convoy bound for the Bristol Channel. The master protested but complied. The vessel grounded and suffered damage. The owners claimed against the Crown as charterers, contending that the damage had resulted from the charterers' order to return to Cardiff. Lord Wright said:

> h 'The view of the judge was that what he described as the sailing orders to Quiberon Bay to be obeyed forthwith ... were orders as to employment within cl 9. With the greatest respect, I cannot agree with that view. These sailing orders which the judge found were given were, in my opinion, merely dealing with matters of navigation, in regard to carrying out the orders to proceed to Cardiff.' (See [1945] 1 All ER 329 at 333, [1945] AC 246 at 256.)

j Lord Porter said:

> 'Three answers to this argument have been made by the respondent. (i) That though an order specifying the voyage to be performed is an order as to employment, yet an order as to the time of sailing is not. That order, it is contended, is one as to navigation, or, at any rate, not as to employment.

My Lords, this distinction seems to me to be justified: an order to sail from port A to port B is in common parlance an order as to employment, but an order that a ship shall sail at a particular time is not an order as to employment because its object is not to direct how the ship shall be employed, but how she shall act in the course of that employment. If the word were held to include every order which affected not the employment itself but any incident arising in the course of it almost every other liability undertaken by the charterer would be otiose, since the owners would be indemnified against almost all losses which the ship would incur in prosecuting her voyages.' (See [1945] 1 All ER 329 at 336, [1945] AC 246 at 261.)

Then Lord Porter continued:

'(ii) ... even if it were conceded that orders to sail in a storm were orders in respect of which an indemnity is due, they must still be orders of the charterers as charterers and such as under this charterparty they are entitled to give. The mere instruction to sail may be such an order, but such an instruction leaves it to the discretion of the master who is responsible for the safety of his ship to choose the time and opportunity for starting on his voyage. I know of no right on the part of a charterer to insist that the safety of the ship should be endangered by sailing at a time when seamanship requires her to stay in port.' (See [1945] 1 All ER 329 at 337, [1945] AC 246 at 262.)

Lastly, I would refer to *Newa Line v Erechthion Shipping Co SA, The Erechthion* [1987] 2 Lloyd's Rep 180 at 185, in which Staughton J said:

'(2) *Orders as to employment.*

It is well settled that the orders which a charterer is entitled to give, and an owner bound to obey, are orders as to the employment of the vessel. They do not include orders as to navigation, which remains in the control of the owner through his master—at any rate in the absence of special and unusual terms. It follows that a charterer, again in the absence of such terms, is only bound to indemnify the owner against the consequences of orders as to employment, and not of orders as to navigation. That is established by *Weir v. The Union Steamship Company Ltd.*, ([1900] AC 525), *Larrinaga Steamship Co. Ltd. v. The King*, ([1945] 1 All ER 329, [1945] AC 246); the *Stag Line* case ([1969] 3 All ER 374, [1969] 1 WLR 1098), Scrutton on Charterparties (19th ed.) p. 376, Carver on Carriage by Sea (13th ed.) par. 669, Wilford on Time Charters (2nd ed.) pp. 197–198. The question here is whether the order to proceed to Dawes Island anchorage was an order as to employment or as to navigation. Seeing that the manifest intention was for the vessel to lighten there by discharging part of her cargo, I am of opinion that it was plainly an order as to employment. By contrast the advice of the pilot as to precisely where the vessel should anchor, if it had been an order and if (which is not suggested) it had been given on behalf of the charterers, would have been an order as to navigation.'

It is not hard to think of orders which plainly relate to the employment of the vessel and others which plainly relate to its navigation. It is much less easy to formulate any test which clearly distinguishes between the two. The charterer's right to use the vessel must be given full and fair effect; but it cannot encroach on matters falling within the specialised professional maritime expertise of the

master, particularly where the safety or security of the vessel, her crew and her cargo are involved. He is the person, on the vessel, immediately responsible. Technical questions concerning the operation of the vessel are for him. Thus a decision when, in the prevailing conditions of wind, tide and weather, to sail from a given port is plainly a navigational matter, as held in the *Larrinaga* case. By contrast, a decision without good reason to remain in port instead of continuing with a voyage (as in *The Renée Hyaffil* and the *Lord* case) or to economise on bunkers for no good maritime reason (as in the *Suzuki* case) were properly regarded as falling outside the navigational area reserved to the master's professional judgment.

Despite the judgments below, I am of the clear opinion that the majority arbitrators were right to hold that the orders to take the great circle route on both the disputed voyages were orders which the charterers were entitled to give and with which (on the arbitrators' findings) the owners were bound to comply. This does not mean that the charterers usurped the owners' navigational responsibility. As pointed out in Lenfestey *Dictionary of Nautical Terms* p 196:

> 'To sail a perfect circle route would require continuous course changes, because a great circle intersects each meridian at a different angle (except when sailing straight along the equator). Since this is not practical, a series of points are established along the course, and the rhumb lines between them are sailed.'

The responsibility for making good, so far as practicable, whatever course is chosen of course remains with the master and crew, as does that for navigating the vessel safely into and out of port, and responding to maritime problems encountered in the open sea. But subject to safety considerations and the specific terms of the charter, the charterers may not only order a vessel to sail from A to B but may also direct the route to be followed between the two.

For these reasons, as well as those given by Lord Hobhouse of Woodborough, I would allow the appeal and make the order which he proposes.

LORD NICHOLLS OF BIRKENHEAD. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hobhouse of Woodborough. For the reasons they give, and with which I agree, I would allow this appeal.

LORD HOFFMANN. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hobhouse of Woodborough. For the reasons they give, and with which I agree, I would allow this appeal.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hobhouse of Woodborough. I agree with them, and for the reasons which they have given I too would allow the appeal and make the order which Lord Hobhouse proposes.

LORD HOBHOUSE OF WOODBOROUGH. My Lords, this is an appeal under the Arbitration Act 1979 from a reasoned award of arbitrators appointed under a time charter dated Tokyo 21 October 1993. It was one of a chain of charterparties relating to the Liberian motor ship Hill Harmony described as being of 15,622

tons gross and 9,017 tons net register, having a deadweight capacity of 24,683 metric tons and a laden service speed of about 13 knots in good weather conditions. She had been built in 1985 and was a bulk carrier with five holds. The parties to the relevant charterparty were the respondents Whistler International Ltd of the British Virgin Islands as disponent owners and the appellants Kawasaki Kisen Kaisha Ltd of Tokyo as charterers: I will call them respectively the 'owners' and the 'charterers'. *a* *b*

The time charter, which was for seven to nine months at charterers' option, was on the New York Produce Exchange form with amendments. It contained a London arbitration clause (cl 17) referring disputes to the arbitration of three commercial and shipping men in London in accordance with English law, the decision of any two of them to be final. The disputes between the owners and charterers was referred to arbitration in accordance with this clause. The arbitrators by a majority decided substantially in favour of the charterers. The owners obtained leave to take the award to the Commercial Court under the Act and Clarke J ([1998] 4 All ER 286, [1999] QB 72) reversed the decision of the arbitrators, but certified that the award raised a question of law of general public importance and gave leave to appeal. The charterers' appeal to the Court of Appeal ([1999] 2 All ER (Comm) 1, [2000] QB 241) was dismissed, and they have now appealed with leave to your Lordships' House. *c* *d*

The relevant dispute relates to two laden voyages performed by the vessel from Vancouver to Japan in respectively January/February and April/May 1994. The actual cargoes carried are immaterial and were presumably non-perishable. The respective voyages should only have taken about 16¾ and 13¾ days. But on neither voyage did the vessel go by the shortest route. As a result, on one voyage she took six and a half days longer to get to her destination and consumed some 130 tons more fuel and on the other she took three days longer and consumed some 69 tons more. The loss to the charterers was about $US89,800. The owners denied liability for the charterers' loss. They contended that they were not obliged to send the vessel on the shortest route and furthermore were entitled to reject orders from the charterers to take the shortest route. *e* *f*

So far as presently relevant, the charterparty provided as follows. The vessel was let to the charterers for worldwide trading via safe ports, berths or anchorages always within Institute Warranty Limits. These limits are the geographical limits contained in the standard terms of marine H&M policies so this provision has the effect of precluding the charterers from requiring the vessel to go outside the geographical limits permitted by the owners' insurance cover assuming that that cover is on the ordinary terms. (The charterparty also excluded a list of other areas or countries which are not material to the present dispute, mostly relating to political and cognate risks. Similarly there were clauses relating to ice which are likewise not relevant.) The owners undertook that the vessel when delivered would be seaworthy and in every way fit for the charter service and she was to be so maintained during the service (cl 1). (A similar obligation of due diligence arose under the clauses paramount incorporated in the charterparty.) The owners had also to provide and pay for the crew. Nothing in the charterparty was to construed as a demise of the vessel to the charterers and the owners were to remain responsible for the navigation of the vessel, acts of pilots and/or tugboats, insurance, crew and all other matters as when trading for their own account (cl 26). *g* *h* *j*

The charterers were to provide and pay for the bunkers whilst the vessel was on hire and to pay for port charges, pilotages, agencies and all other usual charges (cl 2). The charterers were to pay the hire half-monthly in advance at the agreed rate, the liability accruing from day to day except when the vessel was off-hire (cl 4). The charterparty contained an off-hire clause (cl 15) which is not material to the present appeal since the arbitrators rejected the charterers' claim under that clause on a point of construction and that part of their decision was not the subject of an appeal. I express no view upon it.

The charterers were also under an obligation to furnish the captain of the vessel from time to time with all requisite instructions and sailing directions (cl 11). The captain was to prosecute his voyages with the utmost dispatch and was, although appointed by the owners, to be under the orders and directions of the charterers as regards employment and agency (cl 8). The vessel was to have the liberty to deviate for the purpose of saving life and property (cl 16) and by reason of the incorporation of the amended Hague Rules (v inf) any other reasonable deviation was permitted (art IV, r 4).

The charterparty also incorporated no fewer than three clauses paramount but no point arose on their application (*Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1958] 1 All ER 725, [1959] AC 133) nor as to which one was relevant. It was accepted that their effect was to incorporate an exception for loss or damage arising from the act, neglect or default of the master in the navigation or management of the ship in art IV, r 2(a) of the amended Hague Rules.

The charterers' allegation was that the owners had been in breach of their obligation to prosecute the relevant voyages with the utmost dispatch and to comply with charterers' orders to proceed by the shortest route. The owners' response was that the orders and the choice of route did not relate to the employment of the vessel but to its navigation and all matters of navigation were within the sole province of the master to decide and, if he was in any way at fault, owners' liability was excluded under art IV, r 2(a). The dispute therefore raised a question of the scope of the contrasting terms 'employment' and 'navigation' as used in this type of charterparty.

The arbitration was at the wish of the parties conducted on documents without an oral hearing. The arbitrators described the principal issue in the arbitration as being whether the master's decision to disregard the charterers' instructions as to the course which he was to take on the two voyages in question was unjustifiable. They referred to what appeared to be the background to the master's attitude. In October 1993, under a previous charterparty, the vessel had encountered heavy weather on a voyage from near San Francisco to a port in southern Japan and had suffered heavy weather damage. It was apparently this experience which had led the master in the following January and April to choose to follow a more southerly route from Vancouver to the east coast of Japan. Indeed, in January 1994, he gave this as his reason for refusing to obey the charterers' order to proceed by the shortest route, that is to say the 'great circle' or more northerly route, and preferring to go further south along the 'rhumb line' where he might expect easier weather conditions. Having considered the evidence, the (majority) arbitrators stated: 'We did not consider that this amounted to a satisfactory reason in itself for disregarding the Charterers' instructions.' As regards the April voyage, the only reason which the master gave was that the vessel's auxiliary boiler was inoperative as it had broken down and not been repaired. This excuse if factually correct would have raised obvious

difficulties for the owners as it involved saying that the vessel was not seaworthy. But the arbitrators rejected the master's excuse as spurious since the problem with the auxiliary boiler had been dealt with at Vancouver before the vessel sailed and no question of unseaworthiness could arise. The arbitrators suspected that his true reason was the same as before. They said:

> 'In the case of the second disputed voyage, if the master's decision had indeed been based upon the experience of [the 1993 voyage], it was even more difficult to justify than his decision in relation to the first disputed voyage given the fact that the voyage commenced in late April when the weather could be expected to have been significantly better on the recommended [shorter] route.'

They concluded that—

> 'the evidence ... had failed to demonstrate that the master had acted reasonably having regard to all the relevant circumstances in rejecting the charterers' orders on both these voyages.'

The evidence to which the arbitrators were referring included independent evidence which they clearly accepted and which, as appears from the recitation in their reasons, was uncontradicted by any other evidence. The charterers' orders as to the route were given after taking the advice of Ocean Routes. Ocean Routes are a well established specialist commercial organisation of which the business is to assemble and record information about weather and sea conditions in the oceans of the world at different times of year and accordingly to advise those involved in the marine transportation industry as to the most favourable routes to follow when crossing oceans. Thus when the arbitrators refer to the 'recommended' route they are referring to the route recommended by Ocean Routes. The evidence accepted by the arbitrators was that in the period March to May 1994 Ocean Routes had provided advice to some 360 vessels routed from the Pacific north-west to northerly China Korea or Japan. All of these vessels had sailed on a northerly route. The only vessels that did not do so were vessels which were proceeding to destinations far to the south of Japan such as Singapore or the Philippines. There was no evidence of any particular difficulties encountered by the vessels which had taken the northern route during the relevant period.

The (majority) arbitrators found that the owners were in breach of their obligation under the charterparty to ensure that the master prosecuted the voyages with the utmost dispatch and followed the charterers' orders regarding the employment of the vessel. They then considered the defence 'error' in navigation (sic). Following what they understood was the effect of the decision in *Lord (owners) v Newsum, Sons & Co Ltd* [1920] 1 KB 846, they concluded that the planning of the voyage was not a matter of navigation; it was not a case where the master had decided to alter course at sea.

Clarke J adopted a diametrically opposite approach. He held that the dispute related to matters of navigation not to matters of employment. It followed that the orders were not ones which the charterers were entitled to give and the decision what route to follow was one for the master alone. If any liability had arisen it would have been covered by the exception. He said:

> 'In my judgment an order as to where the vessel was to go, as for example to port A or B to load or discharge or to port A or port B via port C to bunker would be an order as to employment which the master would be bound to

follow, subject of course (as all parties agreed) to his overriding responsibility for the safety of his ship. An order as to how to get from where the ship was to port A, B or C would not, however, be an order as to employment but an order as to navigation. So, for example, to take an illustration discussed in argument, a direction to a master proceeding to a port of discharge to pass, say, on one side or another of a light vessel or an island or to proceed by way of one channel rather than another would be a direction as to navigation not employment. There can I think be no real doubt that a decision by a master as to which channel to take, what course to set or which side of an island or light vessel to go, would be a decision as to navigation and not as to employment. The same must be true of an order or direction to the master in any of those respects. In my judgment these considerations lead to the conclusion that a decision whether to proceed across the Pacific by taking the great circle route or the rhumb line route or course would also be a decision in and about the navigation of the vessel and not in and about her employment. It is true, as the arbitrators say and as has been urged in argument, that one decision or the other would be likely to have important financial consequences for the charterers, (and perhaps also the owners), but that is true of many decisions which masters take.' (See [1998] 4 All ER 286 at 292, [1999] QB 72 at 81–82.)

He therefore was able to discard as irrelevant the arbitrators' view that the decisions of the master were unreasonable and unjustified:

> 'That might have been a good decision or a bad decision. It might have been justified or (as the arbitrators held) unjustified but it was not, in my judgment, a decision as to the employment but as to the navigation of the vessel.' (See [1998] 4 All ER 286 at 292, [1999] QB 72 at 82.)

As regards whether the master had failed to prosecute the voyages with the utmost dispatch, Clarke J apparently concluded that the arbitrators had not found that he had failed to do so. He said that they had not considered it ([1998] 4 All ER 286 at 298, [1999] QB 72 at 88).

In the Court of Appeal, the leading judgment, agreed to by the other members of the court, was given by Potter LJ. He held that the ocean route to be followed by the vessel was a matter of navigation for the master and not a matter of employment upon which the charterers could give the master orders. Provided that the master acted bona fide, it did not matter whether he acted reasonably because the owners were protected by the exception in art IV, r 2(a). He summarised his decision:

> 'It seems to me, as Mr Hamblen submitted, that the master's decision was a decision on navigation because it was a decision upon what course or combination of courses to follow in prosecuting the overall voyage, and because the reason for the decision, made bona fide, was the master's concern for the safety of the vessel ... So far as the application of art IV, r 2(a) is concerned, I consider that the judge was right in construing the term "navigation" as therein appearing as extending to a decision taken, in the course of voyage planning, to steer a particular course or courses having regard to the weather to be anticipated.' (See [1999] 2 All ER (Comm) 1 at 17, [2000] QB 241 at 261–262.)

These judgments of two such experienced judges are entitled to great respect but so is the decision of the commercial shipping arbitrators to whom the parties agreed that the resolution of their dispute should be entrusted. It should also be appreciated that the decision of Clarke J has been forcefully criticised by the late Mr Davenport QC in 'Rhumb Line or Great Circle?—That is a Question of Navigation' [1998] LMCLQ 502 and that the Court of Appeal decision has been similarly criticised from a commercial point of view at 'Right to Routes' [1999] LMCLQ 461 by Mr Donald Davies, a highly experienced and legally qualified London maritime arbitrator who has also had experience as a master mariner. Similarly, Mr Young who appeared for the charterers was able to refer your Lordships to an award of maritime arbitrators in New York holding, on facts probably less favourable to charterers, that the master was not entitled to choose, contrary to the wishes of the charterers, to proceed across the Pacific by a longer and more southerly route.

The question raised by this dispute is not a new one. It reflects the conflict of interest between owners and charterers under a time charter. Under a voyage charter the owner or disponent owner is using the vessel to trade for his own account. He decides and controls how he will exploit the earning capacity of the vessel, what trades he will compete in, what cargoes he will carry. He bears the full commercial risk and expense and enjoys the full benefit of the earnings of the vessel. A time charter is different. The owner still has to bear the expense of maintaining the ship and the crew. He still carries the risk of marine accidents and has to insure his interest in the vessel appropriately. But, in return for the payment of hire, he transfers the right to exploit the earning capacity of the vessel to the time charterer. The time charterer also agrees to provide and pay for the fuel consumed and to bear the disbursements which arise from the trading of the vessel. The owner of a time-chartered vessel does not normally have any interest in saving time. An exception is where towards the end of a time charter, the expiry of the charter depends upon whether voyages can or cannot be performed within the allotted period. In such a situation the owners' interest will vary depending upon whether the charter rate is above or below the current market rate.

There have been a succession of statements by experienced commercial judges which refer to these features of charterparties. To quote Lord Mustill in *Torvald Klaveness A/S v Arni Maritime Corp, The Gregos* [1995] 1 Lloyd's Rep 1 at 4:

> 'My Lords, in merchant shipping time is money. A cargo ship is expensive to finance and expensive to run. The shipowner must keep it earning with the minimum of gaps between employments. Time is also important for the charterer, because arrangements must be made for the shipment and receipt of the cargo, or for the performance of obligations under sub-contracts. These demands encourage the planning and performance of voyages to the tightest of margins. Yet even today ships do not run precisely to time. The most prudent schedule may be disrupted by regular hazards such as adverse weather or delays in port happening in an unexpected manner or degree, or by the intervention of wholly adventitious events. Where the charter-party is for a period of time rather than a voyage, and the remuneration is calculated according to the time used rather than the service performed, the risk of delay is primarily on the charterer. For the shipowner, so long as he commits no breach and nothing puts the ship off-hire, his right to remuneration is unaffected by a disturbance of the charterer's plans. It is for

the latter to choose between cautious planning, which may leave gaps between employments, and bolder scheduling with the risk of setting aims which cannot be realized in practice. This conflict of interest becomes particularly acute when there is time left for only one more voyage before the expiry of the charter, and disputes may arise if the charterer orders the ship to perform a service which the shipowner believes will extend beyond the date fixed for redelivery.'

What might be described as the scheduling of the vessel is of critical importance to the charterer so that obligations to others can be fulfilled, employment opportunities not missed and flexibility maintained. The 'utmost dispatch' clause is, as Lord Sumner said in *Suzuki & Co Ltd v T Beynon & Co Ltd* (1925) 24 Ll L Rep 49 at 54, a merchants' clause with the object of giving effect to the mercantile policy of saving time. As a matter of this mercantile policy and, indeed, as a matter of the use of English, a voyage will not have been prosecuted with the utmost dispatch if the owners or the master unnecessarily chooses a longer route which will cause the vessel's arrival at her destination to be delayed. If the charterer has sub-voyage-chartered the vessel to another or has caused bills of lading to be issued, the charterer will be under a legal obligation to ensure that the voyage be prosecuted without undue delay and without unjustifiable deviation. The charterer is entitled to look to the owner of the carrying vessel to perform this obligation and that is one of the reasons why the 'utmost dispatch' clause is included in the usual forms of time charter.

Suppose that the charterer does no more than order the vessel to load at Vancouver and proceed to a port on the east coast of Japan, that order would give rise to an obligation under the clause to proceed from one port to the other with the utmost dispatch and is inconsistent with a liberty to delay the vessel by going by a longer than necessary route. To proceed by an unnecessarily long route delays the vessel just as surely as if the vessel had sailed at something less than full speed. There may of course be countervailing factors such as adverse currents or headwinds which may make an apparently longer route in fact the more expeditious route but, on the arbitrators' findings, none of those factors justified taking the longer route in the present case.

Another difficulty for the owners' argument is the fact that the owners have already agreed in the charterparty what are to be the limits within which the charterers can order the vessel to sail, for present purposes the Institute Warranty Limits, and have undertaken that, barring unforeseen matters, the vessel will be fit to sail in those waters. It is not open to the owners to say that the vessel is not fit to sail from Vancouver to Japan by the shortest route within IWL. Yet it was exactly this type of argument which the courts below entertained. In fact, upon the findings of the arbitrators, the vessel was fit to sail by the shorter northern route and the master did not have any good reason for preferring the longer southern route. It was not a good reason that he preferred to sail through calm waters or that he wanted to avoid heavy weather. Vessels are designed and built to be able to sail safely in heavy weather. The classification society rules require, as does cl 1 of the NYPE form, the maintenance of these safety standards. It is no excuse for the owners to say that the shortest route would (even if it be the case) take the vessel through the heavy weather which she is designed to be able to encounter.

The courts below discussed the question of deviation under bill of lading contracts or voyage charterparties. This was not directly material to a time charter

where the contract is not a contract of carriage but a contract for the provision of the services of a crewed vessel. However, there is a relationship between prosecuting a voyage with the utmost dispatch and doing so without unjustifiable deviation. Thus, in relation to a voyage charter, Lord Porter said:

> 'It is the duty of a ship—at any rate, when sailing upon an ocean voyage from one port to another—to take the usual route between those two ports. If no evidence be given, that route is presumed to be the direct geographical route, but it may be modified in many cases, for navigational or other reasons, and evidence may always be given to show what the usual route is, unless a specific route be prescribed by the charterparty or bill of lading ... In some cases, there may be more than one usual route. It would be difficult to say that a ship sailing from New Zealand to this country had deviated from her course whether she sailed by the Suez Canal, the Panama Canal, round the Cape of Good Hope or through the Straits of Magellan. Each would, I think, be a usual route.' (See *Reardon Smith Lines Ltd v Black Sea and Baltic General Insurance Co Ltd, The Indian City* [1939] 3 All ER 444 at 457, [1939] AC 562 at 584.)

The question in that case was whether a visit to a bunkering port was a breach of the charterparty contract. There was evidence that it was usual for vessels loading at the loading port to proceed via the other port for bunkers. Therefore there was no breach of the contract of carriage.

A number of points relevant to the present case arise from this. Under the time charter the obligation is not simply to proceed by a usual route but to proceed with the utmost dispatch. Further, where the vessel should take on bunkers is, subject to emergencies, undoubtedly a matter for the charterers. The provision of bunkers is the charterers' responsibility and the charterers can give orders as to the bunkering ports to be visited; no question of what is usual arises. Again, Lord Porter points out that there may be more than one usual route for proceeding on a long voyage from one continent to another. The argument of the owners, from which they did not resile, was that in this situation the choice between the usual routes was entirely a matter for the master and the charterers could not give orders as to which was to be chosen, say, via the Cape of Good Hope or via the Suez Canal, even though the charterers would have to pay the canal and port dues and pay for the fuel consumed (see also Mr Davenport QC, loc cit). The significance of such choices are commercial and relate to the exploitation of the earning capacity of the vessel. They are within the ambit of the employment of the vessel and are matters about which time charterers can give orders. A time charterer can give an order because he wants the vessel to be well positioned for a commercial opportunity or other commercial reason. A time charterer can order the chartered vessel to proceed at an economical speed; the time charterer may be waiting for a cargo to become available or the laydays at a loading port may not begin until after a certain date.

But even if the courts below should have got involved, which they have not, in a discussion of what was the usual route across the Pacific from Vancouver to the east coast of Japan, the arbitrators' reasons were clear. The northerly route was the shortest route. There was no evidence that any other route was a usual route. There was evidence that the northerly route was the usual route to follow as it had been by 360 vessels over a three-month period. It was also incorrect to treat the case as if it left open the possibility that there had been a rational

justification for refusing to proceed by the northerly route. The arbitrators found that the master did not have any rational justification for what he did. My Lords, it follows from what I have already said that, on the findings of the arbitrators, the charterers were, by ordering the vessel to proceed by the shortest and most direct route, requiring nothing more than was in any event the contractual obligation of the owners. Therefore the question whether the order was an order as regards the employment of the vessel is academic. But it was in truth such an order. The choice of ocean route was, in the absence of some overriding factor, a matter of the employment of the vessel, her scheduling, her trading so as to exploit her earning capacity. The courts below, by contrast, accepted the owners' argument that it was necessarily a matter of the navigation of the vessel.

In support of this argument, the charterers primarily relied upon *Larrinaga Steamship Co Ltd v R* [1945] 1 All ER 329, [1945] AC 246. The vessel in question had suffered a marine casualty: in the early hours of 14 October 1939, in a storm, she had stranded on a bank outside St Nazaire. She was at the time under requisition by the British Government on the terms of the T99A charterparty which effectively incorporated war risks insurance. This insurance includes cover for accidents occurring during or the consequence of 'warlike operations'. The vessel had at the time received an oral order from a sea transport officer to vacate the berth and sail to join a convoy proceeding to the Bristol Channel. As a result of the stranding the vessel was seriously damaged. Her owners sought to recover the cost of repairs from the government. They put their claim on two bases, neither of which succeeded. First, they claimed that the casualty was a consequence of a warlike operation: it was not, nor was she engaged on such an operation at the time. Secondly, they claimed under the charterparty indemnity clause on the basis that the casualty was caused by obeying an order regarding the employment of the vessel. This too failed for a number of reasons. The only order as regards the employment of the vessel was that requiring her to proceed from the French port to the English port; that order did not cause the casualty; in any event the order to leave St Nazaire had been a naval order not an order of the charterer. The relevant parts of the speeches are those relating to whether there was an order of the charterer regarding the employment of the vessel and whether the casualty was caused by that order or by the master's navigation of the vessel. The question of causation is a real one. Lord Porter stressed this. He referred to the fact that employment related to the employment of the vessel and that the order had been to sail after discharge was complete. He said:

> 'But this order did not in a legal sense, and I doubt if such an order ever could, cause such a loss ... This wording left it to the master's discretion to sail at a reasonable time thereafter, and in determining what is a reasonable time all such matters as the state of the weather and the exhaustion of the crew would properly be taken into consideration. In these circumstances it cannot be said that either of these orders caused the damage which the ship suffered. A loss is not, under English law, caused by orders to make or by making a voyage because it occurs in the course of it. Such a loss is merely the fortuitous result of the ship being at a particular place at a particular time, and in no legal sense caused by the charterers' choice of port to which the ship is directed or their instructions to her master to proceed to it. But it was said that the ship sailed not by reason of the written order to proceed, but by the subsequent oral order, and that such an order did cause the loss, since it was the probable and contemplated result of sailing in unfavourable weather

> that the ship might suffer damage which, had the master been free to choose his own time, would probably have been avoided.' (See [1945] 1 All ER 329 at 336, [1945] AC 246 at 260–261.)

This argument Lord Porter rejected, giving three reasons for doing so. First, he drew a distinction between an order to sail from port 'A' to port 'B' and an order to sail at a particular time, the former being a direction as how the ship shall be employed and the latter relating to how she shall act in the course of that employment. His second reason was that, whilst a mere order to sail may be an order which the charterer is entitled to give, this still 'leaves it to the discretion of the master who is responsible for the safety of his ship to choose the time and opportunity for starting on his voyage'. 'I know of no right on the part of a charterer to insist that the safety of the ship should be endangered by sailing at a time when seamanship requires her to stay in port.' (See [1945] 1 All ER 329 at 337, [1945] AC 246 at 262.) An order from a naval authority could be different but that was not something for which the Government was liable as charterer. His third reason was one of lack of legal causation. (Later authorities confirm this need for a *direct* causal link: eg *The White Rose, AB Helsingfors Steamship Co Ltd v Rederiaktiebolaget Rex* [1969] 3 All ER 374, [1969] 1 WLR 1098.) The other members of the House agreed with Lord Porter, Lord Wright adding ([1945] 1 All ER 329 at 333, [1945] AC 246 at 255) that 'employment' meant 'the services which the ship is ordered to perform' and contrasting it with 'navigation'.

Lord Porter used the word 'seamanship'. This word was also used by Lord Sumner in *Suzuki & Co Ltd v T Beynon & Co Ltd* (1925) 24 Ll L Rep 49 when describing what was encompassed by the exception for errors of navigation. That case concerned the master of a time-chartered vessel which failed, without any good reason, to steam at full speed. He said (at 54):

> 'I see no ground for bringing the captain's action or inaction under the head of navigation ... there is a real field in which the captain's shortcomings would not fall within the exception clause (14) ["negligence, default or error in judgment of the ... master ... in the management or navigation of the steamer"] and yet would constitute a breach of his obligation to use dispatch under Clause 9 ["the captain shall prosecute all his voyages with the utmost dispatch"]. The maintenance of full speed may often be part of the duty which those responsible for navigation have to perform, directly or by others, as, for example, in order to save a tide at a bar or to correct excessive leeway or deflection by currents, or to make the ship quick to answer her helm, or to make a course good against head winds, or what not. Here, however, it is not pretended that the ship was handled in an unseamanlike manner or that either ship or cargo were imperilled by the navigation that took place.'

Similarly, in the case *The Renée Hyaffil* (1915) 32 TLR 83 (Evans P); (1916) 42 TLR 660 (CA), the vessel was supposed to be performing a winter voyage from the east coast of Spain to London laden with a cargo of fruit but the master did not wish to brave the weather in the Bay of Biscay even though it was no worse than might be expected for that time of year. He put into La Corunna and stayed there for 23 days. When sued, the owners sought to rely upon the exception neglect in the navigation or management of the vessel. This defence failed both before the judge and in the Court of Appeal: 'That delay had nothing to do with the

navigation or management of the ship as such.' (See (1916) 42 TLR 660 per Swinfen Eady LJ.)

The Renée Hyaffil was cited in *Lord (owners) v Newsum, Sons & Co Ltd* [1920] 1 KB 846 which was relied upon by the charterers but criticised by the courts below as being inconsistent with *Carmichael & Co v Liverpool Sailing Ship Owners' Mutual Indemnity Association* (1887) 19 QBD 242. In the *Lord* case, the vessel was under a six-month time charter made in 1916. She was ordered on a laden voyage to Archangel but had to abandon the voyage because the master chose to proceed by a route close to the coast of Norway and was held up by the presence of German submarines. If he had proceeded by a route further from the coast, as prescribed by the British Admiralty and by the Norwegian war risk insurers, she would have been able to complete the voyage. The owners were held liable under the 'utmost dispatch' clause. The 'navigation and management' clause was held to provide no defence. Bailhache J said ([1920] 1 KB 846 at 849):

> '... the deliberate choice, while in harbour, of one of two routes to be pursued cannot, I think, be an error in the "management" or in the "navigation" of the ship. There is no doubt sometimes great difficulty in drawing the line between what is and what is not "navigation," but I think the line ought to be drawn in the way I have indicated and as excluding the deliberation by the master in port regarding the route by which he will proceed to his port of destination.'

The decision was no doubt correct but the reasoning is certainly confusing. The character of the decision cannot be determined by where the decision is made. A master, whilst his vessel is still at the berth, may, on the one hand, decide whether he needs the assistance of a tug to execute a manoeuvre while leaving or whether the vessel's draft will permit safe departure on a certain state of the tide and, on the other hand, what ocean route is consistent with his owners' obligation to execute the coming voyage with the utmost dispatch. The former come within the exception; the latter does not. Where the decision is made does not alter either conclusion.

My Lords, what I have said has the support of Staughton J in *Newa Line v Erechthion Shipping Co SA, The Erechthion* [1987] 2 Lloyd's Rep 180 at 185 where he distinguished between an order to proceed to a particular anchorage and lighten—'employment'—and taking the advice of the pilot as to where in that anchorage to drop the anchor—'navigation'. The owners have relied upon various insurance cases giving a broad interpretation to the use of the word 'navigation' in policies and other insurance contracts. These cases did not assist in the present case which is concerned with the use of the term in an exception clause in contracts of carriage and the amended Hague Rules and its interrelationship with the use of the word 'employment'.

The meaning of any language is affected by its context. This is true of the words 'employment' in a time charter and of the exception for negligence in the 'navigation' of the ship in a charterparty or contract of carriage. They reflect different aspects of the operation of the vessel. 'Employment' embraces the economic aspect—the exploitation of the earning potential of the vessel. 'Navigation' embraces matters of seamanship. Mr Donald Davies in the article I have referred to suggests that the words 'strategy' and 'tactics' give a useful indication. What is clear is that to use the word 'navigation' in this context as if it includes everything which involves the vessel proceeding through the water is

both mistaken and unhelpful. As Lord Sumner pointed out, where seamanship is in question, choices as to the speed or steering of the vessel are matters of navigation, as will be the exercise of laying off a course on a chart. But it is erroneous to reason, as did Clarke J, from the fact that the master must choose how much of a safety margin he should leave between his course and a hazard or how and at what speed to proceed up a hazardous channel to the conclusion that all questions of what route to follow are questions of navigation.

The master remains responsible for the safety of the vessel, her crew and cargo. If an order is given compliance with which exposes the vessel to a risk which the owners have not agreed to bear, the master is entitled to refuse to obey it: indeed, as the safe port cases show, in extreme situations the master is under an obligation not to obey the order. The charterers' submissions in the present case and the arbitrator's reasons and decision did not controvert this.

In the present case, the exception did not provide a defence. First, the breach of contract was the breach of both aspects of the owners' obligations under cl 8 of the time charter—to prosecute the voyage with the utmost dispatch and to comply with the orders and directions of the charterers as regards the employment of the vessel. As a matter of construction, the exception does not apply to the choice not to perform these obligations: *Steamship Knutsford Ltd v Tillmanns & Co* [1908] AC 406, [1908–10] All ER Rep 549; *Suzuki & Co Ltd v T Beynon & Co Ltd* (1925) 24 Ll L Rep 49. In the words of Lord Loreburn LC ([1908] AC 406 at 408, [1908–10] All ER Rep 549 at 552) the master 'simply broke his contract, interpreting it erroneously'. In the same case, Lord Dunedin said, referring to the exception of error of judgment in navigating the ship or otherwise:

> 'It seems to me fantastic to extend it to the idea of a captain forming a wrong legal opinion on the meaning of a clause in the bill of lading and then proceeding to act upon it.' (See [1908] AC 406 at 410, [1908–10] All ER Rep 549 at 553.)

(See to the same effect Kennedy LJ in the Court of Appeal ([1908] 2 KB 385 at 406–407.) Secondly, any error which the master made in this connection was not an error in the navigation or management of the vessel; it did not concern any matter of seamanship. Thirdly, the owners failed to discharge the burden of proof which lay upon them to bring themselves within the exception. This was clearest with regard to the second of the two relevant voyages where the arbitrators could only guess at, 'suspect', why it was that the master acted as he did.

My Lords, the courts below were wrong to set aside the award of the arbitrators. Their award was not erroneous in point of law. The interpretation which they placed upon the utmost dispatch and employment clause was one which was open to them and it was likewise right for them, on the view they took of the state of the evidence, to conclude that the defence was not made out. The arbitrators' role in deciding a dispute of this kind draws upon their experience of the shipping industry and the problems it gives rise to. Their description of the commercial character of the bargain struck in a time charter echoed that of Lord Mustill already quoted and is the same as that which I have attempted to explain. They stressed that if the owners wished to rely upon the navigation defence they must explain their position and justify what they had done. In so far as the arbitrators did have any explanation from the master, they rejected it as not providing any justification for not proceeding by the shorter northern route, the

great circle route. The evidence of the recommendations of Ocean Routes was uncontradicted.

Accordingly the appeal should be allowed; the respondents, Whistler International Ltd, should pay the costs of the appellants, Kawasaki Kisen Kaisha Ltd, in your Lordships' House, in the Court of Appeal and in the Commercial Court, such costs to include any sums which Kawasaki Kisen Kaisha Ltd were ordered by Clarke J to pay in respect of the costs of Tokai Shipping Co Ltd; and the order of Clarke J should be set aside and the award upheld.

Appeal allowed.

Kate O'Hanlon Barrister.

Smith and another v Lloyds TSB Bank plc
Harvey Jones Ltd v Woolwich plc

COURT OF APPEAL, CIVIL DIVISION

PILL, POTTER LJJ AND SIR MURRAY STUART-SMITH

28, 29 JUNE, 27 JULY 2000

Bank – Cheque – Conversion – Fraudulent alteration of cheque or banker's draft – Whether collecting or paying bank liable in conversion for face value of fraudulently altered cheque or banker's draft – Bills of Exchange Act 1882, s 64.

In the first of two appeals raising a common issue on the effect of s 64(1)[a] of the Banking Act 1882, the Insolvency Service sent the claimant liquidators a cheque for some £127,240, payable to the Revenue. The cheque was stolen from the liquidators' offices and the name of the payee fraudulently altered. It was paid into a branch of the defendant bank, L plc, and was cleared before the liquidators discovered its loss. They brought proceedings in conversion against L plc, as collecting bank, seeking damages in the sum of the cheque's face value. L plc relied on s 64(1) of the 1882 Act which provided, subject to an inapplicable proviso, that where a bill or acceptance was materially altered without the assent of all parties liable on it, the bill was avoided except as against a party who had himself made, authorised, or assented to the alteration, and subsequent indorsers. The judge held that s 64(1) had rendered the cheque a worthless piece of paper before it reached L plc, and that accordingly the liquidators were entitled only to nominal damages. The liquidators appealed.

In the second appeal, the claimant, H Ltd, was the holder and payee of a draft issued by the defendant bank, W plc, in the sum of approximately £7,222. The draft was stolen from H Ltd's premises and presented to the branch of another bank with the payee's name fraudulently altered. The collecting bank presented the altered draft to W plc for payment to an account in the name appearing as the payee on the fraudulently altered draft. W plc duly paid the sum to the collecting bank in purported discharge of the draft. Until that point, W plc would have supplied H Ltd, on request, with a replacement draft in the same sum. H Ltd subsequently brought proceedings in conversion against W plc which relied on s 64(1) of the 1882 Act. The judge held that H Ltd was entitled to damages for the full face value of the fraudulently altered draft. W plc appealed.

Held – On the true construction of s 64(1) of the 1882 Act, a materially altered cheque or draft was, subject to the qualifications in the section, a worthless piece of paper. Thus no party could bring an action for damages in conversion for its face value because it no longer represented a chose in action for that amount. In the case of a cheque, the customer of the paying bank was protected because the bank, which bore the risk, could not debit the customer's account. In the case of a banker's draft, the customer's account was debited when the draft was issued to him. He had the benefit of a bill drawn by the bank itself, which he might require to satisfy business requirements, but once he had it, he assumed the relevant risk as he would assume the risk if he drew bank notes which were stolen. The fact

a Section 64, so far as material, is set out at p 427 *j* to p 428 *a*, post

that the paying bank would normally issue a replacement draft if the invalidity were discovered before the collecting bank credited the wrong account did not mean that the materially altered draft was valid. The paying bank would have suffered no loss and might issue a replacement draft as a matter of good business practice, or possibly contractual obligation. However, the likelihood of such action did not render valid that which s 64 had rendered invalid. Moreover, the consequence of invalidity could not be avoided by alleging an estoppel. The cheque was rendered invalid by s 64 and, by presenting it under normal banking arrangements, the collecting bank was not asserting its validity. Accordingly, the first appeal would be dismissed and the second appeal would be allowed (see p 434 *d* to *j* and p 435 *g* to *j*, post).

Slingsby v District Bank Ltd [1931] All ER Rep 143 explained.

Decision of Blofeld J [2000] 1 All ER (Comm) 53 affirmed.

Notes

For the effect of the alteration of an instrument, see 4(1) *Halsbury's Laws* (4th edn reissue) para 457.

For the Bills of Exchange Act 1882, s 64, see 5 *Halsbury's Statutes* (4th edn) (1998 reissue) 451.

Cases referred to in judgments

Lloyds Bank v Chartered Bank of India, Australia and China [1929] 1 KB 40, [1928] All ER Rep 285.

Morison v London County and Westminster Bank Ltd [1914] 3 KB 356, [1914–15] All ER Rep 853, CA.

Reckitt v Midland Bank Ltd (1932) 48 TLR 271, HL.

Slingsby v District Bank Ltd [1932] 1 KB 544, [1931] All ER Rep 143, CA; *affg* [1931] 2 KB 588.

Slingsby v Westminster Bank Ltd [1931] 1 KB 173.

Slingsby v Westminster Bank Ltd (No 2) [1931] 2 KB 583.

Underwood (A L) Ltd v Bank of Liverpool and Martins, A L Underwood Ltd v Barclays Bank [1924] 1 KB 775, [1924] All ER Rep 230, CA.

Cases also cited or referred to in skeleton arguments

Arrow Transfer Co Ltd v Royal Bank of Canada (1971) 19 DLR (3d) 420, BC CA; *affd* (1972) 27 DLR (3d) 81, Can SC.

Bank of Canada v Bank of Montreal (1977) 76 DLR (3d) 385, Can SC.

Bank of Ceylon v Kulatilleke (1957) 59 NLR 188.

Bavins Junr and Sims v London and South Western Bank Ltd [1900] 1 QB 270, CA.

Blackie v Pidding (1848) 6 CB 196, 136 ER 1225.

Building and Civil Engineering Holidays Scheme Management Ltd v Post Office [1965] 1 All ER 163, [1966] 1 QB 247, CA.

Bute (Marquess) v Barclays Bank Ltd [1954] 3 All ER 365, [1955] 1 QB 202.

Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd [1919] AC 744, HL.

Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd (NV Handelsmaatschappij J Smits Import-Export, third party) [1954] 1 All ER 779, sub nom *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459.

Clarke v Quince (1834) 3 Dowl 26.

Elawadi v Bank of Credit and Commerce International SA [1989] 1 All ER 242, [1990] 1 QB 606.

Fine Art Society Ltd v Union Bank of London Ltd (1886) 17 QBD 705, CA.

Koster's Premier Pottery Pty Ltd v Bank of Adelaide (1981) 28 SASR 355, SA SC.

Lumsden & Co v London Trustee Savings Bank [1971] 1 Lloyd's Rep 114.
Mathew v Sherwell (1810) 2 Taunt 439, 127 ER 1148.
Midland Bank Ltd v Reckitt [1933] AC 1, [1932] All ER Rep 90, HL.
Motis Exports Ltd v Dampskibsselskabet AF 1912 Aktieselskab [2000] 1 Lloyd's Rep 211, CA.
Orbit Mining & Trading Co v Westminister Bank Ltd [1962] 3 All ER 565, [1963] 1 QB 794, CA; *rvsg* [1962] 2 All ER 552.
Stoney Stanton Supplies (Coventry) Ltd v Midland Bank Ltd [1966] 2 Lloyd's Rep 373, CA.
Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1985] 2 All ER 947, [1986] AC 80, PC.
Underwood (A L) Ltd v Bank of Liverpool and Martins, A L Underwood Ltd v Barclays Bank [1924] 1 KB 775, [1924] All ER Rep 230, CA.
Yorkshire Bank plc v Lloyds Bank plc [1999] Lloyd's Rep Bank 191.

Appeals

Smith and another v Lloyds TSB Group plc

The claimants, Roger Smith and Christopher Timothy Esmond Hayward, appealed from the decision of Blofeld J on 29 June 1999 ([2000] 1 All ER (Comm) 53) whereby, on the determination of a preliminary issue, he held that they were only entitled to an award of nominal damages in conversion against the defendant, Lloyds TSB Group plc (Lloyds), for collecting a cheque in the sum of £127,240·30 which had been fraudulently altered in respect of the payee's name. The facts are set out in the judgment of Pill LJ.

Harvey Jones Ltd v Woolwich plc

The defendant, Woolwich plc, appealed with permission of Judge Hallgarten QC, granted on 5 July 1999, from his decision at Central London County Court on 8 June 1999 ordering it to pay the claimants, Harvey Jones Ltd, as true owners of a fraudulently altered banker's draft in the sum of £7,222·80, damages in conversion for the full face value the draft. The facts are set out in the judgment of Pill LJ.

Marion Simmons QC and *Sonia Tolaney* (instructed by *Berrymans Lace Mawer*) for the claimants in the Lloyds action.
Mark Hapgood QC and *Alexander Pelling* (instructed by *Dibb Lupton Alsop*) for Lloyds.
David Wolfson (instructed by *Thomas Eggar Church Adams*) for Woolwich.
Richard Slade (instructed by *Gersten & Nixon*) for the claimants in the Woolwich action.

Cur adv vult

27 July 2000. The following judgments were delivered.

PILL LJ. These appeals raise questions as to the possible liabilities in conversion of a bank to the true owner of a cheque or banker's draft for the full value of the instrument where the instrument has been fraudulently altered by the deletion of the name of the true payee and substitution of the name of a false payee prior to collection and payment. In *Smith v Lloyds TSB Group plc* (the Lloyds action), the claimants appeal against the decision of Blofeld J, dated 29 June 1999 ([2000] 1 All ER 53), whereby it was ordered, following the hearing of a preliminary issue of law, that the claimant was entitled to no more than nominal damages for the conversion by Lloyds, as the collecting bank, of a cheque which had been fraudulently altered. In the Woolwich action, the bank appeal against a decision of Judge

Hallgarten QC, dated 8 June 1999, whereby it was ordered that the true owner of a banker's draft was entitled to damages in conversion for the full face value of a fraudulently altered draft which had been converted by them as paying bank. In each case, the bank relied upon s 64 of the Bills of Exchange Act 1882.

The Lloyds action

The claimants are joint liquidators of ILG Travel Ltd, a company in creditors' voluntary winding up. By the Insolvency Regulations 1994, SI 1994/2507, moneys received or paid out in the course of a creditor's voluntary liquidation are routed through the Insolvency Services Account (the account) held by the Department of Trade and Industry (DTI) with the Bank of England. Moneys in the account are held by the DTI as trustees for those entitled to them, including the liquidator and unsecured creditors. In the case of a voluntary winding up, where the liquidator requires to make a payment in respect of the expenses of the winding-up, he may apply to the Secretary of the State, who may authorise payment to the liquidator or direct the issue to the liquidator of a payment instrument for delivery to the person to whom the payment is made. On 19 September 1996 the claimants applied to the Insolvency Service for the issue of a cheque for £127,240·30 payable to the Inland Revenue. On 23 September 1996 there was drawn on the account a cheque dated 26 September 1996 in that sum payable to the Inland Revenue. The cheque was crossed 'A/C Payee Only' and the claimants received it on 25 September 1996. Shortly afterwards the cheque was stolen from the claimants' offices and the name of the payee was fraudulently altered by deleting the words 'Inland Revenue' and inserting the name 'Joseph Smitherman'. The cheque was then fraudulently paid into an account in the name Smitherman at Lloyds' Southsea branch and was cleared on 17 October 1996, before the claimants discovered the loss of the cheque. When the Insolvency Service was informed of the loss, payment had already been made by the Bank of England. The claimants sue Lloyds, the collecting bank.

The Woolwich action

The claimants, who were manufacturers and suppliers of kitchen units, were the holders and payees of a draft dated 9 August 1996 issued by Woolwich and drawn on their corporate account in the sum of £7,222·80. It was issued by Woolwich at the request of their customers, Brian Easter and Jane Tucker, in order to meet a debt owed to the claimants for kitchen units, the customers' account being debited accordingly. On or about 14 August 1996 the draft was stolen from the claimants' premises and presented by an unknown third party to the Kennington branch of National Westminster Bank plc (NatWest) with the claimants' name altered to 'Edmund C.A. Owusu-Sekyere', such presentation being made for collection to an account in that name. NatWest presented the altered draft to Woolwich for payment to that account. Woolwich took possession of it and paid £7,222·80 to NatWest in purported discharge of the draft. Prior to that act, Woolwich would at the request either of the claimants or of Brian Easter and Jane Tucker, have supplied the claimants with a replacement draft in the sum of £7,222·80. The claimants sue Woolwich, the paying bank.

The statute

Section 64(1) of the 1882 Act provides:

> 'Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent

endorsers. Provided that, Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour ...'

By virtue of s 73 of the 1882 Act, a cheque is a bill of exchange drawn on a banker payable on demand. The 1882 Act, supplemented by the Cheques Act 1957 and the Cheques Act 1992, regulates the rights and liabilities of the parties to a cheque and of banks who collect and pay cheques. Section 80 of the 1882 Act protects a bank which in good faith and without negligence pays a crossed cheque drawn on it to another bank. Section 4 of the 1957 Act is the counterpart of s 80 and protects a collecting bank which acts in good faith and without negligence. Section 81A of the 1882 Act, inserted by s 1 of the 1992 Act, provides that where a cheque is crossed and bears across its face the words 'account payee' or 'a/c payee' either with or without the word 'only', the cheque shall not be transferable, but shall only be valid as between the parties thereto. Prior to its enactment, a person who stole a cheque which was a negotiable instrument could obtain the proceeds by forging an indorsement in the name of the true payee and paying the cheque into an account in the name of the indorsee or, in the case of a general indorsement, into any account. The effect of s 81A is to make a cheque crossed 'account payee', as the cheque in the Lloyds action was, not only not negotiable but also not transferable.

That fraud prevention measure, so described by Mr Hapgood QC on behalf of Lloyds, requiring the cheque to be paid into an account in the name of the payee, may be circumvented if a cheque is altered, the alteration not being apparent, by erasing the name of the true payee and substituting the name of a different payee in whose name an account has been opened. The name may of course be that of a rogue purporting to be the payee.

The common ground and the issues

The issues in these appeals are narrowed by the common ground which exists. (1) Authority binding on this court establishes that both a collecting bank and a paying bank may in certain circumstances be liable in the tort of conversion by collecting or paying a cheque for or to someone other than the true owner. (2) In both appeals, the banks accept that they converted the relevant piece of paper. (3) Section 80 of the 1882 Act does not protect a bank which pays on a forged instrument, for example a cheque on which the signature of the drawer has been forged, or an instrument which was once valid but has been avoided by material alteration. The paying bank is not entitled to debit its customer and bears the loss itself. (4) Both the alteration to the name of the payee on the cheque in the Lloyds action and the draft in the Woolwich action were 'material alterations' within the meaning of s 64 of the 1882 Act. (5) In these appeals, no party comes within the exception in or the proviso to s 64(1) of the 1882 Act. (6) Neither alteration was apparent on the face of the document and the failure of the bank to recognise the change in name was not in either case negligent.

In each case, it was alleged that the bank had converted the claimant's cheque. In the Lloyds action, the claim was also based on money had and received. Blofeld J recorded that it was accepted that no separate issue of law arose on that claim. At that stage the claim was kept open on the facts but the complainants now concede that, on the facts of this case, there is no claim for money had and received.

I accept Mr Hapgood's formulation of the main issue in the appeals:

'Where a cheque or banker's draft is fraudulently altered by deleting the name of the true payee and substituting the name of a different payee, and the cheque or draft is then collected and paid, is the paying bank and/or the collecting bank liable in conversion for the full value of the instrument, or is the measure of damage nominal on the ground that the material alteration renders the instrument a nullity by virtue of section 64 of the 1882 Act?'

Conversion is an interference with goods inconsistent with the owner's right to possession. Cheques are goods for this purpose. Both defendant banks admit that they converted the relevant piece of paper, the cheque form.

By a legal fiction, a valid cheque is deemed to have a value equal to its face amount. This rule was explained by Scrutton LJ in *Lloyds Bank v Chartered Bank of India, Australia and China* [1929] 1 KB 40 at 55–56, [1928] All ER Rep 285 at 288:

'Conversion primarily is conversion of chattels, and the relation of bank to customer is that of debtor and creditor. As no specific coins in a bank are the property of any specific customer there might appear to be some difficulty in holding that a bank, which paid part of what it owed its customer to some other person not authorized to receive it, had converted its customer's chattels; but a series of decisions ... culminating in *Morison's* case ([1914] 3 KB 356, [1914–15] All ER Rep 853) and *Underwood's* case ([1924] 1 KB 775, [1924] All ER Rep 230), have surmounted the difficulty by treating the conversion as of the chattel, the piece of paper, the cheque under which the money was collected, and the value of the chattel converted as the money received under it: see the explanation of Phillimore L.J. in *Morison's* case.'

In *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356 at 379, [1914–15] All ER Rep 853 at 865, Phillimore LJ stated:

'That the damages for such conversion are (at any rate where the drawer has sufficient funds to his credit and the drawee bank is solvent) the face value of the cheques is ... so well established that it is not necessary to inquire into the principle which may underlie the authority. But the principle probably is that, though the plaintiff might at any moment destroy the cheques while they remained in his possession, they are potential instruments whereby the sums they represent may be drawn from his bankers, and, if they get into any other hands than his, he will be the loser to the extent of the sums which they represent. It may be also that any one who has obtained its value by presenting a cheque is estopped from asserting that it has only a nominal value.'

The submissions

For the claimants in the Lloyds action, Miss Simmons QC submits that, even if the materially altered instrument ceases to be valid as a cheque, it retains its face value for the purposes of a claim in conversion, as evidenced by the fact that Lloyds, the collecting bank, obtained that face value. No distinction should be drawn between the unauthorised drawing of a cheque and the forging of an indorsement on the one hand and the material alteration of a cheque on the other.

Alternatively, once a valid instrument is created, there should be no distinction between a subsequent abuse of authority by an agent (as in the *Morison* line of cases) and a fraudulent indorsement on the one hand and a material alteration on the other. A unifying principle is needed to cover those situations, it is submitted. The proceeds are diverted from the true payee and the collecting bank is liable to compensate for the loss.

Miss Simmons also submits that policy requires that the true owner of the cheque should be compensated where a wrongdoer has used it to the detriment of the true owner. The risk should be borne by the banks rather than the customer. It is insufficient protection that the drawer can claim against the paying bank. It may not be the drawer who suffers the loss, as for example in the case of the banker's draft in the Woolwich action, or the bank may become insolvent. Moreover, the law often recognises that a wronged party may have alternative remedies and that more than one party can be liable for the same loss.

It is submitted that s 64 of the 1882 Act was intended to protect the drawer of a cheque and should not be construed so as to deprive the true owner of compensation. Moreover the word 'avoided' is used in the section by way of contrast with the words 'nullity' or 'discharged' used elsewhere in the 1882 Act. The instrument is 'avoided' as against any party to it but, if payment is made upon a conversion, the value remains the face value. It is further submitted that Lloyds, having obtained the face value of the cheque, are estopped from asserting that the cheque has only a nominal value.

In the Woolwich action, Mr Slade adopts the submissions of Miss Simmons, adding that the relevant instruments, unlike those in the cases of forged cheque forms, represented genuine choses in action. He submits that it would be perverse to hold that the altered draft was a valueless piece of paper. Woolwich has accepted that, at any time before it converted the draft, it would have issued the claimants with a replacement draft in the same face value as the altered draft. Woolwich cannot in those circumstances be heard to say that the altered draft had no value to the claimants.

Mr Slade also submits that Judge Hallgarten was correct in finding that ss 69 and 70 of the 1882 Act were relevant. Those sections confer rights on the holder of an instrument which is lost. There is also a common law right to sue under a destroyed instrument. Those provisions support the principle that, had the claimants discovered the alteration prior to the conversion by Woolwich, they would have had a valuable instrument. Since it was only the conversion by Woolwich which deprived it of that value, the damages for such conversion should be the full amount of that value.

The parties are in dispute as to the effect of the decision of the Court of Appeal in *Slingsby v District Bank Ltd* [1932] 1 KB 544, [1931] All ER Rep 143 but, before turning to that decision, I refer to the scheme of the 1882 Act, described in its short title as 'an Act to codify the law relating to bills of exchange, cheques and promissory notes'. Mr Hapgood invites the court to consider the effect of s 64 in the context of the scheme of the 1882 Act. It imposes, he submits, an elaborate and complex allocation of risk where there has been dishonesty. Because there are potentially four affected parties with a single instrument, (drawer, paying bank, payee, collecting bank), there are many potential lines of liability. The impact of dishonest conduct depends on the nature of the dishonest act and the person who perpetrates it, as appears, for example, from ss 23 to 25, dealing with signatures on bills. With respect to certain kinds of fraud, ss 60 and 80 provide protection for a paying bank and s 82, now s 4 of the 1957 Act, for a collecting bank, as already mentioned.

Section 64 provides that an instrument which is materially altered is avoided in the sense that it avoids all rights to sue and discharges all liabilities to pay upon the instrument as from the moment of alteration. Thus, Mr Hapgood submits that the effect is that, before the instrument reached Lloyds, it was a worthless piece of paper, as found by Blofeld J. The fact that a payment was made under a mistake of fact does not render the instrument valid; its value has completely and irrevocably

gone. That result provided protection for both drawer and payee. The risk of a material alteration was upon the paying bank. It cannot debit its customer's account and the claimants in the Lloyds action had the right to have their account with the Bank of England credited. As between the parties, the instrument had no value at all, save as a piece of paper, and there were no contractual rights to sue upon it. The payee could go back to the drawer for a fresh instrument. The material alteration has the effect of avoiding all contracts then in existence upon the instrument.

No claim could be made against Lloyds upon an estoppel. Lloyds merely went through the process of collecting and presenting the instrument. By presenting it, Lloyds cannot be said to have represented it as valid. The possibility of an estoppel raised by Phillimore LJ in *Morison's* case has not been followed in subsequent cases.

In replying to the submissions of Mr Slade, Mr Wolfson, for Woolwich, submits that, by virtue of s 64, the banker's draft was avoided when materially altered. Reliance upon provisions for replacing lost or destroyed instruments depends upon there being a valid instrument in existence at the time of loss or destruction. The claimant could not be in a better position after destruction than he had been before destruction. It was by virtue of the material alteration that the instrument was avoided and not by virtue of the subsequent conversion. It did not follow from the fact that Woolwich would have provided a replacement draft, had the alteration been discovered before conversion, that the materially altered draft retained its face value.

Slingsby

Each side contends that an authoritative ruling in its favour emerges from the judgment of Scrutton LJ in *Slingsby v District Bank Ltd* [1932] 1 KB 544, [1931] All ER Rep 143. That was the last of three actions by the executors of an estate who wished to invest £5,000 in war stock and employed a firm of stockbrokers John Prust and Co. The executors drew a cheque on their account at a branch of the District Bank, the payees being expressed to be 'John Prust & Co or order'. It was duly signed by the executors and left with a solicitor Cumberbirch, a partner in the firm, Cumberbirch and Potts. Cumberbirch fraudulently added the words 'per Cumberbirch and Potts' in the space between the words John Prust & Co and the words 'or order'. He then indorsed the cheque 'Cumberbirch and Potts' and paid it into the account, at a branch of Westminster Bank, of a company in which he had an interest. The cheque was dealt with in the usual way in that the account of the company with the Westminster Bank was credited and the account of the executors with the District Bank was debited.

The executors failed in their first action against the Westminster Bank (*Slingsby v Westminster Bank Ltd* [1931] 1 KB 173), which is not material for present purposes, on the ground that the bank was protected by s 82 of the 1882 Act. They failed in a second action against Westminster Bank, the collecting bank, also heard by Finlay J (*Slingsby v Westminster Bank Ltd (No 2)* [1931] 2 KB 583), on the ground that there had been a material alteration by Cumberbirch of the cheque, which had therefore ceased to be a valid cheque and there had been no conversion of any money of the executors. An action against District Bank, the paying bank, succeeded, the Court of Appeal ([1932] 1 KB 544, [1931] All ER Rep 143) upholding a decision of Wright J ([1931] 2 KB 588). The parties are in issue as to the grounds upon which the court found against District Bank and as to the effect of the court's decision upon the judgment of Finlay J in the earlier action.

Finlay J stated that the facts were simple and not really in dispute. Both sides agreed that the alteration to the cheque was a material alteration with the result that, under s 64 of the 1882 Act, the cheque was avoided. The judge accepted the

submission that the cheque was by reason of the alteration a mere valueless piece of paper. He stated ([1931] 2 KB 583 at 586):

> 'I have come to the conclusion that [the bank's] submission is right and ought to prevail. It seems clear that the document, when it came into the hands of the defendant bank, was not a valid cheque at all. It had been avoided by the material alteration made in it. This being so, it seems to me that no action can be brought upon it against the defendants. They have not dealt either with a cheque or the money of the plaintiffs, and on this short ground I think this action must fail.'

Miss Simmons accepts that, if that is a correct statement of the law, the claim against Lloyds fails.

Finlay J twice stated in his judgment that, if that view was correct, the question of negligence did not arise but he none the less considered the conduct of the collecting bank in detail and concluded that there was no negligence and the bank was entitled to the protection of s 82 of the 1882 Act. There was nothing to suggest that further inquiry ought to have been made. It was not disputed that the indorsement was a proper one.

Wright J tried the action against the paying bank in the following year. In *Slingsby v District Bank Ltd* [1931] 2 KB 588 the validity of the indorsement was not admitted. Wright J held that the indorsement was an improper indorsement. Wright J went on to consider and reject several distinct claims that defences arose. Defences were claimed under s 60 of the 1882 Act, the proviso to s 64(1), s 80, as well as defences by reason of the conduct of the executors and by reason of the liability of Cumberbirch's employers for his fraud. The effect of s 64 does not appear to have been in issue and was stated briefly by the judge. Having held that the alteration was a material alteration within the meaning of s 64(1) Wright J stated (at 599):

> 'But under the section just cited, the alteration avoids the cheque, subject to the proviso. The defendants cannot charge the plaintiffs with a payment made, however innocently, on a void instrument, or a payment for which they cannot show a mandate from the plaintiffs to pay; the only mandate by the plaintiffs was to pay John Prust & Co. simpliciter, whereas the defendants paid on the simple indorsement of Cumberbirch & Potts, and in any case on an apparent mandate deviating in respect of the description of the payee.'

That view of the effect of s 64 is consistent with the view expressed by Finlay J in the earlier case.

Delivering the leading judgment in the Court of Appeal, Scrutton LJ considered three issues, whether Westminster Bank had been negligent, the effect of the indorsement and the effect of s 64. He dealt with them in that order, though it would appear that it was Finlay J who took the logical course of dealing with s 64 first because, if the cheque was a worthless piece of paper, the claim against Westminster Bank was bound to fail and that against District Bank, for debiting its customer's account, was bound to succeed. Scrutton LJ expressed, in strong terms, his disagreement with the finding of Finlay J in the earlier action that Westminster Bank had not been negligent. It was when dealing with the second issue, that is whether the indorsement was a proper one, that Scrutton LJ cited in full the view of Finlay J on the effect of s 64. However, the statement by Finlay J had nothing to do with the point Scrutton LJ was then considering, the propriety of the indorsement. That point had not been in issue before Finlay J. Having cited the passage, Scrutton LJ stated:

> 'I cannot understand this. There are, of course, difficulties as to how in law you should deal with money claimed by a customer from a bank because the bank has collected it from the customer's bank on a document which does not authorize such collection, but I thought that all those difficulties had been settled by the decision in *Morison's* case, followed by this Court in *Underwood's* case; in the *Lloyds Bank* case; and in *Reckitt* v. *Midland Bank*, lately affirmed in the House of Lords ((1932) 48 TLR 271). *Slingsby* v. *Westminster Bank* is, in my opinion, wrongly decided and should not be followed by any Court in preference to these decisions of the Court of Appeal.' (See [1932] 1 KB 544 at 558, [1931] All ER Rep 143 at 149.)

Only then did Scrutton LJ consider the effect of s 64. He stated:

> 'But the legal result of these facts begins earlier than indorsement. This cheque, having been signed by the executors in a form which gave Cumberbirch no rights, was fraudulently altered by Cumberbirch before it was issued and, it was not disputed, altered in a material particular, by the addition of the words "per Cumberbirch & Potts." The cheque was thereby avoided under s. 64 of the Bills of Exchange Act. A holder in due course might not be affected by an alteration not apparent, such as this alteration. But counsel for the District Bank did not contend that the Westminster Bank were holders in due course, and I am clear they were not. They could not therefore justifiably claim on the District Bank, and the cheque when presented to the District Bank was invalid, avoided, a worthless bit of paper, which the District Bank was under no duty to pay. This invalidity comes before any question of indorsement.' (See [1932] 1 KB 544 at 559, [1931] All ER Rep 143 at 149.)

Scrutton LJ went on the repeat his conclusion that the cheque was not properly indorsed and concluded this section of his judgment, stating:

> 'The protection given by ss. 80 and 82 is excluded in my opinion by the fact that the alteration has made the paper a null and void document, no longer a cheque.' (See [1932] 1 KB 544 at 559, [1931] All ER Rep 143 at 150.)

Scrutton LJ concluded his judgment by stating that he might have been content to adopt the careful judgment of Wright J, with which he substantially agreed.

Greer LJ also stated that 'under the provisions of s.64 of the Act the cheque was rendered void except as therein stated' (see [1932] 1 KB 544 at 562, [1931] All ER Rep 143 at 151). The defect in the cheque which rendered it invalid was on the face of the cheque and not merely in the indorsement. Romer LJ listed the six questions which appeared to him to arise from the appeal and expressed his agreement with the conclusions of Wright J. I find it significant that Romer LJ did not identify the effect of s 64 as being an issue in the appeal.

Miss Simmons understandably relies strongly upon the apparent rejection by Scrutton LJ of Finlay J's statement in *Slingsby v District Bank Ltd* of the effect of s 64. However I have come to the conclusion that the apparent disapproval was based upon a wholly uncharacteristic and, with great respect, most unexpected misreading by Scrutton LJ of the judgment of Finlay J in the earlier action. Scrutton LJ expressed in strong terms his disagreement with Finlay J on the negligence issue. He then dealt with the indorsement issue, which had first been raised only in *Slingsby v District Bank Ltd*, but cited from Finlay J's judgment in *Slingsby v Westminster Bank Ltd (No 2)* a passage dealing not with indorsement, but with s 64. That Scrutton LJ was dealing with the indorsement issue at that stage

and not s 64 is illustrated by his reference to the *Morison* line of cases which deals with other types of dishonesty and not material alteration which is covered by s 64. When going on to deal specifically with the effect of s 64, Scrutton LJ expressed views entirely consistent with those of Finlay J.

It is submitted that, when stating ([1932] 1 KB 544 at 559, [1931] All ER Rep 143 at 149) that Westminster Bank could not claim against District Bank, Scrutton LJ was distinguishing between the position of the banks as against each other and the position of the customer of the paying bank as against the collecting bank. It is also submitted that Judge Hallgarten QC was right to find that, underlying Scrutton LJ's approach, was the feature that, so far as the claimants in the Woolwich action, as owners, were concerned, the cheque continued to have its face value. In my judgment Scrutton LJ's reasoning upon s 64 is not susceptible to those interpretations.

The effect of s 64 was in my view not seriously in issue in *Slingsby v District Bank Ltd.* Wright J dealt with it briefly and in conformity with the view of Finlay J. All members of the Court of Appeal expressed agreement with Wright J, Greer LJ stating that under the provisions of s 64 the cheque was rendered void and Romer LJ setting out the questions arising upon the appeal without mentioning a question on s 64.

Conclusion

My conclusions can in the event be stated briefly. In my judgment the effect of the presence of the word 'avoided' in s 64(1) of the 1882 Act is that the materially altered cheque or draft is, subject to the qualifications in the section, a worthless piece of paper. The words of Scrutton LJ when dealing with the legal effect of the material alteration of the cheque in that case are to be taken at face value. The piece of paper is no longer a cheque and no action can be brought upon it as a cheque. The cheque is invalidated and no distinction can be drawn between parties who, but for the material alteration, would have had contractual rights based on the cheque. No party can bring an action for damages in conversion for its face value because it no longer represents a chose in action for that amount.

In the case of a cheque, the customer of the paying bank is protected because the bank, which bears the risk, cannot debit the customer's account. In the case of a banker's draft, the customer's account is debited when the draft is issued to him. He has the benefit of a bill drawn by the bank itself, which he may require to satisfy business requirements, but once he has it he assumes the relevant risk as he would assume the risk if he drew bank notes which are stolen. It does not follow from the fact that the paying bank will normally issue a replacement draft, if the invalidity is discovered before the collecting bank credits the wrong account, that the materially altered draft is valid. The paying bank will have suffered no loss and may issue a replacement draft as a matter of good business practice, or possibly contractual obligation. The likelihood of such action does not, however, render valid what s 64 has rendered invalid.

Moreover the consequence of invalidity cannot in my judgment be avoided by alleging an estoppel. The cheque is rendered invalid by s 64 and, by presenting it under normal banking arrangements, the collecting bank was not asserting its validity.

I would dismiss the appeal in the Lloyds action and allow the appeal in the Woolwich action.

POTTER LJ. I agree with the judgment of Pill LJ and there is little I can usefully add. I too have had difficulty in understanding that part of the judgment of Scrutton LJ in *Slingsby v District Bank Ltd* [1932] 1 KB 544 at 558, [1931] All ER Rep 143 at 149 in which

he asserted that he could not understand a passage which he had quoted from the judgment of Finlay J in *Slingsby v Westminster Bank Ltd (No 2)* [1931] 2 KB 583, which Scrutton LJ appeared to regard as invalidated by the decision in *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, [1914–15] All ER Rep 853 and the subsequent line of authority stemming from it. It may be that, in expressing himself as he did, Scrutton LJ had fastened upon the last sentence which he quoted from the judgment of Finlay J to the effect that: 'They have not dealt either with a cheque or the money of the plaintiffs, and on this short ground I think this action must fail.' Taken alone, that sentence might have appeared inconsistent with *Morison's* case by not recognising the legal fiction which equates the value of the cheque as a chattel or piece of paper with its face value as representing the moneys due and/or received under it for the purpose of a claim for damages in conversion.

Whether or not that is so, it is plain, as Pill LJ has pointed out, that Scrutton LJ was in no doubt as to the effect of a material alteration rendering a cheque a 'worthless' and 'null and void' piece of paper, to which the fiction as to value for the purposes of a claim in conversion would be inappropriate and inapplicable (cf the view expressed in Brindle and Cox *Law of Bank Payments* (2nd edn, 1999) para 7-200).

In my view, the arguments of Miss Simmons and the reasoning adopted by Judge Hallgarten QC in order to avoid this otherwise insuperable difficulty are not effective for that purpose. The judge held that, had the claimants immediately realised that the draft had been stolen and notified Woolwich accordingly, they would have had the right to make claims against Woolwich under ss 69 and 70 of the 1882 Act. Section 69 allows the holder of a bill which has been lost before it is overdue to apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons in case the bill is found again. If the drawer refuses to give such a duplicate bill he may be compelled to do so. Section 70 provides that in any action upon a bill, the court may order that the loss of the instrument shall not be set up, provided an indemnity is given to the satisfaction of the court against the claims of any other person upon the instrument in question.

The judge observed that, in those circumstances, it struck him as perverse to say that the draft had no value save as a piece of paper and that the only thing which might be said to have served to destroy the draft's value was the defendant's own conduct in purporting to discharge it by paying such value to NatWest Bank, ie the very act of conversion relied on. However, this does not seem to me to meet the point that the claim for conversion was in respect of a specific cheque or draft which at the date of conversion (which is the relevant date at which to assess the value of the chattel) had no value as a piece of paper and no value as a chose in action, because it had earlier been robbed of such value as at the date it was materially altered. The fact that, at any time before the draft was presented to and converted by the Woolwich, the plaintiffs might have had a legal or moral right to its replacement by a new draft did not render the altered draft of value in the sense appropriate to a claim in conversion, the damages for which conventionally relate to the intrinsic value of the specific chattel converted.

I too would allow the appeal in the Woolwich action and dismiss the appeal in the Lloyds action.

SIR MURRAY STUART-SMITH. I agree.

Appeal in the Lloyds action dismissed. Appeal in the Woolwich action allowed.

Dilys Tausz Barrister.

R v Richmond London Borough Council, ex parte Watson and other appeals

COURT OF APPEAL, CIVIL DIVISION
OTTON, BUXTON LJJ AND HOOPER J
18, 19 MAY, 27 JULY 2000

Mental health – Patient – After-care services – Whether local authorities having duty or right to charge discharged patients for accommodation provided as after-care services – National Assistance Act 1948, ss 21, 22 – Mental Health Act 1983, s 117.

In four linked cases, the respondents were persons who had been discharged from detention under s 3 of the Mental Health Act 1983, and had been provided with accommodation by the appellant local authorities. Under s 117[a] of the 1983 Act, health authorities and local social services authorities had a duty to provide such persons with 'after-care' services. There was no express provision entitling local authorities to charge for services provided under s 117. However, s 22[b] of the National Assistance Act 1948 provided that, where persons had been provided with accommodation under s 21[c] of that Act, authorities were required to recover the costs from them, according to means. Under s 21(1), authorities had a duty to provide residential accommodation for persons in need of care and attention which was not otherwise available to them. In judicial review proceedings brought by the former patients, the authorities contended that s 117 did not impose upon them a free-standing duty to provide after-care services, but was merely a 'gateway' section which imposed a duty to ensure that such services were provided under such other enactment as might be appropriate; that in the case of residential accommodation, the appropriate enactment was s 21(1) of the 1948 Act; and that accordingly they were required to levy charges for the accommodation provided to the former patients. The judge rejected those contentions, holding, inter alia, that the s 21(1) duty was disengaged by s 21(8) of the 1948 Act which provided that nothing in s 21 'shall authorise or require' local authorities to make any provision 'authorised or required to be made ... by or under any enactment not contained in this Part of this Act'. He therefore allowed the applications for judicial review, and the authorities appealed

Held – On its true construction, s 117 of the 1983 Act imposed a free-standing duty on local and health authorities to provide after-care services. There was no reference in that section or elsewhere in the 1983 Act to the exercise of that duty being dependent on any other provision in the Act or any other piece of legislation. Consequently, it would be artificial and contrary to the plain meaning of s 117 to imply a further requirement that the local authority could only exercise that duty by reference to a separate provision. In the instant cases, accommodation had been made available to the former patients under s 117. Accordingly, the power under s 21(1) of the 1948 Act, which applied where accommodation was 'not otherwise available to them', did not arise. Moreover, s 117 of the 1983 Act was another enactment for the purposes of s 21(8) of the

a Section 117 is set out at p 438 *f* to *h*, post
b Section 22, so far as material, is set out at p 439 *e f*, post
c Section 21, so far as material, is set out at p 439 *a* to *c e f*, post

1948 Act. Given that s 117 both authorised and required the provision of accommodation to the former patients, s 21(8) of the 1948 Act specifically disengaged the s 21(1) power. Accordingly, the accommodation was being provided under s 117 of the 1983 Act and was wholly independent of s 21 of the 1948 Act. It followed that the authorities had no power to levy charges for after-care services, including residential accommodation, provided under s 117. The appeal would therefore be dismissed (see p 442 *c* to *e h j*, p 443 *j* to p 444 *a*, p 447 *a b e* to *j* and p 449 *f*, post).

Notes

For the provision of after-care services, see 30 *Halsbury's Laws* (4th edn reissue) para 1228.

For the National Assistance Act 1948, ss 21, 22, see 40 *Halsbury's Statutes* (4th edn) (1997 reissue) 20, 23.

For the Mental Health Act 1983, s 117, see 28 *Halsbury's Statutes* (4th edn) (1996 reissue) 984.

Cases referred to in judgments

A-G v Wilts United Dairies Ltd (1921) 37 TLR 884, CA; *affd* (1922) 91 LJKB 897, HL.

Clunis v Camden and Islington Health Authority [1998] 3 All ER 180, [1998] QB 978, [1998] 2 WLR 902, CA.

McCarthy & Stone (Developments) Ltd v Richmond upon Thames London BC [1991] 4 All ER 897, [1992] 2 AC 48, [1991] 3 WLR 941, HL.

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

R v Ealing District Health Authority, ex p Fox [1993] 3 All ER 170, [1993] 1 WLR 373.

R v North and East Devon Health Authority, ex p Coughlan (Secretary of State for Health intervening) [2000] 3 All ER 850, [2000] 2 WLR 622, CA.

R v Somerset CC, ex p Fewings [1995] 1 All ER 513; *affd* [1995] 3 All ER 20, [1995] 1 WLR 1037, CA.

Cases also cited or referred to in skeleton arguments

Bromley London BC v Special Educational Needs Tribunal [1999] 3 All ER 587, CA.

R v Tower Hamlets London BC, ex p Bradford [1998] FCR 629.

Appeals

The appellant local authorities, Richmond London Borough Council, Redcar and Cleveland Borough Council, Manchester City Council and Harrow London Borough Council, appealed with permission of Sullivan J from his decision on 28 July 1999 ([2000] LGR 318) allowing applications by the respondents, Mary Watson, Christopher Armstrong, Danovan Stennett and Nora Cobham, for judicial review of decisions of the authorities to charge them for accommodation provided under s 117 of the Mental Health Act 1983. The facts are set out in the judgment of Otton LJ.

Richard Lissack QC, Robin Tolson and *Mark Mullins* (instructed by *Richard Mellor, Richard Frankland*, Middlesbrough, *Susan Orrell*, Manchester, *Gerald Balabanoff*) for the appellant local authorities.

Richard Drabble QC and *David Wolfe* (instructed by the *Public Law Project*) for the respondents Watson and Armstrong.

Fenella Morris (instructed by *Hogans*) for the respondent Stennett.

Jennifer Richards (instructed by *Mackintosh Duncan*) for the respondent Cobham. a

Cur adv vult

27 July 2000. The following judgments were delivered.

OTTON LJ. These four appeals involve an important issue as to whether charges can be levied by local authorities in relation to accommodation provided by them under s 117 of the Mental Health Act 1983 to persons who have been discharged from detention under s 3 of that Act. The appellant local authorities contend that charges can (and indeed must) be levied; the respondents submit that there is no power to charge and charges cannot thus be made. On 28 July 1999 Sullivan J ([2000] LGR 318) held that there was no power for the respondents to charge for such residential accommodation in the absence of express statutory authority and that s 117 conferred no power to charge. He granted permission to appeal. b c

The outcome of these appeals has wide-ranging financial implications for all local authorities. We are told that in practice local authorities are divided on this issue. About half recognise that there is a positive obligation upon them to provide accommodation free to such patients; the other half consider they have a right (or even a duty) to charge for this accommodation. The respondents in all four appeals have all been subject to detention under s 3 of the 1983 Act. Upon their respective discharge from that detention, the appellant social services authority in each case has provided them with residential accommodation. d e

Statutory framework

The two principle statutory provisions for consideration are as follows. Section 117 of the 1983 Act as amended by s 2(1) of and para 107(8) of Sch 1 to the Health Authorities Act 1995 and s 1(2) of and para 15 of Sch 1 to the Mental Health (Patients in the Community) Act 1995: f

> '*After-care.*—(1) This section applies to persons who are detained under section 3 above, or admitted to a hospital in pursuance of a hospital order made under section 37 above, or transferred to a hospital in pursuance of a transfer direction made under section 47 or 48 above, and then cease to be detained and (whether or not immediately after so ceasing) leave hospital. g
>
> (2) It shall be the duty of the Health Authority and of the local social services authority to provide, in co-operation with relevant voluntary agencies, after-care services for any person to whom this section applies until such time as the Health Authority and the local social services authority are satisfied that the person concerned is no longer in need of such services; but they shall not be so satisfied in the case of a patient who is subject to after-care under supervision at any time while he remains so subject.' h

The expression 'after-care services' is not defined in the 1983 Act. Section 117 confers no express authority to charge for after-care services. It is the appellants' principle contention that the power to do so derives from the National Assistance Act 1948, as amended by ss 113 and 114 of and Sch 4 to the Mental Health (Scotland) Act 1960, s 195(6) of and para 2(1) and (4) of Sch 2 to the Local Government Act 1972, s 108(5) of and para 11 of Sch 13 to the Children Act 1989 and ss 42(1), (2) and 66 of and para 5(3) of Sch 9 to the National Health Service and Community Care Act 1990. j

Section 21, so far as is material, provides:

> '*Duty of local authorities to provide accommodation.*—(1) Subject to and in accordance with the provisions of this Part of the Act, a local authority may with the approval of the Secretary of State, and to such an extent as he may direct shall, make arrangements for providing—(a) residential accommodation for persons aged eighteen or over who by reasons of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them: and (aa) residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to them.
>
> (2) In making any such arrangements a local authority shall have regard to the welfare of all persons for whom accommodation is provided, and in particular to the need for providing accommodation of different descriptions suited to different descriptions of such persons as are mentioned in the last foregoing subsection.'

However there is an important provision in sub-s (8) which provides:

> '... nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this Part of this Act or authorised or required to be provided under the National Health Service Act 1977.'

Section 22(1) provides :

> '*Charges to be made for accommodation.*—(1) Subject to section 26 of this Act, where a person is provided with accommodation under this Part of this Act the local authority providing the accommodation shall recover from him the amount of the payment which he is liable to make in accordance with the following provisions of this section.'

Thus the 1948 Act imposes a duty to charge for residential accommodation according to means. Section 29 provides:

> '*Welfare arrangements for blind, deaf, dumb and crippled persons, etc.*—(1) A local authority may with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area of the local authority shall make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons aged eighteen or over who are blind, deaf or dumb or who suffer from mental disorder of any description, and other persons aged eighteen or over who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister.'

Before Sullivan J, the local authorities contended that s 117 does not impose a free-standing duty to provide after-care services, including 'caring' residential accommodation. It is a 'gateway' section which imposes a duty to ensure that after care services are provided under such other enactments as may be appropriate. In the case of residential accommodation they must ensure that it is provided under s 21 of the 1948 Act. Once accommodation is provided under s 21 then a charge must be made under s 22. In respect of other aspects of after-care, the local authority must be sure that it is provided under, among others, s 29. A

local authority does not impose charges or discharge payments for that element of the after-care package.

Sullivan J held that the question was one of statutory interpretation and accepted the submissions on behalf of the patients that the starting point must be the language in s 117 itself, considered not in isolation, but within the immediate framework provided by the 1983 Act and the wider context of related legislation. He held that s 117(2) imposes a duty on the health authority and the local services authority to provide after-care services for persons to whom s 117 applies. It does not impose a duty to secure the provision of such services under other powers, and no other enactments are mentioned in sub-s 2 as a potential source of such power. He alluded to the fact that there are other sections of the 1983 Act (which have been incorporated by way of amendment in 1990) which expressly referred to the fact that s 117 imposed a free-standing duty to provide after-care services. Moreover, he held that s 117 is an 'other enactment' within the terms of s 21(8). Given that s 117 both 'authorises' and 'requires' the provision of accommodation for these four patients the effect of sub-s (8) was specifically to disengage the local authorities' s 21(1) power.

He made a declaration in respect of each applicant that—

> '(1) the applicant falls within the terms of section 117(1) of the Mental Health Act 1983; (2) [his/her] accommodation must be provided pursuant to section 117(2) of that Act, and not section 21(1) of the National Assistance Act 1948; (3) accordingly, the [local authorities] are not entitled to charge the applicant for that accommodation.'

Mr Richard Lissack QC on behalf of the local authorities submitted that the judge's construction of s 117 conflicts with the language of the section, its place in the statutory regime and, if it is permissible in terms of *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593 to look at it, the singular Parliamentary history of s 117. He accepts that s 117 does create a duty: the duty to provide 'after-care services'. However, he contended that the right question to ask is 'what services?' It is either: (a) a free-standing raft of otherwise undefined services, as the judge appears to have found, or, (b) that body of services which the local authority has power to provide under other enactments, ie a 'gateway' (as the local authorities contend).

In support of his argument leading counsel points to the language of the section itself. First, he points to the lack of any definition of 'services'. A local authority only has those functions expressly conferred by statute or ancillary thereto pursuant to s 111 of the 1972 Act. Hence, the functions of local authorities are usually tightly defined. If the judge is correct and s 117 operates outside s 21 then, in theory, 'anything goes' for the more vulnerable s 117 qualifiers. In order to prevent such an open-ended commitment Parliament now circumscribes how (ie the administrative manner in which) the s 117 duty is to be performed: see s 117(2)(b) and s 32). He commented that it is odd for it not to have similarly incorporated regulations to govern the functions themselves if they are 'free-standing'. There is no need to, because they are not.

Second, the language of s 117 appears to place the same duty on both local authorities and health authorities, and raises the practical question of who should pay as between authorities. Health authorities, and local authorities exercise different functions but the judge's construction strikes at the heart of this distinction. Leading counsel submitted that the purpose of s 117 is to impose a

duty on both authorities to exercise their respective powers: not to require one to exercise the powers of the other.

Third, Mr Lissack relied heavily on the fact that there has been no amendment to s 117 'after-care services' since 1983. The after-care services which health authorities and local authorities provide in other contexts have changed since then. He submitted that the only explanation for no change is that the services which it envisages are those which the authorities have power, 'outside of' s 117 to provide. Parliament should be presumed not to have intended that the 1983 position would continue to apply.

He further submitted that beyond the language of s 117 itself, the local authorities' approach is harmonious and consistent. The section would guarantee that a person qualifying will be provided with the after-care services needed; impose on the health authority and the local authority a duty to act in concert to avoid a s 3 qualifier from slipping through the net; remove any discretion to provide; and mark out a specific sub-group. In the light of this analysis s 117 would not run counter to present policy where, for example, local authorities have, since 1993, been forbidden from providing (free) residential accommodation to the mentally ill: see the National Health Service Act 1977, Sch 8, para 2(4AA) (as inserted by National Health Service and Community Care Act 1990, s 66 and Sch 9, para 18(14)). In essence, it is submitted that the wider legislation provides, as Parliament and government intended, for local authorities to charge for residential accommodation in all financially appropriate cases. Thus the local authorities' construction allows 'after-care services' in s 117 to move with the times.

Counsel for the four respondents made common cause and submitted that the statutory framework is clear and unambiguous and in their favour. In essence they contend that—

> 'the provision of accommodation can and must be provided to these applicants pursuant to section 117(2) and given that the section 117 is thus engaged, the section 21 power is expressly disengaged by section 21 itself. Accordingly, there can be no question of the local authority choosing to use the charge-attracting power.'

Conclusions

All counsel agree that the starting point must be the language in s 117 itself. Mr Lissack concedes, in my view correctly, that the words 'after-care services' in the 1983 Act can include residential accommodation which is specifically designed to care for the needs of persons who have been detained under s 3 and who have left hospital. Like the learned judge, I consider leading counsel was correct to make that concession. In *Clunis v Camden and Islington Health Authority* [1998] 3 All ER 180 at 191, [1998] QB 978 at 992 Beldam LJ said:

> 'After-care services are not defined in the Act. They would normally include social work, support in helping the ex-patient with problems of employment, accommodation or family relationships, the provision of domiciliary services and the use of day centre and residential facilities.'

The interpretation of s 117 was considered in *R v Ealing District Health Authority, ex p Fox* [1993] 3 All ER 170 at 181, [1993] 1 WLR 373 at 385 where I said:

> '... the duty is not only a general duty but a specific duty owed to the applicant to provide him with after-care services until such time as the

district health authority and local social services authority are satisfied that he is no longer in need of such services.' a

It must follow that from the cessation of each respondent's respective detention under s 3 the local authorities owed the respondents a specific duty to provide them with after-care services until the local authorities concerned become satisfied that the services are no longer needed. As Sullivan J stated: b

'On the face of it, section 117(2) imposes a duty on the health authority and the local social services authority to provide aftercare services for persons to whom section 117 applies. It does not impose a duty to secure the provision of such services under other powers; no other enactments are mentioned in subsection (2) as a potential source of such power.' (See [2000] LGR 318 at 328.) c

In my judgment, as a matter of construction, s 117 is unambiguous in its imposition of a free-standing duty to provide after-care services on local and health authorities. The language adopted by the draftsmen is in imperative form, providing that: 'It shall be the duty ...' There is no reference in that section or elsewhere in the 1983 Act to the exercise of this duty being dependent on any d other provision in the Act or any other piece of legislation (primary or secondary). Consequently, it would be artificial and contrary to the plain meaning of that section to imply a further requirement that the local authority can only exercise this duty by reference to a separate provision. Moreover, if s 117 had been intended as a gateway provision, one would expect to find an express reference to those other provisions in the section itself (for example see s 2 of the e Chronically Sick and Disabled Persons Act 1970). The absence of any such reference suggests that to interpret s 117 as a gateway provision would be highly artificial. Thus in my view the interpretation of s 117 by the judge cannot be faulted.

The judge having so decided stated (at 331): 'Having looked at the language, it is sensible to stand back and see if the result gives rise to any anomaly, absurdity f or injustice.' This Mr Lissack invites us now to do.

I start by considering the language of the amendments to the 1983 Act contained in ss 25A to 25J, as inserted by s 1(1) of the Mental Health (Patients in the Community) Act 1995, which deal with the 'after-care under supervision' and thus are not directly relevant to these cases. However, Mr Richard Drabble QC on behalf of Mrs Watson and Mr Armstrong indicated 21 instances in ss 25A to g 25H where expressions such as 'after-care services provided for him under section 117', 'after- care services provided (or to be provided) under section 117 below' and 'after-care services other than medical treatment) provided for the patient under section 117 below' are to be found. I accept Mr Drabble's contention that if s 117 were not a direct provision-making section, then ss 25A to 25H would not h have been expressed as above.

I turn to consider the language and effect of s 21 of the 1948 Act. Subsection (1) authorises the provision of accommodation to a person only where accommodation is 'not otherwise available to them'. In the present cases, accommodation is, or was, otherwise available to all the respondents, namely by virtue of s 117 of the 1983 j Act. Thus, on my interpretation, the s 21(1) power does not, or did not, arise. Even in the absence of s 117, s 21(1) would permit the local authorities to provide s 3 persons with residential accommodation because they are in need of it 'by reason of age, illness, disability or any other circumstances'. This again supports the argument that s 117 is a self-standing provision and is not a gateway to ss 21 and 22 of the 1948 Act.

a There was considerable argument concerning s 21(8) which states:

> 'Nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this Part of this Act or authorised or required to be made under the National Health Service Act 1977.'

b

In my judgment, all this means is that if one enactment authorises or requires the provision of residential accommodation (in this case s 117 of the 1983 Act), there is no power to provide residential accommodation under s 21(1). The effect of this provision was considered by the Court of Appeal in *R v North and East Devon Health Authority, ex p Coughlan (Secretary of State for Health intervening)* [2000] c 3 All ER 850, [2000] 2 WLR 622. Lord Woolf MR, delivering the decision of the court, at para 27 posed the question:

> 'How are the words "or authorised or required to be provided under" the 1977 Act to be applied?
>
> d 28. Each word is of significance. The powers of the local authority are not excluded *by* the existence of a power in the 1977 Act to provide the service, but they are excluded where the provision is authorised or required to be made *under* the 1977 Act. The position is different in the case of "any other enactment", where it is sufficient if there is an authority or requirement to be made *by or under* the enactments.
>
> e 29 ... The section [21(8)] should not be regarded as preventing a local authority from providing any health services. The subsection's prohibitive effect is limited to those health services which, in fact, have been authorised or required to be provided under the 1977 Act. Such health services would not therefore include services which the Secretary of State legitimately decided under s 3(1) of the 1977 Act it was not necessary for the NHS to f provide ... the true effect is to emphasise that 1948 Act provision, which is secondary to 1977 Act provision, may nevertheless include nursing care which properly falls outside the NHS.' (See [2000] 3 All ER 850 at 862, [2000] 2 WLR 622 at 635.)

g Mr Lissack recognises that para 28 presents difficulty but sought to distinguish the decision on the basis that since s 117 was not directly in issue, the final sentence of para 28 was obiter. Addressing this argument, Sullivan J said ([2000] LGR 318 at 331):

> h 'Although section 117 was not in issue, the court did have to construe the excluding provisions of section 21(8). The contrast between the position where provision is authorised or required to be made under the National Health Service Act 1977, and by or under "any other enactment", including section 117, was central to the court's decision. I am therefore satisfied that the approach of the court to section 21(8) is binding upon me.'

j Although I have some reservations as to what para 28 really means, I respectfully agree with the decision of the Court of Appeal and Sullivan J. Section 117 is an 'other enactment' in the terms of s 21(8). Given that it both 'authorises' and 'requires' the provision of accommodation to these four patients, s 21(8) of the 1948 Act specifically disengages the local authorities s 21(1) power. Accordingly the accommodation thus provided is being provided pursuant to s 117 of the 1983 Act and is wholly independent of s 21 of the 1948 Act. It must follow that there is no

power to levy charges for after-care services, including the residential accommodation, provided pursuant to s 117. *a*

All counsel invited us to look at legislation outside the two immediate provisions which we have discussed to see if the result reached by Sullivan J gives rise to any anomaly, absurdity or injustice. Ms Jenni Richards for the respondent Cobham drew our attention to s 46(3) of the National Health Service and Community Care Act 1990 where there is a specific reference to s 117. *b* Subsection (1) requires each local authority to prepare and publish a plan for the provision of community care services in their area. Subsection (3) provides:

> '... "community care services" means services which a local authority may provide or arrange to be provided under any of the following provisions— (a) Part III of National Assistance Act 1948; (b) section 45 of the Health Services *c* and Public Health Act 1968; (c) section 21 of and Schedule 8 to the National Health Service Act 1977; and (d) section 117 of the Mental Health Act 1983 ...'

The effect of this section to my mind makes it clear that s 117 is concerned with the *direct* provision of services and is not merely a gateway to the provision of residential accommodation under s 21 of the 1948 Act or to the provision of other *d* services under unspecified enactments. She also pointed out that by s 47(1) the local authority must (a) carry out an assessment of the person's needs for those services and, (b) having regard to the results the local authority must then decide whether his needs 'call for the provision by them of any such services' ie under s 117 of the 1983 Act. I was attracted by her argument that s 47(1) is in itself a *e* gateway or trigger to community care services provided in the assessment and service provision decision regime. It is not necessary to go further to consider her contention that the argument advanced by the local authorities would provide, effectively, a gateway to a gateway. I did not find any of the Acts cited by Mr Lissack to carry any weight in this regard.

Mr Lissack advanced a number of 'policy based' and consequential arguments *f* to support a submission that the judge's decision and his reasoning were at fault. He suggested that upholding Sullivan J's construction would lead to a 'windfall gain' for patients. The case has wide-ranging financial implications for all local authorities: the nation-wide annual loss of revenue may be around £100m if the learned judge is right. The windfall gain to individuals receiving services would *g* come largely from centrally funded state benefits. The question whether authorities are liable to repay to those hitherto charged also arises. There the amount at stake may be as high as £800m. These figures were based on a study conducted by the Association of Directors of Social Services (ADSS).

I do not find the concept of a 'windfall' convincing in the context of the provision of after-care services to all those who genuinely require them and who *h* qualify for services provided for by Parliament. Section 3 persons are particularly vulnerable, they are probably unlikely to be able to manage to earn a living, or manage their affairs or return to their former home. As Ms Richards succinctly put it:

> '... the categorisation of the provision of free services to individuals who *j* have been compulsorily detained in hospital and who may be amongst the most seriously ill and needy in society as a "windfall gain" is wholly inapt.'

Similarly I consider the argument advanced by and on behalf of the local authorities that provision is made for those who 'deserve' services and those who are 'undeserving' (e g the 'brain-damaged victim' on one hand as against the

'elderly imprisoned criminal' on the other) unhelpful in a situation where one is seeking to construe and give effect to an Act of Parliament. Suffice it to say that s 117 is concerned with those who have been detained under the powers of compulsory admission which are only to be exercised as a last resort. As Sullivan J aptly put it ([2000] LGR 318 at 333):

> '[There is no] inherent unfairness in such a group being entitled to free accommodation as part of their package of aftercare in the community ... If, as part of [the programme of community care] patients who would otherwise have been detained in hospital, at considerable cost to the NHS, are accommodated within the community as part of their aftercare, I can see good reason why the public purse and not the former patient should bear the cost of providing that accommodation.'

I also found unattractive the suggestion that there was 'a perverse incentive' to patients who will positively wish to be compulsorily detained under the 1983 Act in order that they might benefit from s 117 when their compulsory detention terminates. To my mind the s 3 person and his family are unlikely to be able to make this fine judgment and the suggestion is also a slur on those members of the medical profession who are responsible for taking the decision whether or not to exercise the powers of compulsory admission. Sullivan J rather kindly described this submission as 'somewhat far-fetched'.

I see nothing anomalous in imposing a joint duty on health and local authorities' social services to provide after-care services. Ms Fenella Morris, for the respondent Stennett, pointed to a variety of statutory provisions which allow for joint or cross-funding for community care services such as s 28A of the 1977 Act and s 113 of the 1972 Act. The language of the section clearly reduces the opportunity of two such authorities to try to pass the buck and as a result no proper provision is made. The person's illness may require a particular type of provision more readily available from the health authority; another person may be in good physical health not requiring health service treatment but who is able and indeed obliged to reside in caring residential accommodation provided by the local authority. In time, the person in residential accommodation may experience a deterioration in his physical health in which case the responsibility may properly pass to a health authority. This is not an uncommon situation and the language of s 117 ensures a seamless provision for the s 3 person while at the same time permitting cross-funding of community care services between the two authorities. Thus I am not persuaded by the argument that Parliament could not have intended to impose an identical duty on local and health authorities. There is nothing inequitable in such an arrangement. On the contrary the health authority is not allowed to charge, to allow the local authority to recover the costs *would* produce an inequitable outcome. Moreover, this is not, as suggested, an open-ended commitment: by s 117(2) after-care services are provided only 'until such time as the ... authority are satisfied that the person concerned is no longer in need of such services'.

I am unconvinced by the argument that the absence of amendment since 1983 supports the local authorities' contention that it is a gateway provision. The absence of amendment merely suggests that the provision has not been considered in need of change. It has not been suggested that the scheme does not work satisfactorily. Since the local authorities have opted to make provision (as opposed to the other half of the authorities who have not), this strongly suggests that there is no need for further regulation.

I am unable to accept the local authorities' contention that their approach is 'harmonious and consistent'. In the absence of ambiguity in the wording of s 117, the fact that another interpretation may accord with general policy has no bearing on the matter. Mr Lissack's four predicted outcomes of interpreting s 117 as a gateway provision would equally be true of the judge's interpretation of s 117 as a free-standing duty.

I have considered the local authorities' assertion that no other provision imposes a duty on local authorities to provide residential accommodation for the mentally ill, free of charge. This, to my mind, is a circular argument. The fact that Parliament has made separate provision for a particular category of the mentally ill to be provided with caring residential accommodation after they have left hospital when no member of any other sub-group of the mentally ill is accorded the same treatment, does not undermine Parliament's specific intention. It simply demonstrates that those covered by s 117 are regarded as meriting different treatment by the provision of residential accommodation which, if they refuse to accept, will result in their compulsory return to hospital.

In summary, I am unpersuaded that any of these policy or social considerations can be deployed to any effect in what is essentially a question of construction. The local authorities' suggestion that the interpretation which I favour can result in unfairness is not an argument for imposing an artificial construction on s 117. Giving full weight to the 'unfair windfall' argument the appropriate response is to amend the benefits under the relevant regulations and not to depart from the plain words of s 117. It is unrealistic to suggest that mentally ill patients, or their relatives or doctors and medical staff would intentionally behave in such a way as to ensure a detention under s 3 so that on release the person would be entitled to accommodation without charge. If there be faults in the system they can only be remedied by further legislation.

The Pepper v Hart argument

Since I have concluded that the wording of the section is unambiguous, there is no need to resort to policy arguments or to refer to Hansard to elucidate the Parliamentary intention behind the provisions. The local authorities point to the lack of 'tightness' in the wording of the provision and the absence of regulations governing the exercise of the s 117 duty. Although there is a positive duty to provide the after-care services there is clearly a discretion as to the level at which those services should be provided, bearing in mind that the obligation is to each individual patient and is circumscribed by the need of the patient. This discretion cannot be said to introduce ambiguity into the section. Similarly, the absence of any definition of 'after-care services' does not render the provision ambiguous. The absence of a definition simply points to the discretion accorded to the authorities in the appropriateness of the provision for each individual patient. For reasons already given the argument that Parliament could not have intended to impose an identical or joint duty on local and health authorities does not create an ambiguity.

Consequently, I have come to the conclusion that neither the interpretation of the section nor the outcome of the appeal depends upon policy considerations and reference to the Parliamentary history according to the criteria set out in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593 should not be permitted. Nevertheless, even if the correct construction of s 117 leads to anomalies, in the operation of the benefits system or for other sub-groups of the mentally ill, it is for Parliament to address them by legislation and does not justify

a departure from the plain meaning of s 117 or an excursion into its Parliamentary history.

Accordingly, I would dismiss this appeal.

BUXTON LJ. I agree with Otton LJ that this appeal must be dismissed, and with the reasons that he gives for that conclusion. I venture to add a few words of my b own.

This case turns on a small number of fundamental, even trite, propositions about the powers and duties of local authorities. They are:

(1) A public body can only do that which it is authorised to do by positive law. In the words of Laws J in *R v Somerset CC, ex p Fewings* [1995] 1 All ER 513 at 524, c that is a sinew of the rule of law.

(2) In practical terms, the powers and duties of a local authority under that rule will only be found in statutory form.

(3) A strong form of that inhibition on local authorities is to be found in the particular rule that financial charges can only be imposed by a public body with specific statutory approval: see the principle enunciated in *A-G v Wilts United* d *Dairies Ltd* (1921) 37 TLR 884, cited by the House of Lords in *McCarthy & Stone (Developments) Ltd v Richmond upon Thames London BC* [1991] 4 All ER 897 at 900, [1992] 2 AC 48 at 67.

(4) By the operation of the rule that Parliament does nothing in vain, (a) statutory provisions expressed in terms of duties are to be assumed to have operative force e in imposing those duties; and (b) a duty imposed by one Act is to be assumed not to duplicate a duty already imposed by another Act.

It follows from these propositions that:

(1) when Parliament passed what is now s 117 of the Mental Health Act 1983, clear words would have been needed to establish either (a) that the terms of f s 117(2) did not create a duty; or (b) that the duty that s 117(2) did create was duplicated by or was in the same terms as the duty created by s 21 of the National Assistance Act 1948. In that connection, the concept of a 'gateway' section invoked by the local authorities does not apply here. Such a section might be that cited by the judge, s 2 of the Chronically Sick and Disabled Persons Act 1970, which imposes on the local authority a duty to exercise one of its existing and g specified powers. But s 117(2) creates a duty that makes no reference to any other statutory power or duty.

(2) The s 117 duty is sui generis, and does not repeat or overlap with the power or duty created by s 21.

(3) In exercising the s 117 duty the local authority can only charge those in h respect of whom it performs that duty if there is statutory authority to charge specific to that duty. No such authority exists.

(4) It is not open to the local authority to claim that when providing accommodation to a person falling under s 117(1) it is exercising its powers under s 21. If that were the case, the local authority would be failing to perform its duty j under s 117. Alternatively, where a specific duty without a charging provision is imposed on a local authority, it does not have vires in that case to exercise a more general power that does have a charging power attached to it.

Accordingly, the local authorities were obliged to provide accommodation as part of their after-care function by the provisions of s 117 but not otherwise; and thus could only impose contingent requirements on the receivers of those services if s 117 or a power attracted by s 117 so permitted. No such power exists.

That being the plain effect of the statutory provisions, it is very doubtful whether arguments based on the anomalous or unreasonable effect of the provisions could displace it. But in fact the statutory provision is not at all anomalous, and not at all surprising. The persons referred to in s 117(1) are an identifiable and exceptionally vulnerable class. To their inherent vulnerability they add the burden, and the responsibility for the medical and social service authorities, of having been compulsorily detained. It is entirely proper that special provision should be made for them to receive after-care, and it would be surprising, rather than the reverse, if they were required to pay for what is essentially a health-related form of care and treatment.

These considerations enable to be put in perspective the argument based on s 21(8) of the 1948 Act, and the reference to that section that is contained in para 28 of the judgment of this court in *R v North and East Devon Health Authority, ex p Coughlan (Secretary of State for Health intervening)* [2000] 3 All ER 850, [2000] 2 WLR 622, which Otton LJ has set out. The respondents' argument was simple. The provision of residential accommodation is both authorised and required by s 117, which is plainly an enactment not contained in the 1948 Act. Therefore, the power to provide residential accommodation under s 21(1) of the 1948 Act and thus to charge for it is, as Mr Drabble put it, 'disengaged' by the existence of the s 117 power. The judge appears to have been persuaded by this argument, which he thought to be reinforced or justified by the observation about s 21(8) in para 28 of the judgment in *Ex p Coughlan* that:

> 'The powers of the local authority are ... excluded ... in the case of "any other enactment", where it is sufficient if there is an authority or requirement to be made *by or under* the enactment.' (See [2000] 3 All ER 850 at 862, [2000] 2 WLR 622 at 635; the court's emphasis.)

I do not consider that either the terms of s 21(8) or the reference to it in *Ex p Coughlan* have the conclusive force attributed to them by the judge. The argument based on s 21(8) necessarily presupposes that s 117 itself does indeed authorise or require the provision of residential accommodation: the very issue that lies at the heart of this appeal. If it does have that effect, then, as I have already indicated, because it has no charging provision attached to it the local authority cannot impose charges for that accommodation; and s 21(8) therefore adds nothing effective to the argument. If on the other hand s 117 does not itself authorise or require the provision of residential accommodation, then s 21(8) by its terms is not engaged at all. The same is true of the observations in *Ex p Coughlan*, which do no more than repeat the terms of s 21(8) in a more difficult context, not engaged in our case, of the relationship between local authorities and the National Health Service in the provision of nursing care.

All that said, however, consideration of the relationship between s 117 and s 21(8) yields some further reflections that are of some general significance in this case. First, when one asks whether a section that in its terms says that it is the *duty* of the local authority to *provide* services is a section that authorises or requires the provision of services, it is very difficult to think of reasons for saying that it is not. Second, the rule emphasised in s 21(8) is a strong reflection of the general principle already set out that every local government power must be attributed to a specific and identifiable statutory authority: not least because of the issue that is central to this case, of determining the vires of any ancillary provisions, such as charging. It is very difficult against that background to think that Parliament would have placed on the statute book a provision like s 117 that

appears to create, but on the local authorities' argument does not create, a specific duty. It is even less likely that authority would be conferred to make the same provision under two different statutory enactments which have different ancillary implications: a situation that in any event s 21(8) renders impossible so far as provision under s 21 is concerned.

Finally, Mr Lissack was properly diffident in invoking the jurisprudence of *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593 in this case, and he was right to show that caution. This case comes nowhere near to being one in which the *Pepper v Hart* criteria are present. There is no clear Parliamentary statement of the purpose of the Bill; and the important pre-condition of ambiguity in the Act's wording is not fulfilled either. Mr Lissack argued that the ambiguity was to be found in the term 'after-care services' not being defined. But that term is certainly not *ambiguous*. Its meaning may, like many expressions, be subject to the possibility of some argument at its outer penumbra; but there can be no doubt at all that the service in issue in this case, the provision of residential accommodation, falls squarely within it.

For what it is worth, however, when we did look, as we were asked to do, at the Parliamentary material, none of it supported the case that the local authorities wished to make. Some speakers, including the proposer of the amendment that became s 117, thought or may have thought that s 117, as it now is, converted a previous power into a duty. Some, including the minister with departmental responsibility for the Bill, thought or may have thought that the duty that it created was the same as that already existing. None of them said that s 117 merely referred to the existing duty, and did not itself impose any duty at all. Whether government spokesmen would have persisted in that view, and thus have persisted in adopting the wording of s 117, if they had had the benefit of the arguments in this case is perhaps another matter. But the fact that that question simply cannot be answered is a very good demonstration of why the *Pepper v Hart* jurisprudence should only be used in those cases where the House of Lords clearly intended it to be used.

HOOPER J. I agree that the appeal should be dismissed.

Appeals dismissed. Permission to appeal refused.

Kate O'Hanlon Barrister.

Owners of the Carbonnade and others v Owners of the Ruta

Harding (owner of the Lutra II) v Owners of the Ruta

QUEEN'S BENCH DIVISION (ADMIRALTY COURT)
DAVID STEEL J
4 NOVEMBER 1999, 11 FEBRUARY 2000

Admiralty – Practice – Action in rem – Priorities – Ranking and priority of maritime liens – Competing damage and wages claims against fund – Damages claimant enforcing security by arrest but vessel being re-arrested – Whether damages claim having priority over wages claim – Whether claim having equal ranking with other damages claims after arrest and re-arrest.

R, a small cargo vessel manned by a crew of nine, collided with three yachts, C, S and L, outside the port of Ipswich. C sank and was rendered a constructive total loss. S and L were damaged. A new crew subsequently took over R. In September 1998 R was arrested in port in Ireland at the instance of M Ltd, manager of the vessel and mortgagee. The owners of L thereupon issued a caveat against release and later took over the arrest of the vessel. Security was provided by R's P & I club and the vessel was released. However, R was re-arrested in France at the instance of the owners of C and S. By this time R's hull underwriters had gone into liquidation and the club refused to provide funds in its stead. R was accordingly released from arrest to complete a laden voyage to England, where she was again re-arrested and eventually sold. In the meantime, a substantial backlog of unpaid crew wages had built up. Four of the crew were paid off by the owners of C and S and the other claimed their outstanding wages in their own right. The owners of L had in the meantime obtained default judgment and sought to enforce the judgment against their security, contending that they were entitled to a maritime lien for damage. It fell to be decided whether a damages claimant had priority over a wages claimant or vice versa, and whether L's maritime lien for damage survived R's release from arrest, thus entitling the owners of L to proceed in rem against the proceeds of sale.

Held – (1) Questions of priority of competing maritime lien claims were not capable of being compartmentalised in the form of strict rules of ranking. While in appropriate cases it would be a highly significant factor, in the instant case, neither creditor could pray in aid some status as a preserver of the res. Moreover, considerations of public policy, namely the interests of mariners and the promotion of safe navigation, were evenly matched. The contrast between the voluntary nature of the wages lien and the involuntary nature of the damage lien might afford some justification for giving priority to the damage lien; however, once engaged, the seaman had no option but to continue to volunteer his services. Furthermore, the instant case was not one where the damage lien was attributable to the negligence of the crew claimants, who had not had navigational responsibilities and had in any case joined the vessel after the collisions. The decisive factor in the instant case was the fact that the wages

claimants had no alternative form of redress, as the owners of R were insolvent, since where the only remedy open to the wages claimants was recovery from the proceeds of sale, considerations of public policy accord them a very high level of priority (see p 458 *a* to *f*, post); *The Linda Flor* (1857) Swab 309 considered.

(2) It was an appropriate exercise of the court's discretion for the claim of the owners of L against the proceeds of sale to have the same priority as that of the owners of C and S. That conclusion reflected the general equitable approach to issues of priority, and was reinforced by the consideration that the circumstances would justify permission to re-arrest R, as the security obtained by the owners of L was insufficient to cover the substantial costs element; the level of dividend the unsecured creditors of the P & I club could have expected was minimal; and all three collisions occurred on the same day in the same incident. It would therefore have been unfair to have accorded priority to one claim over the others (see p 461 *c* to *f*, post); *The Wild Ranger* (1863) Brown & Lush 84 considered.

Notes

For admiralty proceedings in rem, see 1(1) *Halsbury's Laws* (4th edn reissue) paras 311–312.

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Alletta, The [1974] 1 Lloyd's Rep 40.
Benares, The (1850) 1 Not Cas Supp 5.
Birchglen, The [1990] 3 FC 301, Can Fed Ct.
Chimera, The (1852) 8 PD 131.
Christiansborg, The (1885) 10 PD 141, CA.
City of Mecca, The (1879) 5 PD 28; *rvsd* (1881) 6 PD 106, CA.
CJ Saxe, The (1906) 145 Fed Rep 749, NY District Ct.
Currie v M'Knight [1897] AC 97, HL.
Daien Maru, The [1986] 1 Lloyd's Rep 387, Sing HC.
Duna, The (1861) 5 LT 217, Ir Ct of Adm.
Elin, The (1883) 8 PD 129, CA.
Freedom, The (1871) LR 3 PC 594, 17 ER 224, PC.
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Hero, The (1865) Brown & Lush 447, 167 ER 436.
Kalamazoo, The (1851) 15 Jur 885, Ct of Adm.
Linda Flor, The (1857) Swab 309, 166 ER 1150.
Lyrma, The [1978] 2 Lloyd's Rep 30.
Mons, The [1932] P 109.
Naval Consulte Assistencia A Maquinas Maritimas LDA v Owners of the Ship Arctic Star (1985) Times, 5 February, CA.
Point Breeze, The [1928] P 135.
SC Rolinay Sea Star Srl v Owners and/or demise charterers of the Bumbesti, The Bumbesti [1999] 2 All ER (Comm) 187.
Tjaskemolen, The (No 2) [1997] 2 Lloyd's Rep 476.
Veritas, The [1901] P 304.
Westminster Bank Ltd v West of England Steamship Owners' Protection and Indemnity Association Ltd (1933) 46 Ll L Rep 101.
Wild Ranger, The (1863) Brown & Lush 84, 167 ER 310.
William Leishear, The (1927) 21 Fed Rep (2nd) 862, Md DC.

Cases also cited or referred to in skeleton arguments
Stream Fisher, The [1927] P 73, [1926] All ER Rep 513.
Volant, The (1842) 1 Wm Rob 383, 166 ER 616.

Actions
The claimants, the owners of the yacht Carbonnade, the owners of the yacht Shamal II and Mr Malcolm Harding, owner of the yacht Lutra II, brought actions against the defendants, the owners of the ship Ruta, seeking damages following a collision between the ship and the three yachts on 10 October 1997 when the ship was outward bound from Ipswich and the yachts were at anchor. The facts are set out in the judgment.

Colin Wright (instructed by *Donne Mileham & Haddock*, Brighton) for the owners of Carbonnade and Shamal II.
Charles Holroyd (instructed by *Elborne Mitchell*) for the owners of Lutra II.
Christopher Smith (instructed by *Bridge McFarland*, Grimsby) for the vessel Ruta.

Cur adv vult

11 February 2000. The following judgment was delivered.

DAVID STEEL J.

1. It is so often the case that actions involving relatively modest sums of money raise difficult issues of law. This case is one such. The proceeds of sale of the vessel Ruta are wholly insufficient to satisfy the large number of maritime claims outstanding against her former owners and it falls to the court to decide their ranking. Two primary issues have arisen. (a) Does a damage claimant have priority over a wages claimant or vice versa? (b) On what terms as to priority can a claimant who has earlier obtained contractual security proceed against the proceeds of sale?

2. The background is unusual. On 10 October 1997, Ruta, a small general cargo vessel of 1,593 grt, manned by a crew of nine, was outward bound from Ipswich. In the course of her passage, she came out of the channel and collided with three yachts lying at anchor, Carbonnade, Shamal II and Lutra II. Carbonnade sank and was rendered a constructive total loss. Her owners had a claim for about £45,000. Shamal II and Lutra II were both less severely damaged and their owners had claims in the region of £16,000 and £8,000 respectively.

3. (It is worth mentioning that only ten days earlier, Ruta had been involved in another incident in the port whereby electrical cables had become damaged. In the result, Ipswich Port Ltd had been furnished with an insured guarantee covering their claim arising out of the incident in the sum of $600,000 just before Ruta sailed.)

4. During the course of 1998, with the three yacht claims lying fallow, a new crew took over Ruta. A B Seledchenko joined in February and chief officer Konopkin and A B Kann in March. All the remainder, captain Maslennikov, chief engineer Pilippov, second engineer Sokolov, electrician Poluetkov, motorman Tjurikov and cook Vlasov, joined in August. As their names suggest, they came either from Russia or from one of the Baltic States.

5. On 15 September 1998, Ruta was arrested at Youghal in the Republic of Ireland at the instance of Morline Ltd who were the managers of the vessel and also mortgagees. The owners of Lutra II thereupon issued a caveat against

release and, on 25 September, took over the arrest of the vessel from Morline. In the meantime, their solicitors had made the following proposal as regards security:

> 'Our clients will accept security in the form of a cash deposit in an interest bearing escrow account opened in joint names, in the form of a bail bond, or in the form of a guarantee to be provided either by a first class British bank or by an International Group P & I Club.'

6. Following negotiations between solicitors, the owners of Lutra II accepted a letter of undertaking from Ruta's P&I club, Ocean Marine Mutual Insurance Association Ltd (OMMIA), in the sum of £14,000 and the vessel was released the same day, 2 October. (The undertaking also provided for the acceptance of service of English proceedings.) On 27 October, Ruta was arrested at Sables d'Olonne, this time at the instance of the owners of Carbonnade and Shamal II. This proved to be unrewarding, as the hull underwriters of Ruta had by now gone into liquidation and the club refused to furnish security in their stead. Ruta was accordingly released from arrest with a view to her completing a laden voyage to England, thereby earning freight. On 2 November, Ruta arrived at Immingham and was re-arrested. The vessel was eventually removed to Hull where she remained until sold.

7. In the meantime a substantial backlog of unpaid crew wages had built up. The crew appear to have left the vessel in December. Four of them were paid off by the owners of Carbonnade and Shamal II, including their repatriation costs, pursuant to an order of this court that the owners thereby be subrogated to the relevant crew claims. The other five joined another vessel and claim their outstanding wages in their own right. The total sums involved are in the region of $30,000, representing approximately two-and-a-half months wages.

8. A range of claimants including mortgagees, repairers and bunker suppliers subsequently entered various caveats against release or payment out. But when the vessel was eventually sold in November 1999, the sum realised inclusive of bunkers was only $167,163. Against this was ranged a number of claims:

(a) Admiralty Marshal's Expenses	£19,399
(b) Carbonnade	£49,907
(c) Shamal	£18,062
(d) Crew wages	£13,310

This was enough to persuade the additional claimants that there was no realistic prospect of a dividend given their low priority as compared with the maritime lienors.

9. The position was further complicated when, having obtained default judgment in March 1999 in the sum of £8,965 (together with £14,670 in costs), the owners of Lutra II sought to enforce the judgment against their security. They learned that provisional liquidators had been appointed to the guarantor company in March by an order of the courts of the Turks and Caicos Islands. The liquidators duly notified the owners' solicitors by letter dated 26 October 1999, as follows:

> 'You are correct to assume that holders of Letters of Undertaking from OMMIA will be treated as unsecured creditors. I am unable to estimate either the timing or the quantum of any dividend to unsecured creditors at this early stage in what is a highly complex provisional liquidation. Similarly

> I am unable to release financial information at this stage, except to state that there are substantial secured claims on the assets which will rank ahead of unsecured creditors for dividends.'

It is this claim, which the owners of Lutra II now also seek to bring against the fund in court, still entitled to the priority, it is contended, of a maritime lien for damage.

THE RANKING OF THE WAGES CLAIM

10. Regardless of the priority of the Lutra II claim, the entire net fund would be absorbed by the claims of Carbonnade and Shamal (after allowance for interest) unless the wages claim has priority over them. This immediately raises the question of the validity of the 'rule' spoken to in many of the textbooks that the lien for wages ranks below that for collision damage: eg Williams & Bruce *Admiralty Practice* (2nd edn, 1886) p 205, Maude & Pollock *On Merchant Shipping* (4th edn, 1881) p 240, *Abbott's Law of Merchant Ships and Seamen* (14th edn, 1901) p 1026, and Roscoe *Admiralty Jurisdiction and Practice*, (5th edn, 1931) p 227. It is in this tradition that the status of a damage lien is summarised in McGuffie *Admiralty Practice* (1964) p 1574 as follows: 'Damage has priority over: (a) earlier salvage; (b) wages; (c) subsequent possessory liens; (d) necessaries; (e) execution creditors; (f) mortgages.'

11. This approach was challenged by the wages claimants. It was their case that there was no hard and fast rule in respect of this (or indeed any other) priority issue. The Admiralty Court, it was argued, approached the question of priority in a broad discretionary way, having regard to considerations of equity and public policy. In the light of the authorities, the particular features of the present case that were emphasised by the wages claimants as allegedly justifying priority of their claim over the collision claims were as follows. (a) The wages were earned after the collisions occurred. (b) The claimants were not themselves responsible for the imposition of the damage liens. (c) At least in comparison with the damage claimants, the wages claimants could fairly be regarded as preservers of the res. (d) The interests of mariners were a special concern of the Admiralty Court. (e) With the owners being insolvent, the wages claimants had no alternative remedy.

Authorities

12. Before considering the validity of the broad submission as to the discretionary nature of the court's task or the significance of the detailed criteria said to support the case of the wages claimants, I propose to review the principal authorities touching on the comparative priority of wages and damage claims.

13. A convenient introduction is *The Aline* (1839) 1 W Rob 111, 166 ER 514 in which Dr Lushington considered the relative priority between a damage lien on the one hand and a mortgage or bottomry bond on the other. He placed particular emphasis on the involuntary nature of the damage lienor's interest and the availability to the mortgagee or bondholder of an alternative remedy:

> 'In both of these cases, I apprehend that the mortgagee and the bondholder, cannot take any right greater than the owner could confer; viz. a lien on the ship as a security against the owner and all who claim under him. I am also of opinion, that neither the mortgagee nor bottomry bondholder could be a competitor with the successful suitor in a cause of damage, and for this reason, that the mortgage or bottomry bond might, and

often does, extend to the whole value of the ship; if, therefore, the ship was not first liable for the damage she had occasioned, the person receiving the injury might be wholly without a remedy, more especially where (as in this case) the damage is done by a foreigner, and the only redress is by a proceeding against the ship. Another reason that would incline the preponderance in favour of the person suffering the damage arises from the consideration, that he has no option, no caution to exercise; the creditor on mortgage or bottomry has. He may consider all the possible risks, and advance his money or not as he may think most advisable for his own interest. He has an alternative; the suitor in a cause of damage has none.' (See (1839) 1 W Rob 111 at 118, 166 ER 514 at 517.)

14. Following two decisions of the English Admiralty Court in *The Benares* (1850) 1 Not Cas Supp 5 and *The Chimera* (1852) 8 PD 131 in which damage lienors were accorded priority over wages claimants on the basis that the latter should be left to rely on their in personam claim against their employers who were not said to be insolvent, the underlying rationale for such an approach was spelt out in the Irish decision in *The Duna* (1861) 5 LT 217 at 218 per Judge Kelly:

'By the maritime law of all great maritime states the mariner has a threefold remedy for the recovery of his wages. He can sue the ship herself, or he can sue the owner, or he can sue the master of her. His right to all or any of these several remedies is beyond dispute, and he can select any of them which his convenience or his necessity may suggest. The petitioners in this cause of damage, in which the ship is a foreign one, and sold in this, a foreign country, have no other remedy than against that ship, and if that be abstracted, or its value absorbed by other claimants, they are remediless. With all these considerations before it, the court is now called upon to decide whether it ought to prefer the claim for compensation of the injured party, or the claim of those who by inference of law contributed to, or occasioned that injury—whether it ought to diminish a fund already insufficient for its specific and assigned purpose of compensating a wrong, in favour of those on account of whose unskilfulness or negligence that fund was so impounded as a penalty, and whether it would allow one party, who has diverse remedies unnecessarily to select that particular one which is the only remedy of the other party, and which, if absorbed or diminished, would leave his rights unsatisfied. Upon every principle of natural justice it is impossible for the court to prefer the claims of the master and mariners whose conduct in the management of the wrong-doing vessel was, at the least, so questionable, to the claim for compensation of an innocent party, who has suffered injury by or through that conduct; or to relieve the owner of the vessel from his unquestioned liability to the master and mariners for their wages at the expense of the petitioner in the cause of damage, and out of the very fund which he was compelled, by an action of tort, to allocate to those petitioners as compensation. Acting on the well-known principle of equity, where one party has several and the other but one remedy, it inflicts no hardship upon those seamen sending them to their personal action against an owner who is not stated to be bankrupt or insolvent, and is, moreover, a fellow-subject and resident in that country to which they are about to return; and still less should they consider it a grievance that they were so sent, when they knew that it was in order that justice might be done to others, who, according to

the judgment of the court, had received damage, and were entitled to be indemnified.' a

15. In the meantime, this approach had been echoed by Dr Lushington in *The Linda Flor* (1857) Swab 309, 166 ER 1150. He expressly adhered to his earlier decision on the issue in *The Chimera* emphasising the comparison between the alternative forms of redress open to the wages claimant and the absence of any option available to the damage lienor. He did, however, complete his short judgment by commenting: 'This is not the case of a bankrupt owner; it will be time to consider such a case when it arises.' b

16. The issue eventually reached the Court of Appeal in *The Elin* (1883) 8 PD 129. The court refused to hold that the earlier cases had been wrongly decided, viewing the matter not as a question of priority but as the outcome of the proper application of equitable principles preventing the owner who caused the damage from being entitled to withhold part of the fund for the payment of wages. The underlying premise remained that the wages claimants were able to recover from the owners direct: c

'If the Admiralty Court allowed seamen to recover wages out of this fund it would in so doing give a relief to the owner of the wrong-doing ship in the hands of the Court. Dr. Lushington, in exercising the wide equitable maritime jurisdiction of the Admiralty Court, came to the conclusion that it would be unjust to the owner of the injured ship if he allowed the fund against which the lien for damage has priority to be diminished by a payment of wages. This he did quite independently of any mere questions of priority. He did it on the principle of acting justly to the owner of the injured ship ... It may perhaps be somewhat hard on the seamen not to allow them to obtain their wages from the res in Court; but it must be borne in mind that they may recover them from the owners of the vessel on which they have served.' (See (1883) 8 PD 129 at 130.) d e f

17. The House of Lords gave further impetus to the status of the maritime lien for damage in *Currie v M'Knight* [1897] AC 97. The speech of Lord Watson contains the following passage (at 105–106):

'*The Bold Buccleugh* which was decided by the Judicial Committee of the Privy Council affirming the judgment of Dr. Lushington, is the earliest English authority which distinctly establishes the doctrine that in a case of actual collision between two ships, if one of them only is to blame, she must bear a maritime lien for the amount of the damage sustained by the other, which has priority, not only to the interest of her owner, but of her mortgagees. The principle of that decision has been adopted in the American Courts; and in the Admiralty Court in England it has for nearly forty years been followed in a variety of cases in which the lien for damage done by the ship has been preferred to claims for salvage and seamen's wages, and upon bottomry bonds.' g h

Nonetheless it has to be borne in mind that the only issue before the House of Lords was whether the Privy Council decision in *Harmer v Bell, The Bold Buccleugh* (1850) 7 Moo PCC 267, 13 ER 884 that there was a maritime lien for collision damage, reflected the maritime law of Great Britain. It was only being noted in passing that, as indeed was the case, there were examples of the damage lien being preferred to a wages lien. j

18. Matters were taken a little bit further in *The Veritas* [1901] P 304. The issue before the court was the relative priority of a wreck-raising claim and an earlier salvage claim. In his judgment Gorell Barnes J (at 313) made this general observation regarding the relative priority of contractual and tort claims:

> 'It is also clear that liens arising ex delicto take precedence over prior liens arising ex contractu. The reasons for this are pointed out by Dr. Lushington in *The Aline*. The principal one appears to be that the person having a right of lien ex contractu becomes, so to speak, a part owner in interest with the owners of the vessel. He has chosen to enter into relationship with the vessel for his own interests, whereas a person suffering damage by the negligent navigation of a ship has no option. Reparation for wrongs done should come first; otherwise the injured party might be unable to satisfy his claim out of the res without paying off prior claims which arise in such circumstances that the claimants may be considered to have chosen to run the risk of subsequent events affecting their claims. It has even been held that the maritime lien for damage takes precedence of the lien of the seamen for wages earned by them since the collision: *The Elin*.'

19. The difficulty of establishing rules of ranking based simply on the nature of the relevant causes of action was somewhat undermined by the outcome in *The Mons* [1932] P 109. Counsel for the salvors conceded that wages earned subsequent to the salvage services took priority over the salvage claim. However, this concession was accepted only with reluctance by the trial judge and in *The Lyrma* [1978] 2 Lloyd's Rep 30, following full argument on the topic, Brandon J held that no distinction could be drawn between wages earned before and after a salvage service. They were all subordinate on the basis that the salvage services had preserved the res. As part of the analysis, Brandon J said (at 35):

> 'There is a further argument in support of the view that no distinction should be made between earlier and later wages which arises in this way. It was held in *The Elin* above, following *The Linda Flor* ((1857) Swab 309, 166 ER 1150) that earlier damage had priority over later wages, and the decision in *The Elin* was affirmed by the Court of Appeal at page 129 of the same volume. It was further held in *The Inna* above that later salvage had priority over earlier damage. Suppose then a case in which a ship becomes subject to three successive claims, the first in time a damage claim, the second in time a salvage claim, and the third in time a wages claim. In such a case *The Inna* requires the Court to hold that the salvage claim has priority over the damage claim, and *The Elin* requires the Court to hold that the damage claim has priority over the wages claim. How then can the Court, without defiance of logic at any rate, hold that the wages claim has priority over the salvage claim?'

20. Whilst this decision focuses on the special status of a claim by virtue of which the fund has been preserved, it should be noted, at least in passing, that Brandon J went on to recognise that the prospects of the wages claimants successfully enforcing their personal claim against the owners were 'extremely poor' but that that consideration, even taken with the special interest that the Admiralty Court had in welfare of seamen, was not enough to set aside the apparently well-established principle of primacy for the salvage lien.

Conclusion

21. I spoke at the beginning of this section of my judgment of the suggestion in some of the textbooks that there is a rule whereby a damage lien has priority over a wages lien. It is clear even from the restricted citation of authority set out above that questions of priority are not capable of being compartmentalised in the form of strict rules of ranking. The general approach is accurately summarised in Thomas *Maritime Liens* (1980) para 418:

> '[T]he Admiralty and Appellate Courts have adopted a broad discretionary approach with rival claims ranked by reference to considerations of equity, public policy and commercial expediency, with the ultimate aim of doing that which is just in the circumstance of each case.'

22. The relevant considerations in achieving justice in the present case can be summarised as follows. (a) Whilst in appropriate cases it would be a highly significant factor, this is not a case in which either creditor can pray in aid some status as a preserver of the res. (b) Considerations of public policy are evenly matched. The interests of mariners are high in the concerns of the Admiralty Court. Lord Stowell was prone to describe their lien as 'sacred'. By the same token, the damage lien has been seen, perhaps somewhat quaintly, as a potent weapon in the promotion of safe navigation. (c) The contrast between the voluntary nature of the wages lien and the involuntary nature of the damage lien might afford some justification for giving priority to the damage lien. But the contrast would, on the face of it, be more significant in resolving the ranking between a damage lien and an earlier salvage lien. Once engaged the seaman has no option but to continue to volunteer his services. (d) This is not a case where the damage lien is attributable to the negligence of the crew claimants. Quite apart from the fact that their shipboard duties do not appear to involve navigational responsibilities, they joined the vessel after the collisions.

23. In my judgment, the decisive factor in resolving the present issue is the fact that the wages claimants have no alternative forms of redress. In short, the issue raised by Dr Lushington in *The Linda Flor* now falls to be decided in favour of the wages claimants. As I see it, the owners of Ruta are insolvent. Where the only remedy open to the wages claimants is recovery from the proceeds of sale, considerations of public policy justify according to them a very high level of priority. I have in mind not only the general concern for the mariner's interest properly exhibited by the Admiralty Court but also the practical implications of making a wages claimant subordinate to a damage lienor. It will be rare for the outstanding wages claims to amount to more than a fraction of the vessel's value; the damage liens on the other hand may often be as much as or even more than the value. Any preferment of the damage lien to the wages lien will encourage crews to refuse to disembark from vessels under arrest so as to try and force other claimants to pay off their claims. This would be likely to exacerbate their plight at least in the short term and in any event not be conducive to the efficient dispatch of business when vessels are under arrest.

24. In so far as support can be derived from other sources, the conclusion that I have reached is consistent with international conventions on the topic. The 1926 Convention on Maritime Liens and Mortgages, which was signed but not ratified by Great Britain, gave priority to wages claims over damage claims (and, for that matter, to claims arising out of the most recent voyage): see arts 2, 5 and 6. Although not signed by the United Kingdom, wages claims were given the same

priority in the 1967 Convention: art 5. The draft 1993 Convention is to the same effect.

25. So far as other jurisdictions are concerned, the position with regard to those jurisdictions for which detailed material was available appears to be as follows. (a) *Germany*: albeit not a party, the rules of the 1967 Convention have been incorporated into the Commercial Code. (b) *Holland*: Again, it is not a party to the conventions. The Civil Code gives priority to wages claims over salvage claims. Damage claims rank below mortgages. (c) *United States*: wages claims are accorded the highest priority amongst maritime liens. In particular they are to be preferred to collision claimants unless (maybe) there was personal responsibility for faulty navigation: see *The CJ Saxe* (1906) 145 Fed Rep 749 and *The William Leishear* (1927) 21 Fed Rep (2nd) 862. (d) *South Africa*: s 11 of the Admiralty Jurisdiction Regulation Act 1983 ranks crew wages accrued during the year prior to the arrest behind only preservation costs. (Whilst writing this judgment the parties provided a schedule extracted from Tetley, *Maritime Liens and Claims*, (2nd edn, 1998) as regards the priority of wages claims against damage claims worldwide. This demonstrated that precedence was accorded to wages claims in 80% of jurisdictions.)

For all these reasons, I hold that, on the facts of the present case, the wage claims have priority over both the damage claims.

THE LUTRA CLAIM

26. I must now turn to the question whether the owners of Lutra II are entitled to any right of priority against the proceeds of sale despite having obtained security for their claim in the circumstances outlined above.

27. From the perspective of the owners of Lutra II, the security which they extracted is unsatisfactory in two respects. First, there is obviously a significant risk that the security will not be honoured or, at best, only afford a small dividend. Second, the sum secured (£14,000) is substantially less than their claim including interest and costs (£24,000). The owners can, of course, seek to execute against the proceeds of sale by a writ of fi fa. But such a claim would rank subordinate to any maritime claim supported by a maritime or statutory lien. Has the maritime damage lien survived the release from arrest, thus entitling the owners to proceed in rem against the proceeds of sale? Or, put another way, are the owners entitled to the same priority for their claim as if they had proceeded against the proceeds of sale? The answer to these questions, it seems to me, depends, in part, on the discretionary approach to priority discussed above and, in part, upon the analogous theoretical question whether the owners would have entitled to re-arrest the vessel despite earlier having obtained security.

28. As regards the latter issue, the authorities touching on rights of re-arrest are few. A convenient starting point is *The Kalamazoo* (1851) 15 Jur 885 where bail in the sum of £3,500 had been posted but, following judgment on liability, the plaintiff put in a claim for a higher figure and purported to re-arrest the vessel. Dr Lushington set aside the second arrest on the basis that once a party had recovered judgment he was barred from proceeding in a second action. This decision was later followed in *The Point Breeze* [1928] P 135 and *The Alletta* [1974] 1 Lloyd's Rep 40, the rationale being that the right of arrest had become merged in the judgment: but cf *The Freedom* (1871) LR 3 PC 594 at 603–604. A different approach was adopted in Singapore: see *The Daien Maru* [1986] 1 Lloyd's Rep 387 and Jackson *Enforcement of Maritime Claims* (2nd edn, 1996) p 324 but cf *SC Rolinay Sea Star Srl v Owners and/or demise charterers of the Bumbesti, The Bumbesti* [1999]

2 All ER (Comm) 187. (An interesting question arises as to whether the new Admiralty Practice Direction which supplements CPR Pt 49 has reversed *The Alletta* and adopted the Singapore approach: see para 6.1.)

29. As regards those cases where no judgment has been obtained, the general principle was laid down in *The Wild Ranger* (1863) Brown & Lush 84 at 87, 167 ER 310 at 312 where Dr Lushington stated:

> 'Now bail given for a ship in any action is a substitute for the ship; and whenever bail is given, the ship is wholly released from the cause of action, and cannot be arrested again for that cause of action.'

However, in *The Hero* (1865) Brown & Lush 447, 167 ER 436, bail in the sum of £1,000 had been given for the release of the defendant vessel. The claim was in fact for £2,600. The plaintiff's proctor had filled in the praecipe properly but his clerk erroneously entered the claim for the lesser sum. The plaintiff applied to have the arrest set aside and for leave to re-arrest the vessel. Dr Lushington permitted the re-arrest on the following basis ((1865) 13 WR 927 at 927):

> 'I think that case [The Wild Ranger] has no bearing on the present question. Nothing in it militates against the power of the Court to direct measures to be taken to do full justice to the plaintiff, where the application is made before judgment has been pronounced. I am of opinion that the Court has power to grant the motion, and I think it is just and proper that the plaintiff should be relieved from the mistake committed ...'

In *The City of Mecca* (1879) 5 PD 28 at 34, Sir Robert Phillimore recalled that 'there have been several instances in which a ship has been arrested or re-arrested, in consequence of the bail becoming insolvent'.

30. The discretion is exercisable whether the vessel has been released on bail or pursuant to a contractual guarantee: see *The Christiansborg* (1885) 10 PD 141. In *Westminster Bank Ltd v West of England Steamship Owners' Protection and Indemnity Association Ltd* (1933) 46 Ll L Rep 101 at 105 Roche J observed:

> 'It is sufficient for me to say that there is certainly high authority for the view that in proper cases, where there has been a mistake as to the amount for which bail has been asked, or in cases where there are questions of the solvency of the security, the bail question may be reopened and there may be a requirement of further bail and a re-arrest or an arrest if such further bail is not furnished. It is further to be observed that, as far as I know, there is no authority, where the security given is not bail but on the contrary consists of a personal undertaking such as a guarantee, that an arrest cannot follow upon such guarantee where proper reasons for it are shown.'

The discretion is a broad one. It is accurately summarised in the Canadian decision in *The Birchglen* [1990] 3 FC 301 at 311 per Joyal J:

> 'As I view the jurisprudence, courts appear to adopt a fairly discretionary or pragmatic approach on the question and whether or not a maritime lien continues or is revived or is extinguished when security has been put up, is determined according to the facts of each particular case and of the requirements that full justice and equity be applied.'

31. This approach does no more than reflect the decision of the Court of Appeal in *Naval Consulte Assistencia A Maquinas Maritimas LDA v Owners of the Ship Arctic Star* (1985) Times, 5 February in which Lloyd LJ stated:

> 'This Court will not normally permit a second arrest, the reason being, as stated by my Lord, that the bail is said to represent the ship. But that rule is not without exceptions. The justification for the rule is, and always has been, the need to avoid oppression and unfairness.'

See also *The Tjaskemolen (No 2)* [1997] 2 Lloyd's Rep 476.

The new Admiralty Practice Direction makes express provision for permitting an arrest or re-arrest so as to obtain further security: para 6.7(3)(b). I approach the matter on the basis that permission will only be granted in circumstances of oppression or unfairness.

Conclusion

32. I have come to the conclusion that it would be appropriate for the claim of the owners of Lutra II against the proceeds of sale to have the same priority as that of the owners of Carbonnade and Shamal. This conclusion reflects the general equitable approach to issues of priority, reinforced by the consideration that the circumstances would justify permission to re-arrest Ruta. (a) The security obtained by the owners of Lutra II was insufficient to cover the very substantial costs element, itself brought about by the procedural complications of the default claim. (b) Not only is it likely that unsecured creditors of the P&I club will have a long wait before the outcome of the liquidation becomes clear, but also the press reports on the financial condition of OMMIA suggest that the level of dividend will be minimal. (c) It is true that the owners had made it plain at the time of the negotiations for security that they wished any guarantee to be posted by a first class bank or by a club in the International Group and that OMMIA was not a member of the Group. But it was nonetheless a well recognised P&I club, with a large entry and no reported financial difficulties. (d) All three collisions occurred on the same day in the same incident. All three faced similar difficulties as regards the insurance cover of Ruta. It would be unfair to accord priority to one claim over the others.

Order accordingly.

James Wilson Barrister (NZ).

R v Local Commissioner for Administration in North and North East England, ex parte Liverpool City Council

COURT OF APPEAL, CIVIL DIVISION
HENRY, CHADWICK AND MAY LJJ
30 NOVEMBER, 1 DECEMBER 1999, 24 FEBRUARY 2000

Local government – Maladministration – Complaint to local commissioner – Commissioner's report – Commissioner finding maladministration in respect of planning decision – Whether commissioner applying correct tests – Whether commissioner erring in undertaking investigation – Local Government Act 1974, s 26.

The appellant local authority decided to grant planning permission for the erection of a new stand at a football club's stadium. A local residents group subsequently accused councillors of improper and suspect conduct in making the decision, and asked the Local Commissioner for Administration to investigate the matter pursuant to the powers conferred on her by s 26[a] of the Local Government Act 1974. Under s 26(6), the commissioner was precluded from investigating any action in respect of which the person aggrieved had a remedy in legal proceedings, unless she was satisfied that it was not reasonable to expect the person aggrieved to resort to that remedy. After investigating the complaint, the commissioner produced a report in which she concluded that there had been two breaches of the National Code of Local Government Conduct amounting to maladministration within the meaning of s 26 of the 1974 Act. First, she found that seven councillors had wrongly failed to declare that they were either season ticket holders or regular attenders of the football club, that such a connection would have resulted in a reasonable member of the public feeling that it might have been a substantial influence on the way those councillors had voted, that it was therefore a clear and substantial interest, and that accordingly those councillors should not have taken part in the decision. Secondly, she found that the two major political parties within the authority had imposed voting disciplines on the votes for the planning application, and that the final decision had been heavily, perhaps decisively, influenced by a sense of party political loyalty. In reaching those conclusions, the commissioner applied the tests set out in the code. The authority nevertheless challenged her report in judicial review proceedings, but that challenge was dismissed by the judge. On appeal, the authority contended that the subject matter of the complaint overlapped with one of unlawfulness; that the commissioner should therefore have been guided by the 'real danger of bias' test applied in legal proceedings rather than the test set out in the code; that she should not have undertaken the investigation since the complainants had a remedy in judicial review proceedings; and that she was wrong, in the circumstances, to conclude that the imposition of voting disciplines on party lines amounted to maladministration.

Held – Although there was a substantial element of overlap between maladministration and unlawful conduct, those concepts were not synonymous.

a Section 26, so far as material, is set out at p 466 *h* to p 467 *b*, post

Thus there was no reason in principle why the considerations which determined whether there had been maladministration should, necessarily, be the same as those which determined whether conduct had been unlawful. The commissioner's power was to investigate and report on maladministration, not to determine whether conduct had been unlawful. Accordingly, there was no reason why, when exercising the power to investigate and report, she should necessarily be constrained by the legal principles which would be applicable if she were carrying out the different task (for which she had no mandate) of determining whether the conduct had been lawful. It followed that, in the instant case, it could not be an error of law for the commissioner to apply the code, and there was nothing wrong with her approach to maladministration. Nor had she been wrong to conduct the investigation. Serious allegations of maladministration had been made, and they could best be investigated by the resources and power of the commissioner. She had been in a position to get to the bottom of a prima facie case of maladministration, while it would have been very difficult, if not impossible, for the complainants to obtain the necessary evidence in judicial review proceedings. It was therefore a clear case for the application of the proviso to s 26(6) of the 1974 Act. As regards the question of party loyalty and voting disciplines, there were some planning applications, particularly those with resource implications, in which party policy would be a material consideration. However, many, if not most, planning applications would not be of that nature, and the commissioner could not be criticised for concluding that the party pressure brought to bear in the instant case was inappropriate. Accordingly, the appeal would be dismissed (see p 470 *b* to *d*, p 472 *f* to *j*, p 473 *b*, p 474 *b c*, p 476 *f g j* to p 477 *d* and p 479 *b* to *d j* to p 480 *d*, post).

Decision of Hooper J [1999] 3 All ER 85 affirmed.

Notes

For investigation of complaints by commissioners for local administration, see 1(1) *Halsbury's Laws* (4th edn reissue) paras 44–46.

For the Local Government Act 1974, s 26, see 25 *Halsbury's Statutes* (4th edn) (1996 reissue) 513.

Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Locabail (UK) Ltd v Bayfield Properties Ltd, Locabail (UK) Ltd v Waldorf Investment Corp, Timmis v Gormley, Williams v HM Inspector of Taxes, R v Bristol Betting and Gaming Licensing Committee, ex p O'Callaghan [2000] 1 All ER 65, [2000] QB 451, [2000] 2 WLR 870, CA.

R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2) [1999] 1 All ER 577, [2000] 1 AC 119, [1999] 2 WLR 272, HL.

R v Comr for Local Administration, ex p Croydon London BC [1989] 1 All ER 1033, DC.

R v Gough [1993] 2 All ER 724, [1993] AC 646, [1993] 2 WLR 883, HL.

R v Local Comr for Administration for the North and East Area of England, ex p Bradford Metropolitan City Council [1979] 2 All ER 881, [1979] QB 287, [1979] 2 WLR 1, QBD and CA.

R v Secretary of State for the Environment, ex p Kirkstall Valley Campaign Ltd [1996] 3 All ER 304.

R v Waltham Forest London BC, ex p Baxter [1987] 3 All ER 671, [1988] QB 419, [1988] 2 WLR 257, CA.

Cases also cited or referred to in skeleton arguments

R v Amber Valley DC, ex p Jackson [1984] 3 All ER 501, [1985] 1 WLR 298.
R v Buckinghamshire CC, ex p Sharma [1998] COD 182.
R v Comr for Local Administration, ex p Eastleigh BC [1988] 3 All ER 151, [1988] QB 855, CA.
R v Comr for Local Administration, ex p PH (21 December 1998, unreported) QBD; *affd* (8 March 1999, unreported), CA.
R v Lambeth London BC, ex p Crookes (1997) 29 HLR 28.
R v Parliamentary Comr for Administration, ex p Balchin [1998] 1 PLR 1.
Weeks v Magill, Porter v Magill [2000] 2 WLR 1420, CA.

Appeal

By notice dated 4 May 1999, Liverpool City Council appealed with permission of Sedley LJ granted on 26 April 1999 from the decision of Hooper J on 16 February 1999 ([1999] 3 All ER 85) dismissing its application for judicial review of a report by the respondent, the Local Commissioner for Administration in North and North East England, dated 20 May 1997, in which she had made two findings of maladministration against the council in respect of a planning decision. The facts are set out in the judgment of Henry LJ.

Frances Patterson QC and *Colin Crawford* (instructed by *Sharpe Pritchard*, agents for *Stephen Culkin*, Liverpool) for the council.
Brian Ash QC and *John Hobson* (instructed by *Pulvers*, Watford) for the commissioner.

Cur adv vult

24 February 2000. The following judgments were delivered.

HENRY LJ.

1. This is an appeal from the judgment of Hooper J ([1999] 3 All ER 85) refusing the appellants', Liverpool City Council, application for judicial review to quash the report of the respondent (the commissioner) dated 20 May 1997. In that report she found maladministration on the part of the council in two respects. First, it was found that seven councillors voted in favour of the Liverpool Football Club's proposals (to erect an extension to a stand overshadowing the houses of the inhabitants of Anfield Road) without declaring their interest as season ticket holders or regular attenders, in breach of the disclosure rules set out in the National Code of Local Government Conduct (the code), issued jointly by the Secretary of State for the Environment, the Secretary of State for Scotland and the Secretary of State for Wales (who I will collectively refer to as the Secretaries of State) under the provisions of the Local Government and Housing Act 1989. Second, the commissioner found that:

> 'The use of the system of agreed voting in relation to a planning application operated by both the main political parties [Labour, in power, and the Liberal Democrats] before the matter was considered in committee was maladministration in this case.'

2. I adopt with gratitude Hooper J's introductory analysis of the facts (at 87–88):

> 'In 1995 Liverpool City Football Club sought planning permission to erect an extension to an existing stand at the Anfield Road end of the football stadium. The extension would have raised the height of the roof to some 15·8 m

and permitted the football club to provide additional seated accommodation. In 1964 and in 1994 somewhat similar applications had been refused. Following positive reports from the development control sub-committee (19 September 1995) and the planning and transportation committee (22 September 1995), the full council, on 11 October 1995, resolved to grant planning permission subject to a s 106 agreement. That planning permission was finally granted on 25 February 1997. On 24 October 1995 the Anfield Road Residents Group wrote to the [commissioner] asking her to investigate the grant of planning permission. In the letter the group wrote: "The most obvious aspect of this affair is of course that if any other large company in the entertainment industry wanted to erect a 52 foot wall in front of people's homes their plans would have been summarily dismissed; why should it be any different for Liverpool Football Club plc."'

The letter went on to say:

'"We hope that when you have looked into the matter you will agree with us that the councillors' and planning officers' actions have been both improper and suspect." The [commissioner] found maladministration in two respects. She found that six councillors were Liverpool City Football Club season ticket holders and one was a regular match attender. She found that none of the seven had declared an interest, which, in her view, they ought to have done. She also concluded that support for a football club of the kind demonstrated by these seven councillors was such that "a reasonable member of the public would have felt that it might have been a substantial influence on the way in which councillors voted". Secondly, she found that some of the councillors voted as they had done "out of a misplaced sense of loyalty to their political party". Three councillors of the ruling Labour group had said during the investigation that "they voted for the application at the Council meeting but would have voted against if there had been a free vote". Another Labour councillor: "... who had spoken against the proposal said that she absented herself during the voting at the Council meeting but would have voted in accordance with the requirements of the whip if she had voted at all." A Labour councillor who had voted for the application said that he did so partly because that was the view of the Labour group: "He says that he would never now vote against the view of the Group (having done so once before) even though he understands that a councillor who did so on a planning issue would not be subject to any Party discipline." A Liberal Democrat councillor who had felt that the proposed stand was acceptable had nevertheless voted against it "with a heavy heart" because he was unwilling to take sides against his group. Forty-one Labour councillors had voted for the application and none against. Thirty Liberal Democrat councillors had voted against the application with only three in favour. Both main political parties discussed the application prior to the meetings of the sub-committee, the committee and the council. According to the [commissioner]: "There is a general expectation amongst both parties that each councillor will vote in accordance with the view expressed by the majority at the group meeting." The [commissioner] concluded: "The patterns of voting show that the decision on whether to grant planning permission was heavily, and perhaps decisively, influenced by a sense of party political loyalty whether or not councillors had a well founded fear of disciplinary action which might follow a decision to vote against party preference. Such considerations

cannot be material to the consideration of a planning application and serve to make subsequent debate in the Council chamber or Committee room meaningless. I consider that the use of the system of agreed voting in relation to a planning application operated by both the main political parties before the matter was considered in committee was maladministration in this case."'

3. Maladministration is not defined by statute. Lord Denning MR (see *R v Local Comr for Administration for the North and East Area of England, ex p Bradford Metropolitan City Council* [1979] 2 All ER 881 at 898, [1979] QB 287 at 311–312) adopted a passage from Professor Wade's book on *Administrative Law* (4th edn, 1977):

'It will cover "bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on". It would be a long and interesting list, clearly open-ended, covering the *manner* in which a decision is reached or discretion is exercised: but excluding the *merits* of the decision itself or of the discretion itself. It follows that "discretionary decision, properly exercised, which the complainant dislikes but cannot fault the manner in which it was taken, is excluded" (see Hansard, 734 HC Debates (5th series) col 51). In other words, if there is no maladministration, the ombudsman may not question any decision taken by the authorities. He must not go into the merits of it or intimate any view as to whether it was right or wrong. This is explicitly declared in section 34(3) of the Act of 1974. He can enquire whether there was maladministration or not. If he finds none, he must go no further. If he finds it, he can go on and enquire whether any person has suffered injustice thereby.' (Lord Denning MR's emphasis.)

4. But the commissioner did not find that the maladministration had caused injustice to the complainants because she concluded that, given the fact that there was a properly made recommendation to grant from the head of planning, had the application been properly considered, approval would have been given. So the commissioner made findings of maladministration in relation to the seven councillors' failure to disclose private interests, and as to the voting disciplines of the Labour and the Liberal Democrat parties on this issue. By way of relief, under s 30(3A) of the Local Government Act 1974 she found that the seven councillors were in breach of the code, and named them accordingly.

5. The Local Government Ombudsman (as the commissioner is colloquially called) is a creature of Pt 3 of the 1974 Act. Section 26 of that part of the Act deals with matters subject to investigation, and ss 28, 29, 30 and 31 deal with the procedure in respect of investigations, the powers of the commissioner in carrying out such investigations, and reports on the investigations. Section 26 of the 1974 Act is the principal section:

'*Matters subject to investigation.*—(1) Subject to the provisions of this Part of this Act where a written complaint is made by or on behalf of a member of the public who claims to have sustained injustice in consequence of maladministration in connection with action taken by or on behalf of an authority to which this Part of this Act applies, being action taken in the exercise of administrative functions of that authority, a Local Commissioner may investigate that complaint ...

(6) A Local Commissioner shall not conduct an investigation under this Part of this Act in respect of any of the following matters, that is to say—(a) any action in respect of which the person aggrieved has or had a

right of appeal, reference or review to or before a tribunal constituted by or under any enactment; (b) any action in respect of which the person aggrieved has or had a right of appeal to a Minister of the Crown; or (c) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law: Provided that a Local Commissioner may conduct an investigation notwithstanding the existence of such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect the person aggrieved to resort or have resorted to it ...

(10) In determining whether to initiate, continue or discontinue an investigation, a Local Commissioner shall, subject to the preceding provisions of this section, act at discretion; and any question whether a complaint is duly made under this Part of this Act shall be determined by the Local Commissioner.'

6. Miss Frances Patterson QC, for the council, drew our attention to three issues or areas of concern to her clients, arising from the commissioner's report. First, the finding that the seven councillors were in breach of the code in their failure to disclose a private interest (paras 7–15). Second, whether the commissioner's investigation should have been commenced or curtailed having regard to s 26(6) of the 1974 Act (paras 16–20). Third, the finding that both of the major local parties (Labour, the controlling party, and Liberal Democrat) imposed voting disciplines on the votes for this planning application which amounted to maladministration (paras 21–28).

7. In her approach to these issues, Miss Patterson did not (in her presentation to this court) seek to set the commissioner's report aside, nor to quash the finding of maladministration which it contained. Instead, by way of relief, she sought various wide-ranging declarations. We are invited in this case to go much further than is necessary to judge the legality and procedural regularity of the commissioner's actions. We decline that invitation. It is generally dangerous for a court to go further than the issues before it require, and we are satisfied that it would be here.

Maladministration: the seven councillors' failure to declare a private interest

8. The principal complaint under this issue relates to the test setting the threshold for a declaration of interest by a councillor. The commissioner proceeded with the test as set out in the code. The Secretaries of State, referred to above, together issued the code of recommended practice as regards the conduct of members of [local] authorities. This code was issued in 1990, and we are told it has not been revised. Before coming into effect, a draft of it was laid before and approved by each House of Parliament. All councillors are required on accepting office to declare that they will be guided by the code. The introduction to the code states:

'The Code represents the standard against which the conduct of members will be judged, both by the public, and by their fellow councillors. The local ombudsman may also regard a breach of the Code as incompatible with good administration, and may make a finding of maladministration by the council in these circumstances.'

9. The disclosure requirements as to personal interests are as follows:

'5. If you have a private or personal interest in a question which councillors have to decide, you should never take any part in the decision, except in the exceptional circumstances described below. Where such circumstances do

permit you to participate, you should never let your interest influence the decision ...

7. It is not enough to avoid actual impropriety. You should at all times avoid any occasion for suspicion and any appearance of improper conduct.

Disclosure of pecuniary and other interests

8. The law makes specific provision requiring you to disclose both direct and indirect pecuniary interests (including those of a spouse with whom you are living) which you may have in any matter coming before the council, a committee or a sub-committee. It prohibits you from speaking or voting on that matter. Your council's standing orders may also require you to withdraw from the meeting while the matter is discussed. You must also by law declare certain pecuniary interests in the statutory register kept for this purpose. These requirements must be scrupulously observed at all times.

9. Interests which are not pecuniary can be just as important. You should not allow the impression to be created that you are, or may be, using your position to promote a private or personal interest, rather than forwarding the general public interest. Private and personal interests include those of your family and friends, as well as those arising through membership of, or association with clubs, societies and other organisations such as the Freemasons, trade unions and voluntary bodies.

10. If you have private or personal non-pecuniary interests in a matter arising at a local authority meeting, you should always disclose it, unless it is insignificant, or one which you share with other members of the public generally as a ratepayer, a community chargepayer or an inhabitant of an area.

11. Where you have declared such a private or personal interest, you should decide whether it is clear and substantial. If it is not, then you may continue to take part in the discussion and vote on it. If, however, it is a clear and substantial interest, then (except in the special circumstances described below) you should never take any further part in the proceedings, and should always withdraw from the meeting whilst the matter is being considered. *In deciding whether such an interest is clear and substantial, you should ask yourself whether members of the public, knowing the facts of the situation, would reasonably think that you might be influenced by it. If you think so, you should regard the interest as clear and substantial.'*

The crucial words are those italicised in para 11.

10. The application of the test was in para 86 of the report, that paragraph reflecting, as one would expect, the test itself:

'Support for a football club engenders a particularly intense type of loyalty which goes some way beyond a preference for one supermarket over another. I am in no doubt that a reasonable member of the public would have felt that it might have been a substantial influence on the way in which the councillors voted. The reasonable person would have had that view confirmed on seeing that the only members of the main opposition Party who voted in favour of the application were holders of season tickets. Thus I conclude that the seven councillors identified in this report did have a clear and substantial interest. None of them declared an interest and therefore never went on to ask themselves the relevant question. Season ticket holders or regular match attenders should in my view not only have declared an

interest, but also left the meeting. I consider that there was maladministration here ...'

And then she went on to name the councillors in question. In her reference to the 'main opposition party', she was referring to the Liberal Democrats. The Liberal Democrats had taken a caucus decision to oppose the grant of planning permission to Liverpool Football Club. The three councillors who defied the caucus decision and voted in support of the club's application were all undeclared season ticket holders.

11. So she found that seven councillors who should not have taken part in the decision in fact did take part, without having disclosed their interest.

12. Miss Patterson's elaborate attack on the test of when an interest should be disclosed founds on the case of *R v Gough* [1993] 2 All ER 724, [1993] AC 646. In *R v Gough*, in the context of the examination of a juror's conduct in a criminal case, the court was presented with two conflicting lines of authority. The finding in *R v Gough* is analysed in a decision of this court presided over by Lord Bingham of Cornhill CJ (*Locabail (UK) Ltd v Bayfield Properties Ltd, Locabail (UK) Ltd v Waldorf Investment Corp, Timmis v Gormley, Williams v HM Inspector of Taxes, R v Bristol Betting and Gaming Licensing Committee, ex p O'Callaghan* [2000] 1 All ER 65, [2000] QB 451). For present purposes it is simply necessary to say that the two competing tests were whether there was 'a reasonable apprehension or suspicion of bias' or 'a real danger or possibility of bias'. The former test accords with the code (and was clearly the test used by the commissioner). The latter test is the one approved by their Lordships in *R v Gough*, and is now binding on all subordinate courts. It is not disputed that the more stringent test (ie that with the lower threshold for disclosure) is the test to be found in the code.

13. Miss Patterson concedes that the commissioner, in so far as she was applying the words of the code and the test there laid down, reached a decision which a reasonable commissioner could reach. But she suggests that if the less stringent legal test had been used, the commissioner's finding might have been different. However, she does not ask this court to quash the finding of maladministration and order for the naming of the councillors. That she regards as history, and looks to the future in the declarations she formulates.

14. We note from *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [1999] 1 All ER 577, [2000] 1 AC 119 and the *Locabail (UK) Ltd* case, that the *Gough* formulation of the test has not been accepted in a number of common law jurisdictions and that there has been debate in those authorities as to whether the semantic difference between those two tests is likely to make any (and if so what) difference in practice. Thus Lord Hope of Craighead in *Ex p Pinochet Ugarte* said ([1999] 1 All ER 577 at 595, [2000] 1 AC 119 at 142): 'Although the tests are described differently, their application by the appellate courts in each country is likely in practice to lead to results which are so similar as to be indistinguishable.'

15. Given the 'particularly intense type of loyalty' engendered by Liverpool Football Club, I am not persuaded that the answer to the disclosure question would have been different had the test been 'a real danger or possibility of bias'. In either event, season ticket holders and other regular attenders should in my judgment have declared their interest, and it was maladministration not to.

16. Those are my views. I do not consider there to be a misdirection, still less a material misdirection. But if it were to be found that the commissioner had misdirected herself in this regard, in my judgment the correct remedy for this court would be to send the matter back to her to consider how she would have

judged the named councillors' failure to disclose when measured against the *Gough* test.

17. The judge saw no good reason why the commissioner, where the statutory concern was maladministration, should not follow the code guidance as to what constituted a breach of the code, and the code recognised the commissioner's power to find that a breach of the code was maladministration. Maladministration comes in many guises, and while there is a substantial element of overlap between maladministration and unlawful conduct by councils or officers or councillors in local government, they are not synonymous. Section 26 and s 34(3) of the 1974 Act limit the commissioner's powers to the investigation of maladministration. She was ruling on maladministration and I do not see how it can be an error of law in the circumstances to apply the Secretaries of States' code. This after all was the same test that all councillors had, on election, declared they would be bound by. If and when the Secretaries of State feel they should revise the code, they will do so. Meanwhile, no one is inviting the court to strike down the relevant paragraphs of that code as unlawfully applying too stringent a test of disclosure. And while the code is there, the commissioner must take account of it. The commissioner has not made a finding of unlawfulness (for which she would have no legal mandate) but has made a finding of breach of the code and maladministration, which findings were well within her discretionary powers. There was nothing wrong with her approach to the issue of maladministration.

18. Miss Patterson reminded us of *R v Secretary of State for the Environment, ex p Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304. Sedley J (at 314), when dealing with questions of conflict of interest said: 'Although in the nature of things it will ordinarily be for members ... to make up their minds in the first instance, whether they have got it right will always be a question of law.'

19. Mr Ash QC for the commissioner points out that that unimpeachable statement was made in context of whether there was 'in law a margin of appreciation' within which members may 'make up their minds about conflicts of interest' but it lends no support to the proposition that the commissioner is obliged to apply or have regard to the legal test of bias (which extends far beyond questions of local government) when performing her statutory function of investigating breaches of the code and maladministration.

20. The council's skeleton argument impliedly asserts that the commissioner 'slavishly adhered' to the code. I see no evidence of that. The commissioner dealt with the code in paras 8–15 of her report. There is nothing to suggest that her approach to the code can be properly criticised.

21. Next, a general point is made as to the relationship between an investigation carried on by the commissioner, and a legal action against the council and/or its councillors and officers. For this we must go to s 26 of the 1974 Act, set out in para 5 hereof. This was the statutory introduction of the local government ombudsman scheme. It was at a time when judicial review (as we know it today) was in its infancy: three years before RSC Ord 53 (Applications for Judicial Review) became law. Section 26(1) of that Act sets out the trigger for investigative action: a complaint of injustice in consequence of maladministration. Subsection (6) imposes limits when the commissioner should not investigate such complaints. In particular, the commissioner should not investigate 'any action [taken] in respect of which a person aggrieved has or had a remedy by way of proceedings in a court of law' (see s 26(6)(c)).

22. Judicial review would be such a remedy. But that embargo is subject to an important proviso, which the commissioner here applied and to which we must come.

23. What may not have been recognised back in 1974 was the emergence of judicial review to the point where most if not almost all matters which could form the basis for a complaint of maladministration are matters for which the elastic qualities of judicial review might provide a remedy. In that situation, the proviso in sub-s (6) of s 26 of the 1974 Act becomes of greater importance:

> 'Provided that a Local Commissioner may conduct an investigation notwithstanding the existence of such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect the person aggrieved to resort or have resorted to it.'

24. Here, the letter of complaint initiating the investigation by the Anfield Road residents was long and detailed. It was a letter of complaint inviting an investigation complaining of council actions that were 'improper and suspect'. Nothing in the letter indicated that the residents were contemplating judicial review proceedings. The judge found that there was not sufficient information in the letter to found judicial review. But, given the growth of judicial review, I suspect that any experienced public lawyer would be confident of being able to put together a challenge by way of judicial review to the voting procedures and the naming of councillors.

25. In her affidavit the commissioner deals with the difficulty of applying para (c) of s 26(6) of the 1974 Act:

> 'However, the availability of Judicial Review is less certain. I am aware that from time to time the Courts have widened or narrowed the availability of that remedy, and I bear in mind that the requirement to obtain leave to move for Judicial Review necessarily restricts the availability of that remedy. On the other hand I am aware of an argument that nearly all actions which could amount to maladministration ... could also be the subject of an application for leave to move for Judicial Review: for example, an allegation about the wrongful allocation of a council house. My understanding, however, is that maladministration and illegality are different concepts, although there is an overlap, and it is only where there is that overlap that Section 26(6)(c) comes into play ... The Complainants were complaining about a planning decision in favour of the Liverpool Football Club in circumstances where certain Councillors who had been involved with that decision were strong supporters of that Club. Prima facie therefore, the complaint presented itself as a possible breach of the Local Government Code of Conduct, a matter placed by Parliament under Section 30(3A) of the Act, within the purview of the Local Commissioners rather than the Courts.'

26. Section 30(3A) reads:

> 'Where the Local Commissioner is of the opinion—(a) that action constituting maladministration was taken which involved a member of the authority concerned, and (b) that the member's conduct constituted a breach of the National Code of Local Government Conduct, then, unless the Local Commissioner is satisfied that it would be unjust to do so, the report shall name the member and give particulars of the breach.'

27. Later she was to add:

> 'In relation to the complaint, the subject of this application, I was simply looking at an alleged breach of the Code of Conduct, and not considering whether the approval complained of had been obtained through bias, using that word in the sense that it has been considered over the years by the Courts.'

Indeed, on those grounds she did not consider that para (c) of s 26(6) was a bar to her proceedings. I am not sure that she was right in that conclusion. If wrong, she would have had to consider the proviso. And this she addressed in her affidavit:

> '... had I been advised that Judicial Review was potentially available to the Complainants here, I would have gone on to consider whether I should exercise my discretion under the proviso to Section 26(6) to investigate the complaint. It is my belief that in that event I would have exercised discretion in favour of the Complainants because I believe in the particular circumstances of this case it would have been unreasonable to expect the Complainants to have been required to resort to the remedy of Judicial Review. This is because I understood the Complainants to be a group in modest housing, who would have been unlikely to have had the means to pursue that remedy from their own resources, particularly having regard to the uncertainty of the remedy; it seems to me that it is by no means certain that Judicial Review would be appropriate for maladministration where it related to a breach of the Code of Conduct. Further, I would have particularly had in mind that it would have been very difficult, if not impossible, for the Complainants to obtain the necessary evidence to support such an application. Much of the evidence upon which I relied in my report was not available in documentary form, but emerged during interviews with the members concerned. The Complainants however, do not have the investigatory powers given to the Commissioner by the Act and thus that evidence would have been unobtainable by them.'

28. In my judgment this was a clear case for the application of the proviso. Serious allegations of maladministration had been made. Such allegations could best be investigated by the resources and powers of the commissioners, with her powers to compel both disclosure of documents, and the giving of assistance to the investigation. The commissioner was in a position to get to the bottom of a prima facie case of maladministration, and the ratepayers would be unlikely to have reached that goal, having regard to the weaknesses of the coercive fact finding potential of judicial review. As she found, it would be very difficult, if not impossible, for the complainants to obtain the necessary evidence in judicial review proceedings. Additionally, the complainants were a group in modest housing, unlikely to have the means to pursue the remedy. The commissioner was clearly right to use the proviso to continue with her investigation. This case is a good example of a case where the commissioner's investigation and report can provide the just remedy when judicial review might fail to; and can reach facts which might not emerge under the judicial review process.

29. Finally, the third main issue, party loyalty, and the parties' voting disciplines. The line is clear—a local authority councillor is entitled to give weight to the views of party colleagues, but should not abdicate responsibility by voting blindly in support of party policy or party whip (see *R v Waltham Forest London BC*,

ex p Baxter [1987] 3 All ER 671, [1988] QB 419). See too para 4 of the code: 'Whilst you may be strongly influenced by the views of others, and of your party in particular, it is your responsibility alone to decide what view to take on any question which the councillors have to decide.'

30. As is made clear in this judgment, if the code is less permissive than the law, it is the code which councillors should use for guidance. In some planning applications, particularly those with resource implications, party policy will be a material consideration, but certain planning applications (and I would have thought this was one) would be outside party policies, and it is hard to see how then 'heavy and perhaps decisive pressure' at the pre-meeting caucus would be a 'material consideration' to be taken into account when exercising the s 70 powers to determine planning applications under the Town and County Planning Act 1990.

31. The block voting Labour controlled the council at this time, with the Liberal Democrats the second party. Both parties, as is not uncommon in local government, were in the habit of meeting privately prior to the council meeting and agreeing how to vote. Here it was agreed by Labour that they would vote for the club being granted planning permission, and by the Liberal Democrats to oppose it. Forty-one Labour councillors voted for the application, and none against. Thirty Liberal Democrat councillors voted against the application, and three for. All those three Liberal Democrats who defied the party arrangement to vote for Liverpool Football Club were undeclared season ticket holders at Anfield. Of the 'others', two voted for and two against.

32. The commissioner's findings were in her important para 84, which for convenience of reference, I repeat:

> 'The patterns of voting show that the decision on whether to grant planning permission was heavily, and perhaps decisively, influenced by a sense of party political loyalty whether or not councillors had a well founded fear of disciplinary action which might follow a decision to vote against party preference. Such considerations cannot be material to the consideration of a planning application and serve to make subsequent debate in the Council chamber or Committee room meaningless. I consider that the use of the system of agreed voting in relation to a planning application operated by both the main political parties before the matter was considered in committee was maladministration in this case.'

33. Here the commissioner was clearly greatly influenced by what she discovered in the course of her investigation. She was informed by councillors J, K and M that they would have voted differently had it been a free vote. Councillor F informed the commissioner that he would never vote against the view of the Labour group, and councillor P voted in accordance with the Liberal Democrat party line, against the development, even though he felt the proposed stand was acceptable.

34. The council attack para 84 on semantic grounds. The submission is: the code permits a councillor to be 'strongly influenced' by the views of others, and his party in particular; 'strongly' means the same as 'heavily'; heavy influence was here permissible; however, if that influence were decisive that would be maladministration; but the finding was only that 'perhaps' there had been such decisive influence.

35. To so construe para 84 is to take it entirely out of context. The question to be answered by the commissioner (who had interviewed the councillors) was

whether there was maladministration in the vote on this issue, and what led up to it. Here there was heavy and perhaps decisive pressure imposed by a sense of party loyalty. Such party pressure served to make the subsequent debate in committee meaningless. It was out of place in this application. This planning application deserved a proper debate and not a foregone conclusion. To use procedures to deny both the Anfield Road residents and the football club a meaningful debate is to deny a transparent democratic decision.

36. There was ample evidence on which the commissioner could conclude that the system of agreed voting in the circumstances was maladministration in this case. The line is precisely that set out in para 84. Where the party political influence is decisive, it is clear that an immaterial consideration has been taken into account on the facts of this particular application.

37. Accordingly, the challenge to the commissioner's investigation, report and findings fail. It has not been shown that she went outside the generous ambit of the discretion given to her and in my judgment this appeal should be dismissed.

CHADWICK LJ.

38. By its notice of appeal the Liverpool City Council sought an order of certiorari to quash the report dated 20 May 1997 in which the respondent, the Local Commissioner for Administration in the North and North East of England, found maladministration on the part of the council. At the hearing of the appeal, Miss Patterson QC did not pursue that relief. Nor did she ask us to make the declarations which had been sought in the notice of appeal in the following terms: (i) that the respondent exceeded her powers in reporting adversely to the council in respect of her investigation, (ii) that the report and/or the findings of maladministration made therein were void and/or of no effect and/or made without jurisdiction, and (iii) that any personal interest on the part of a councillor was not such as to disqualify him from the decision making process. The relief which she eventually sought, formulated in the course of her submissions, was:

> '1. A declaration that the respondent, in investigating a complaint notwithstanding the availability of a remedy by way of proceedings in any court of law, in the exercise of her discretion under section 26(6) of the Local Government Act 1974, failed to have regard to [and follow] a relevant consideration, namely the legal principles relevant to that remedy. 2. A declaration that the respondent, in investigating a complaint notwithstanding the availability of a remedy by way of proceedings in any court of law, in the exercise of the discretion under section 26(6) of the Local Government Act 1974, failed to have regard to [and follow] a relevant consideration, namely the legal principles relevant to influence of considerations of party political loyalty. 3. A declaration that the respondent, in investigating a complaint notwithstanding the availability of a remedy by way of proceedings in any court of law, in the exercise of the discretion under section 26(6) of the Local Government Act 1974, failed to have regard to [and follow] a relevant consideration, namely the legal principles relevant to allegations of bias.'

39. Section 26 of the Local Government Act 1974 gives power to a local commissioner (appointed under s 23 of that Act) to investigate complaints of maladministration. The condition precedent to the exercise of that power is that the complaint should be made in writing by or on behalf of a member of the public who claims to have sustained injustice in consequence of maladministration in connection with action taken by or on behalf of an authority to which Pt III of

the 1974 Act applies, being action taken in the exercise of administrative functions of that authority (see s 26(1) of that Act). Section 26(6) imposes a limitation on the power: a local commissioner shall not conduct an investigation under Pt III of the Act in respect of 'any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law' (s 26(6)(c) of the 1974 Act). But that limitation is, itself, subject to the qualification set out in the final paragraph of s 26(6):

> 'Provided that a Local Commissioner may conduct an investigation notwithstanding the existence of such a ... remedy if satisfied that in the particular circumstances it is not reasonable to expect the person aggrieved to resort or have resorted to it.'

40. It is clear, therefore, that before commencing to investigate a complaint made under s 26 of the 1974 Act, a commissioner ought to address the question whether the complainant (or person aggrieved) has or had some remedy by way of proceedings in any court of law—in particular, ought to consider whether the complaint could be made the subject of proceedings for judicial review. Consideration of that question does not, as it seems to me, involve any exercise of discretion. The existence, or otherwise, of an alternative remedy is a question of law. But, if the commissioner reaches the conclusion that there is a remedy by way of proceedings in a court of law, then he must go on to consider whether, in the particular circumstances, it is not reasonable to expect the person aggrieved to resort (or to have resorted) to such proceedings. That does involve an exercise of discretion. It is for the commissioner to decide whether or not he is satisfied that it is not reasonable to expect the person aggrieved to pursue the alternative remedy.

41. There is, therefore, potential for two grounds of challenge to the conduct of an investigation in circumstances in which it is said that the complainant has or had a remedy by way of proceedings in a court of law. First, it may be said that the commissioner failed to address the question whether there was an alternative remedy; or, having addressed that question, reached the incorrect conclusion that there was not. Second, it may be said that the commissioner, having identified the existence of an alternative remedy, failed to address the question whether it was reasonable to expect the person aggrieved to have resort to it; or, having addressed that question, reached a conclusion which was, itself, *Wednesbury* unreasonable (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223).

42. It is not clear to me how either of those two grounds of challenge can be advanced in support of the first (or, indeed, any) of the declarations now sought on behalf of the council. A complaint that, in conducting an investigation 'notwithstanding the availability of a remedy by way of proceedings in any court of law' in the exercise of her discretion under s 26(6) of the 1974 Act, the commissioner failed to have regard to 'the legal principles relevant to that remedy' does not, as it seems to me, contain within it an allegation that the commissioner failed to appreciate that there was a remedy by way of proceedings in a court of law. Nor does it contain within it an allegation that the commissioner erred in deciding, as a matter of discretion, to conduct the investigation notwithstanding the existence of an alternative remedy. The criticism implicit in the declarations now sought is not that the commissioner should have declined to conduct, or to continue with, an investigation. The criticism is that, having properly decided to conduct the investigation, the commissioner applied the

wrong principles when reaching her conclusions on the questions which she had to decide in the course of that investigation.

43. Nevertheless, the skeleton argument submitted on behalf of the council identifies, as one of the issues which are said to arise on this appeal:

> 'Issue 3. The learned judge erred in holding, contrary to the authority of *R. v. Commissioner for Local Administration, ex p Croydon L.B.C.* ([1989] 1 All ER 1033) that the Respondent could have regard to the likely success of an application for judicial review in determining whether to exercise her discretion to investigate or continue to investigate a complaint and/or in determining whether there was an alternative remedy available to the local residents making the complaint to the Respondent.'

44. That part of the decision of the Divisional Court in *R v Comr for Local Administration, ex p Croydon London BC* [1989] 1 All ER 1033 on which reliance is placed is found (at 1044) in the judgment of Woolf LJ (with whom Hutchison J agreed). Woolf LJ pointed out that the question for the commissioner, under s 26(6)(c) of the 1974 Act, was not whether proceedings in a court of law (and, in particular, proceedings by way of application for judicial review) would succeed. The relevant question was whether a court of law was an appropriate forum for investigating the subject matter of the complaint. But Woolf LJ went on to observe (at 1045), that even if that question was answered in the affirmative (as, having regard to the increasing readiness of the courts to entertain applications for judicial review, it commonly would be) the commissioner retained his discretion to apply the proviso to s 26(6) and 'unless he exercises this discretion unlawfully the courts will not and cannot interfere with his decision'.

45. I find it difficult, for the reasons which I have sought to give, to understand how it can be said that the issue identified as 'Issue 3' in Miss Patterson's skeleton argument arises in the context of the relief which she now seeks on behalf of the council. But, if the issue does arise, then the point is met by the clear indication in para 9 of the commissioner's affidavit of 20 November 1997 (to which Henry LJ has referred) that—had she been advised that judicial review was available to the complainants in the present case—she would have gone on to consider whether she should, nevertheless, conduct an investigation into the complaint in the exercise of her discretion under the proviso; and would have decided to do so. I agree with Henry LJ that there can be no doubt that the commissioner would have been entitled to take that decision.

46. I turn, therefore, to the criticism which does underlie the first (and, I think, also the second and third) of the declarations now sought: that, having decided to conduct an investigation notwithstanding the availability of a remedy by way of judicial review proceedings, the commissioner ought to have applied the same principles in reaching her conclusions as the court would have applied if it had been considering whether to grant that remedy. This criticism finds expression in the first issue identified in Miss Patterson's skeleton argument:

> 'Issue 1. The learned judge erred in concluding that, in investigating complaints of maladministration, when the subject matter of the complaint overlapped a complaint of unlawfulness, the Respondent did not have to take into account and/or follow and/or set out her reasons for not following the legal principles relevant to a complaint of unlawfulness.'

47. In my view the answer to that criticism is that already given by Henry LJ. Although there is a substantial element of overlap between maladministration

and unlawful conduct in the context of local government, the concepts are not synonymous. There will be cases of maladministration which do not involve unlawful conduct. As Lord Denning MR, observed in *R v Local Comr for Administration for the North and East Area of England, ex p Bradford Metropolitan City Council* [1979] 2 All ER 881 at 898, [1979] QB 287 at 311—quoting from the debate on the Bill which was enacted as the Parliamentary Commissioner Act 1967:

> 'It [maladministration] will cover "bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on". It would be a long and interesting list, clearly open-ended, covering the *manner* in which a decision is reached or discretion is exercised: but excluding the *merits* of the decision itself or of the discretion itself.' (Lord Denning MR's emphasis.)

So there is no reason in principle why the considerations which determine whether there has been maladministration should, necessarily, be the same as those which determine whether there has been unlawful conduct. The commissioner's power is to investigate and report on maladministration; not to determine whether conduct has been unlawful. So there is no reason why, when exercising the power to investigate and report, (which has been conferred on him by the 1974 Act) he should, necessarily, be constrained by the legal principles which would be applicable if he were carrying out the different task (for which he has no mandate) of determining whether conduct has been unlawful.

48. Nor is there any reason why the position should be otherwise if, notwithstanding the availability of a remedy by way of proceedings in a court of law, the commissioner decides, in the exercise of his discretion under the proviso to s 26(6) of the 1974 Act, to conduct an investigation into a complaint of maladministration. The availability of the alternative remedy requires him to consider whether to proceed with the investigation. The fact that, if the complainant were left to pursue the alternative remedy, a court would or might apply legal principles to the determination of the question which would be before it (namely, whether the conduct complained of was unlawful) which differed from those which the commissioner would regard as applicable in an investigation into the complaint which is before him, is a matter which the commissioner may (and, in my view, should) take into account in deciding whether he should proceed with the investigation. But, if he does decide to proceed with the investigation, then he must give effect to that decision. He must proceed on the basis that he is investigating a complaint of maladministration under the powers conferred upon him by statute. He is not acting as a surrogate of the court in determining whether there has been unlawful conduct.

49. Section 31(1) of the Local Government and Housing Act 1989 gave power to the Secretary of State to issue a code of recommended practice (the National Code of Local Government Conduct) for the guidance of members of local authorities. Section 31(4) of that Act required that the code should not be issued unless a draft had been laid before and approved by a resolution of each House of Parliament. Section 31(7) of the 1989 Act provided that the form of declaration of acceptance of office, to be made by a councillor upon election under s 83 of the Local Government Act 1972, might include an undertaking by the declarant to be guided by the code in the performance of his functions. Section 32(1)(b) of the 1989 Act introduced into the 1974 Act a new subsection (s 30(3A) of the 1974 Act) in these terms:

'Where the Local Commissioner is of the opinion—(a) that action constituting maladministration was taken which involved a member of the authority concerned, and (b) that the member's conduct constituted a breach of the National Code of Local Government Conduct, then, unless the Local Commissioner is satisfied that it would be unjust to do so, the report shall name the member and give particulars of the breach.'

50. The introduction to the code issued by the Secretary of State pursuant to the power conferred by the 1989 Act contains the following paragraph:

'The Code represents the standard against which the conduct of members will be judged, both by the public, and by their fellow councillors. The local ombudsmen may also regard a breach of the Code as incompatible with good administration, and may make a finding of maladministration by the council in these circumstances.'

51. As envisaged by s 31(7) of the 1989 Act, the code provides that all councillors are required on accepting office to declare that they will be guided by the code. That obligation was made statutory on 3 May 1990 by the Local Elections (Principal Areas) (Declaration of Acceptance of Office) Order 1990, SI 1990/932.

52. The position, therefore, is that the code is issued under the authority of Parliament, and with the concurrence of both Houses of Parliament. The local commissioner must have regard to it where an action constituting maladministration involves a member of the authority concerned; because, if that member's conduct constituted a breach of the code, he must be named unless the commissioner is satisfied that it would be unjust to do so. The code contemplates that a breach may itself be treated as an incident of maladministration. Members of local authorities are required by statute to declare (and, in practice, do declare) that they will be guided by it. It is pertinent to have these considerations in mind when addressing the second issue identified in Miss Patterson's skeleton argument:

'Issue 2. The learned judge erred in finding that the Ombudsman was bound to apply the National Code of Local Government Conduct without giving any or any proper consideration as to whether the Respondent had a discretion as to whether to apply the Code where (a) the Code no longer reflected the correct legal test of bias (and hence when local authority members had to declare their personal interests); and (b) the application of the Code acted as an unlawful fetter on the discretion on the part of the Respondent.'

53. Those parts of the code directly relevant to the declaration of a member's non-pecuniary interest—and his subsequent participation in any vote which might affect that interest—are contained in paras 9, 10 and 11. They are set out in the judgment of Henry LJ (para 9 above) and it is unnecessary to rehearse them. It is sufficient to indicate that I agree with his view that the crucial words are those in the two final sentences of para 11:

'In deciding whether such an interest is clear and substantial, you should ask yourself whether members of the public, knowing the facts of the situation, would reasonably think that you might be influenced by it. If you think so, you should regard the interest as clear and substantial.'

54. Miss Patterson submitted that that test is more stringent than the test of apparent bias now applied in the courts. She referred us to *R v Gough* [1993] 2 All ER

724, [1993] AC 646. The distinction, as Henry LJ has pointed out in his judgment, is between 'a reasonable apprehension or suspicion of bias' and 'a real danger or possibility of bias'; although it is pertinent to keep in mind the observation of Lord Hope of Craighead in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [1999] 1 All ER 577 at 595, [2000] 1 AC 119 at 142, that the application of either test to particular facts is likely to produce the same result.

55. The commissioner applied the 'reasonable apprehension' test. That, as it seems to me, is plainly the test that was envisaged by the code. I reject the submission that the commissioner misdirected herself. In my view she was correct to accept and adopt the guidance provided by the code. The code set out the test by which the members of the authority had declared themselves willing to be guided. That was the test by which they had been told, in the introduction to the code, their conduct would be judged. That was the test which the commissioner had to apply when deciding whether s 30(3A) of the 1974 Act required the members in question to be named. There was, to my mind, no reason why the commissioner should have directed herself that, in investigating maladministration, she must discard the test provided by the code in favour of some other test which might be applied by the courts in determining unlawfulness. In my view the criticism which underlies the third of the declarations now sought is ill-founded.

56. The criticism which underlies the second of the declarations now sought finds expression in the issues identified as 'Issue 4' and 'Issue 5' in Miss Patterson's skeleton argument:

> 'Issue 4. The learned judge erred in finding that the legitimate influence of party politics in regard to planning applications is different from other areas of local authority administration ...
>
> Issue 5. The learned judge erred in finding that decisions on planning applications cannot be heavily influenced as opposed to determined by considerations of party political loyalty.'

57. The code gives recognition to the legitimate influence of party political considerations in the context of local government decisions. Paragraph 4 contains the following guidance: 'Whilst you may be strongly influenced by the views of others, and your party in particular, it is your responsibility alone to decide what view to take on any question which councillors have to decide.'

58. In my view that reflects the position in law, as expressed by Russell LJ in *R v Waltham Forest London BC, ex p Baxter* [1987] 3 All ER 671 at 677, [1988] QB 419 at 428:

> 'Party loyalty, party unanimity, party policy were all relevant considerations for the individual councillor. The vote becomes unlawful only when the councillor allows these considerations or any other outside influences so to dominate as to exclude other considerations which are required for balanced judgment. If, by blindly toeing the party line, the councillor deprives himself of any real choice or the exercise of any real discretion, then his vote can be impugned and any resolution supported by his vote potentially flawed.'

59. The code recognises that party loyalty may be a legitimate consideration; but the weight to be given to that consideration in relation to any particular decision must be a matter for the individual councillor and must depend on the nature of the decision to be taken. As Henry LJ has pointed out, there may well be planning applications which have important resource or environmental

consequences. In those cases the policy objectives of the party to which the member adheres are engaged and may properly be given very substantial weight by the member when reaching his decision as to how to cast his vote in council. But many, if not most, planning applications will not be of that nature. The commissioner clearly thought that the application in relation to the Anfield Road stand fell into the latter class. It is impossible to say that she was wrong to take that view. It is equally impossible to say that, holding that view and in the light of the evidence which she had heard from the members themselves in the course of her investigation, she was not entitled to reach the conclusion that, in the present case, real or perceived party constraints had gone far beyond what was permissible—both under the code and under the general law. She was plainly entitled to hold that those constraints had been productive of maladministration.

60. For those reasons, and for the reasons given by Henry LJ with whose judgment I agree, I am not persuaded that it would be appropriate to make any of the declarations now sought. The appeal must be dismissed.

MAY LJ.

61. For the reasons set out by my Lords, Henry and Chadwick LJJ, I would agree that this appeal must be dismissed.

Appeal dismissed.

Dilys Tausz Barrister.

Johnson v Gore Wood & Co (a firm)

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD GOFF OF CHIEVELEY, LORD COOKE OF THORNDON, LORD HUTTON AND LORD MILLETT

17, 19, 20 JULY, 14 DECEMBER 2000

Action – Dismissal – Abuse of process of the court – Claimant carrying on business through company – Claimant instructing defendant solicitors to exercise company's option to purchase land – Company bringing proceedings against solicitors for negligence – Claimant informing solicitors of intention to bring personal action in respect of that negligence but not doing so until after settlement of company's action – Whether claimant's action an abuse of process – Whether damages claimed irrecoverable as reflective of company's loss.

The claimant, J, carried on a property development business through a company which, for all practical purposes, was his corporate embodiment. In 1988, J, acting on behalf of the company, instructed the defendant firm of solicitors, which from time to time had acted for him personally, to serve a notice exercising the company's option to purchase certain land. The solicitors duly served the notice, but not in a manner that was incapable of challenge by the vendor. After the vendor disputed the validity of the notice, the company instructed the solicitors to issue proceedings against him for specific performance. Although the court eventually granted such an order, it was not until April 1992 that the land was conveyed to the company. By that time, the company had suffered substantial loss because of the cost of the proceedings, the company's inability to recover damages or costs from the vendor (who had no assets), the collapse of the property market and high interest charges. In 1991 the company brought proceedings for professional negligence against the solicitors, and the latter were informed that J intended to bring a personal claim against them. In fact, in part because of his limited financial resources, J had brought no such claim by December 1992 when the company's proceedings against the solicitors were settled on payment of a substantial part of the sum claimed. In the settlement agreement, J gave an undertaking that he would limit to a specified sum the amount of any claim made by him personally against the solicitors by reason of losses suffered through loss of income, dividends or capital in respect of his position as a shareholder of the company. It was expressly stated that that undertaking did not limit any other of J's rights against the solicitors. In 1993, after obtaining full legal aid, J brought an action against the solicitors for breach of duty, alleging that he had retained the solicitors to act for him personally as well as for the company in the exercise of the option, that they had been negligent in the manner in which they had exercised the option and that they had also been negligent in advice given to him personally on the likely outcome and duration of the proceedings against the vendor. J sought to recover, inter alia, the cost of personal borrowings to fund his own outgoings and those of his various businesses, the diminution in value of his pension and majority shareholding in the company, the loss of a portion of his shareholding in the company which had been transferred to a lender as security for a loan, an additional tax liability, general damages for mental distress and anxiety and aggravated damages. Over the next four and a half years the parties pleaded and re-pleaded their respective

cases. In December 1997, shortly after the trial date had been set, the solicitors intimated for the first time that they intended to apply to strike out the action as an abuse of the process of the court, contending that the action could and should have been brought at the same time as the company's action. On the hearing of that application, the judge held that the solicitors were estopped by convention from contending that the action was an abuse. He also held, on the determination of preliminary issues, that the solicitors had owed J a duty of care and that the heads of damages claimed were not irrecoverable. On the solicitors' appeal, the Court of Appeal agreed with the judge's decision on duty of care and, with one exception, with his decision on the pleaded heads of damages. However, it reversed the judge's finding on estoppel by convention and concluded that the proceedings were an abuse of process, holding that J could have brought his action at the same time as the company's proceedings and that he should therefore have done so. Accordingly, the court struck out the proceedings, and J appealed to the House of Lords. The solicitors cross-appealed from the court's ruling on the heads of damages, contending, in respect of some of them, that the alleged damage had been suffered by the company, not by J.

Held – (1) Although the bringing of a claim or the raising of a defence in later proceedings might, without more, amount to abuse if the court was satisfied that the claim or defence should have been raised in earlier proceedings, it was wrong to hold that a matter should have been raised in such proceedings merely because it could have been. A conclusion to the contrary would involve the adoption of too dogmatic an approach to what should be a broad, merits-based judgment which took account of the public and private interests involved and the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party was misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before. It was not possible to formulate any hard and fast rule to determine whether, on given facts, abuse was to be found or not. Thus, while lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, it was not necessarily irrelevant, particularly if it appeared that the lack of funds had been caused by the party against whom it was sought to claim. While the result might often be the same, it was preferable to ask whether in all the circumstances a party's conduct was an abuse than to ask whether the conduct was an abuse and then, if it was, to ask whether the abuse was excused or justified by special circumstances. In the instant case, the Court of Appeal had applied too mechanical an approach, giving little or no weight to the factors which had led J to act as he had done, and failing to weigh the overall balance of justice. His action was not an abuse of process and, in any event, it would be unconscionable in the circumstances to allow the solicitors to seek to strike out the claim. It followed that J's appeal would be allowed (see p 499 *a* to *e*, p 502 *d*, p 506 *d e*, p 509 *h*, p 517 *h*, p 527 *a* to *f*, post); *Henderson v Henderson* [1843–60] All ER Rep 378 considered.

(2) Where a court had to decide, on a strike-out application, whether on the facts pleaded a shareholder's claim was sustainable in principle, it was necessary to scrutinise the pleadings closely in order to ascertain whether the loss claimed appeared to be or was one which would be made good if the company had enforced its full rights against the party responsible, and whether the loss claimed was merely a reflection of the loss suffered by the company. Any reasonable doubt would have to be resolved in favour of the claimant. In carrying out that

exercise, as in determining at trial whether the shareholder's claim should be upheld on the facts, the court was required, on the one hand, to respect the principle of company autonomy, ensure that the company's creditors were not prejudiced by the action of individual shareholders, and ensure that a party did not recover compensation for a loss which another party had suffered. On the other hand, the court had to be astute to ensure that the party who had in fact suffered loss was not arbitrarily denied fair compensation. In the instant case, the claim for the diminution in the value of J's pension and majority shareholding in the company was merely a reflection of the company's loss, and would therefore be struck out, in so far as it related to payments which the company would have made into a pension fund for J. However, that claim was not objectionable in principle in so far as it related to enhancement in the value of J's pension if the payments had been duly made. As regards the other heads of claim, the claim for aggravated damages failed on the pleaded facts, while the claim for mental distress and anxiety (Lord Cooke dissenting) fell foul of the principle that damages for such loss were not generally recoverable in respect of a breach of contract. Save to that extent, the cross-appeal would be dismissed (see p 503 *h* to p 504 *b e*, p 509 *c d*, p 515 *c d*, p 517 *g*, p 522 *e* to *g*, p 533 *f* to p 534 *a*, post); *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 and *Watts v Morrow* [1991] 4 All ER 937 considered.

Notes

For estoppel and res judicata, see 16 *Halsbury's Laws* (4th edn) para 973.

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Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd [1981] 1 All ER 923, [1982] QB 84, [1981] 2 WLR 554; *affd on other grounds* [1981] 3 All ER 577, [1982] QB 84, [1981] 3 WLR 565, CA.

Arnold v National Westminster Bank plc [1991] 3 All ER 41, [1991] 2 AC 93, [1991] 2 WLR 1177, HL.

Ashmore v British Coal Corp [1990] 2 All ER 981, [1990] 2 QB 338, [1990] 2 WLR 1437, CA.

Bailey v Bullock [1950] 2 All ER 1167.

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Barrow v Bankside Members Agency Ltd [1996] 1 All ER 981, [1996] 1 WLR 257, CA.

Bradford & Bingley Building Society v Seddon (Hancock and ors, t/a Hancocks (a firm), third parties) [1999] 4 All ER 217, [1999] 1 WLR 1482, CA.

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Hunter v Chief Constable of West Midlands [1981] 3 All ER 727, [1982] AC 529, [1981] 3 WLR 906, HL.
Jackson v Horizon Holidays Ltd [1975] 3 All ER 92, [1975] 1 WLR 1468, CA.
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Watts v Morrow [1991] 4 All ER 937, [1991] 1 WLR 1421, CA.
Whelan v Waitaki Meats Ltd [1991] 2 NZLR 74, NZ HC.
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Appeal and cross-appeal

The plaintiff, William Henry Johnson, appealed with permission of the Appeal Committee of the House of Lords given on 25 May 1999 from the order of the Court of Appeal (Nourse, Ward and Mantell LJJ) on 12 November ([1999] BCC

474) and 17 December 1998 allowing an appeal by the defendant firm of solicitors, Gore Wood & Co (GW), from the order of Pumfrey J on 21 May 1998 dismissing their application to strike out Mr Johnson's proceedings against them for breach of duty as an abuse of the process of the court. GW cross-appealed with permission of the Appeal Committee of the House of Lords given on 3 November 1999 from the Court of Appeal's decision that the heads of damages sought by Mr Johnson were, subject to one exception, recoverable in principle on the facts pleaded. The facts are set out in the opinion of Lord Bingham of Cornhill.

Roger Ter Haar QC and Simon Howarth (instructed by *Shoosmith & Harrison*) for Mr Johnson.

Alan Steinfeld QC and *Elizabeth Ovey* (instructed by *Beachcroft Wansbroughs*) for GW.

Their Lordships took time for consideration.

14 December 2000. The following opinions were delivered.

LORD BINGHAM OF CORNHILL. My Lords, there are two parties before the House. The first is Mr Johnson, the plaintiff in the action, who appeals against a decision of the Court of Appeal ([1999] BCC 474) dismissing the action as an abuse of the process of the court. The other is Gore Wood & Co, a firm of solicitors, who cross-appeal against a decision of the Court of Appeal, on a preliminary issue of law, that certain heads of damage pleaded by Mr Johnson should not be struck out as irrecoverable. Both appeal and cross-appeal raise questions of legal principle which your Lordships' House has not, in recent years, had occasion to consider.

The facts

Mr Johnson is a business man who conducted his business affairs through a number of companies. One of his businesses was property development, which he carried on through a company, Westway Homes Ltd (WWH), of which he was managing director and holder of all but two of the issued shares. For all practical purposes WWH was the corporate embodiment of Mr Johnson.

Acting on behalf of WWH, Mr Johnson instructed Gore Wood & Co (GW), through a partner in the firm named Robert Wood, to act as solicitors for WWH in connection with a proposed purchase of land at Burlesdon in Hampshire from a Mr Moores. WWH planned to develop the land, but the project was one of some complexity, since the title of Mr Moores was to some extent doubtful and access to the land was dependent on acquisition of a strip of land owned by a third party. WWH had an option to purchase Mr Moores' land, and WWH instructed GW to serve a notice exercising this option.

Mr Johnson contends that from early April 1987, even before GW was formally instructed to act as solicitor for WWH, Mr Johnson engaged the firm, usually acting through Mr Wood, to advise him personally and act on behalf of certain of his companies in addition to WWH, as a result of which GW and in particular Mr Wood gained a detailed knowledge of his financial affairs and those of the companies concerned. He further contends that GW through Mr Wood knew and intended that advice given to him in connection with any business matter would or might be acted upon by him in relation to the conduct of his business affairs generally, including his personal financial affairs. Since the present

proceedings have not progressed beyond determination of the preliminary issues giving rise to this appeal and cross-appeal there has been no detailed investigation of the facts, some of which are in dispute between the parties. But GW accepts that from time to time the firm acted on behalf of Mr Johnson personally and some of his companies other than WWH.

In February 1988 GW served notice exercising WWH's option on Mr Moores' solicitors. Mr Moores and the solicitors acting for him asserted that the notice had not been validly served since it had not been served upon Mr Moores personally. Having obtained the advice of counsel WWH instructed GW to issue proceedings against Mr Moores for specific performance of the contract created by the exercise of the option. This was done in March 1988. An alternative claim was made against Mr Moores' solicitors alleging breach of warranty of authority. GW continued to act for WWH in those proceedings until the end of November 1989. The proceedings came on for trial in the Chancery Division in January 1990, when an order for specific performance was made against Mr Moores and an inquiry into damages ordered. The alternative claim against Mr Moores' solicitors was dismissed. Mr Moores had been legally aided from an early stage of the litigation and now, because of his mental condition, was acting through a guardian ad litem. He appealed against the judge's decision, but his appeal was dismissed by the Court of Appeal on 20 February 1991, although on different grounds.

For reasons outside the control of Mr Johnson or WWH there was further delay before the land was conveyed to WWH. It was April 1992, more than four years after the exercise of the option, before the conveyance was completed. By this time WWH had suffered substantial loss because of the cost of the Chancery proceedings, the inability of WWH to recover damages and costs from Mr Moores, who had no assets save for the balance of the purchase price of the Burlesdon land, the collapse of the property market and the high interest charges borne by WWH. On 8 January 1991 WWH started proceedings for professional negligence against GW. In those proceedings GW admitted that it owed WWH a duty to exercise reasonable care in connection with the exercise of the option, but denied that that duty had been broken or that the damages claimed were recoverable. WWH applied for summary judgment. This application succeeded at first instance but failed on appeal. WWH was now in serious financial difficulty.

WWH's action against GW came to trial before a deputy judge on 26 October 1992. The hearing was estimated to last 10–12 days. This estimate was greatly exceeded. In the sixth week of trial, the company's evidence on liability had been completed and Mr Wood was in the course of giving evidence for GW when the action was compromised upon payment by GW to WWH of £1,480,000, which represented a very substantial proportion of the sum claimed by WWH, and costs in the agreed sum of £320,000.

Mr Johnson claims that because he had retained GW to advise and act for him personally as well as for WWH, the firm owed him as well as WWH a duty of care in contract and tort in relation to the exercise of the option, the advice which Mr Johnson contends was given to him personally as well as to WWH concerning the prospects of success in and the likely duration of the Chancery proceedings and the conduct of the Chancery proceedings. He claims that GW breached that duty and so caused him substantial loss. Whether GW owed Mr Johnson personally such a duty and whether (if so) it breached that duty will be live issues in this action if it proceeds. But for purposes of the issues now before the House,

GW accepts that the facts pleaded by Mr Johnson are capable of supporting his case on these issues if established at trial.

Mr Johnson did not initiate proceedings to enforce any personal claims against GW at the time when WWH began its action against the firm. In an affidavit sworn on 6 March 1998 he deposed to his reasons for not doing so at that stage. His reasons were: (1) that he was in no position to bring a personal claim against GW until he was granted full legal aid in October 1992, his previous certificate having been limited; (2) that advancing his personal claims would have substantially delayed the progress and ultimate resolution of WWH's action against GW, which would have led to WWH going into liquidation before the trial of its action; (3) that the financial resources of both Mr Johnson and WWH had been exhausted by this litigation, said to have been caused by GW's negligence; (4) that joining the personal claim to WWH's claims would have led to an adjournment of the October 1992 trial date fixed for WWH's action; (5) that the more complicated nature of Mr Johnson's personal claims would have had an adverse effect on the costly and time-consuming work required to prepare WWH's case for trial; and (6) that the time which Mr Johnson could devote to the conduct of litigation was restricted by his need, from June 1991, to find new employment.

GW does not deny that these were the reasons which led Mr Johnson not to proceed personally at that time, but does not accept that they provided valid or reasonable grounds for not doing so.

On 17 January 1991, well before WWH's action came to trial, solicitors representing that company notified the solicitors for GW that Mr Johnson had a personal claim against the firm which he would pursue in due course. No details of the claim were given. On 6 December 1991 solicitors representing Mr Johnson informed GW that he had received a legal aid certificate to take proceedings against the firm for damages for negligence. The letter, couched in general terms, contended that GW had owed a duty to Mr Johnson personally as well as to WWH. While making no admission, GW's insurers in January 1992 invited Mr Johnson's solicitors to give full details of the quantum of his personal claim. Mr Johnson's solicitors replied in February 1992, outlining certain heads of claim and giving estimates in round figures of claims approaching £2m. In October 1992, on the eve of trial of WWH's action against GW, Mr Johnson's solicitors wrote to GW's solicitors, referring to his legal aid certificate and giving notice that his personal claim would be pursued whether the company's claim culminated in judgment or settlement. Since a substantial payment into court had been made on behalf of GW, Mr Johnson and WWH expected a favourable outcome of the company's action. On 19 November 1992, when trial of the company's action against GW was well advanced, Mr Pugh (a solicitor representing Mr Johnson) spoke to Mrs MacLennan (the solicitor representing GW) on the telephone and discussed Mr Johnson's personal claim: Mr Pugh said that it had been thought better to wait until the company's claim had been concluded before dealing with the personal claim; Mrs MacLennan asked whether Mr Pugh would object to an overall settlement of the company's claim and Mr Johnson's personal claim; he said that he would have to take instructions but could not himself see any objections 'provided the figures were all right'. He gave her a rough idea of the heads of claim and the figures. Mr Johnson instructed Mr Pugh that he would not be adverse to an overall settlement provided it was reasonably satisfactory. Mrs MacLennan indicated that GW (or its insurers) also were not adverse to an overall settlement if the figures could be agreed. On 1 December 1992 Mr Pugh

met Mrs MacLennan at court to try to negotiate a settlement of his personal claim. His attendance note of this meeting read:

> 'She mentioned an overall cap and said that she could not settle for more. I said that John Johnson's claim was a separate one and she said that so far as it was not related to the actual company's claim it might well be different. After some discussion it was agreed that so far as his claim as shareholder and only relating to a loss of dividends income and capital distribution there would be a cap at a figure to be agreed. This would not affect all the other claims on the list as previously discussed. Mrs McClenan [sic] reiterated her previous view but said it would be a separate claim and it would really be a matter for separate negotiation in due course. A cap was agreed at £250,000 excluding interest and costs.'

The settlement agreement made between WWH and GW on 2 December 1992 was signed by solicitors for both sides; the solicitors representing WWH also, for this purpose, represented Mr Johnson.

By the settlement agreement GW agreed to pay the sums already mentioned with no admission of liability, in full and final satisfaction of all claims of WWH against GW and vice versa. The sum of £1m which GW had paid into court was to be paid out to WWH's solicitors. WWH undertook that any of its liabilities personally guaranteed by Mr Johnson would be discharged out of the sums received under the settlement agreement, the object plainly being to limit the quantum of any claim which Mr Johnson might thereafter make personally. Clause 3 of the settlement agreement provided:

> 'Mr Johnson undertakes that the amount of any claim made by him personally in any action against [GW] in respect of any losses suffered by him by reason of loss of income, dividends or capital distribution in respect of his position as a shareholder of [WWH] will not exceed £250,000 not including interest accruing in respect of any period after the date of this agreement nor costs. This undertaking does not limit any other of Mr Johnson's rights against [GW].'

A confidentiality clause in the agreement contained an exception: 'In connection with any action which Mr Johnson may bring against [GW].'

Mr Johnson issued his writ in the present proceedings against GW on 7 April 1993. Over the next four and a half years the parties pleaded and re-pleaded their respective cases. A payment into court was made by GW. Witness statements were exchanged. Mr Johnson served his accountancy evidence. On 20 November 1997 the action was fixed for trial in January 1999. On 3 December 1997 GW's solicitors intimated, for the first time, that it intended to apply to strike out the action as an abuse of the process of the court. Notice was also given that GW would seek the determination of preliminary issues whether it had owed Mr Johnson a duty of care and whether the damages which he claimed were in principle recoverable on the facts pleaded. On 25 February 1998 it was ordered that preliminary issues be tried, the second of which was—

> 'to what extent (if at all) on the basis of and assuming the truth of the facts pleaded as set out above are any of the heads of damage pleaded in paras 23 and 24 of the re-amended statement of claim irrecoverable as a matter of law by [Mr Johnson] by way of damages for the pleaded breaches of the duties owed to him.'

In para 6 of his re-amended statement of claim Mr Johnson pleaded an implied term of his personal retainer of GW that it would exercise all due skill and care in execution of that retainer, and a like duty of care in tort. In para 9 it was pleaded:

> 'Without prejudice to the generality of paragraph 6 above it was the duty of [GW], in carrying out its retainer on behalf of [Mr Johnson] in accordance with the implied term pleaded in the said paragraph, or alternatively in discharging its duty of care in tort owed to [Mr Johnson], to (a) exercise all due skill and care in connection with the exercise of the said option to purchase land and/or any further steps which were necessary to obtain possession of the land; (b) advise [Mr Johnson] fully and accurately of all developments in connection with the exercise of the said option which might affect the financial requirements and prospects of [WWH]; (c) advise [Mr Johnson] of the implications of such developments for his personal financial situation and other business projects, including his existing liabilities and new financial commitments contemplated; (d) advise and/or warn [Mr Johnson] fully and accurately of any delay or difficulty in exercising the said option to purchase land, which might adversely affect [Mr Johnson's] personal financial situation and other business projects, including his existing liabilities and new financial commitments contemplated; (e) advise and/or warn [Mr Johnson] fully and accurately of the implications of any advice given or steps taken by [GW] on behalf of [WWH] which might adversely affect [Mr Johnson's] personal financial situation and other business projects.'

In para 12 it was pleaded that GW had acted in breach of the terms pleaded in paras 6 and 9 in connection with the exercise of WWH's option to purchase the Burlesdon land, and in para 16 it was pleaded that between February 1988 and November 1989 GW had acted negligently or in breach of the implied terms of its retainer pleaded in paras 6 and 9 in advising Mr Johnson from time to time as to the likely duration and outcome of the earlier proceedings against Mr Moores. The claims for damages made by Mr Johnson in paras 23 and 24 of his re-amended statement of claim are the subject of detailed consideration below.

The preliminary issues came for hearing at first instance before Pumfrey J who, in a careful judgment delivered on 21 May 1998, resolved them in favour of Mr Johnson. On the abuse issue he found that GW was estopped by convention from contending that the action was an abuse. Applying *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1981] 1 All ER 923, [1982] QB 84 he concluded—

> 'that in reaching the settlement, [GW] and Mr Johnson did act on the common assumption that the personal claim would be made, and would be entertained by the court. I think that it is now unconscionable for [GW] to allege that the personal claim is an abuse of process in the light of *Henderson v Henderson* (1843) 3 Hare 100, [1843–60] All ER Rep 378.'

He resolved the duty issue in favour of Mr Johnson. He concluded that the heads of damage claimed by Mr Johnson were not irrecoverable as a matter of law as damages for the breaches alleged by Mr Johnson.

GW appealed. In a judgment of the court (Nourse, Ward and Mantell LJJ) given on 12 November 1998 ([1999] BCC 474), the Court of Appeal agreed with the judge that on the facts pleaded a duty of care had arguably been owed by GW to Mr Johnson. The Court of Appeal shared the judge's view on the difficulty of the damage issue but agreed with his conclusion that the pleaded heads of damage

were arguably recoverable, save as to one head of damage which it would have struck out.

The Court of Appeal held, differing from the judge, that there had been no estoppel by convention. But it also held that there had been an abuse under the rule in *Henderson v Henderson* (1843) 3 Hare 100, [1843–60] All ER Rep 378. It said ([1999] BCC 474 at 502):

> 'Mr ter Haar submits that the rule has no application because different issues arise in the two sets of proceedings. In this action there are entirely new questions about the extent of the duty owed to the plaintiff personally and the losses he has suffered. On the other hand, there was in our view a substantial similarity, particularly as to whether or not [GW's] conduct as solicitors fell below the required standard in connection with the exercise of the option and the conduct of the Chancery litigation [against Mr Moores] as well as the overlapping loss suffered by the company. This encompasses practically the whole of the ground traversed for six weeks in the company action. In our judgment, narrowly to circumscribe the application of the rule would defeat its purpose. Mr Johnson was the *alter ego* of the company; he controlled the company's decisions and through him the company's claim was brought. Within days after that writ was issued, he was intimating his personal claim. He could have brought it then. Although his legal aid was then limited in some way which is not clear to us, no explanation has been given for the delay in removing whatever limitations had been imposed and he had full cover by October, long before the trial. For reasons which appeared good to him, he preferred not to delay the company action but to pursue it vigorously before the company was forced into liquidation. That does not, in our judgment, excuse him from failing to launch his own claims. If he could have done so, he should have done so.' (My emphasis.)

Abuse of process

The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court (*Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at 590, [1975] 2 WLR 690 at 696 per Lord Kilbrandon, giving the advice of the Judicial Committee; *Brisbane City Council v A-G for Queensland* [1978] 3 All ER 30 at 36, [1979] AC 411 at 425 per Lord Wilberforce, giving the advice of the Judicial Committee). This does not, however, mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is, as Lord Diplock said at the outset of his speech in *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727 at 729, [1982] AC 529 at 536, an—

> 'inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise

a if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.'

One manifestation of this power was to be found in RSC Ord 18, r 19, which empowered the court, at any stage of the proceedings, to strike out any pleading which disclosed no reasonable cause of action or defence, or which was scandalous, b frivolous or vexatious, or which was otherwise an abuse of the process of the court. A similar power is now to be found in r 3.4 of Pt 3 of the Civil Procedure Rules.

GW contends that Mr Johnson has abused the process of the court by bringing an action against it in his own name and for his own benefit when such an action could and should have been brought, if at all, as part of or at the same time as the c action brought against the firm by WWH. The allegations of negligence and breach of duty made against the firm by WWH in that action were, it is argued, essentially those upon which Mr Johnson now relies. The oral and documentary evidence relating to each action is substantially the same. To litigate these matters in separate actions on different occasions is, GW contends, to duplicate the cost and use of court time involved, to prolong the time before the matter is d finally resolved, to subject GW to avoidable harassment and to mount a collateral attack on the outcome of the earlier action, settled by GW on the basis that liability was not admitted.

This form of abuse of process has in recent years been taken to be that described by Sir James Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 at e 114–115, [1843–60] All ER Rep 378 at 381–382, where he said:

'In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not f (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually g required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

h Thus the abuse in question need not involve the reopening of a matter already decided in proceedings between the same parties, as where a party is estopped in law from seeking to re-litigate a cause of action or an issue already decided in earlier proceedings, but (as Somervell LJ put it in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257) may cover—

j 'issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.'

A series of cases, mostly in recent years, has explored this form of abuse. Reference need not be made to all of them. In the *Yat Tung* case abuse was found

where a claimant who had unsuccessfully sued a bank on one ground brought a further action against the same bank and another party on a different ground shortly thereafter. Giving the advice of the Judicial Committee of the Privy Council, Lord Kilbrandon said:

> 'The second question depends on the application of a doctrine of estoppel, namely res judicata. Their Lordships agree with the view expressed by McMullin J. that the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in no. 969, any formal repudiation of the pleas raised by the appellant in no. 534. Nor was Choi Kee, a party to no. 534, a party to no. 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.' (See [1975] AC 581 at 589–590, [1975] 2 WLR 690 at 696.)

In *Brisbane City Council v A-G for Queensland* [1978] 3 All ER 30 at 36, [1979] AC 411 at 425 the Privy Council expressly endorsed Somervell LJ's reference to abuse of process and observed:

> 'This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.'

In *Hunter*'s case, in which *Henderson v Henderson* was not cited, the plaintiff sought to challenge in civil proceedings a decision in a criminal case against which he had not appealed on the ground which he sought to raise in the civil proceedings. The proceedings were struck out.

In *Vervaeke v Smith (Messina and A-G intervening)* [1982] 2 All ER 144, [1983] 1 AC 145 the appellant, who had failed in English proceedings to annul her marriage, had succeeded in doing so in Belgium on different grounds and sought recognition in England of the Belgian decree. Lord Hailsham of St Marylebone LC ([1982] 2 All ER 144 at 152, [1983] 1 AC 145 at 157) described the rule in *Henderson v Henderson* as 'both a rule of public policy and an application of the law of res judicata' and said of it:

> '... whatever the limits of *Henderson v Henderson* (1843) 3 Hare 100, [1843] 3 All ER Rep 378 (which I regard as a sound rule in ordinary civil litigation) may ultimately turn out to be, I believe that it must apply to a case like the present, where the petitioner in the first proceedings not merely does not rely on the grounds then already in theory available to her, but deliberately conceals the real facts (on which she now relies) from the court in order to put forward a bogus case which is radically inconsistent with them.'

Ashmore v British Coal Corp [1990] 2 All ER 981, [1990] 2 QB 338 involved an attempt to reopen issues which had been decided adversely to the appellant's contentions in rulings which, although not formally binding on her, had been given in sample cases selected from a group of claims of which hers had been one. The Court of Appeal held that it was not in the interests of justice to allow her to pursue her claim. Reliance was placed on *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd, Ulster Marine Insurance Co Ltd v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132 at 137 in which Kerr LJ said:

> 'To take the authorities first, it is clear that an attempt to relitigate in another action issues which have been fully investigated and decided in a former action *may* constitute an abuse of process, quite apart from any question of res judicata or issue estoppel on the ground that the parties or their privies are the same. It would be wrong to attempt to categorize the situations in which such a conclusion would be appropriate.' (Kerr LJ's emphasis.)

In *House of Spring Gardens Ltd v Waite* [1990] 2 All ER 990, [1991] 1 QB 241 the plaintiffs sued three defendants in England to enforce a judgment which they had obtained against those defendants in Ireland. The defendants pleaded in defence that the Irish judgment had been obtained by fraud. That was a contention which two of the defendants, but not the third (a Mr McLeod), had raised in Irish proceedings to set aside the judgment, but the allegation had been dismissed by Egan J. Summary judgment was given against the three defendants in England but Mr McLeod appealed against that judgment. The Court of Appeal held that Mr McLeod, like the other defendants, was estopped from mounting what was in effect a collateral challenge to the decision of Egan J. It also held that Mr McLeod's defence was an abuse of process. Stuart-Smith LJ said:

> 'The question is whether it would be in the interests of justice and public policy to allow the issue of fraud to be litigated again in this court, it having been tried and determined by Egan J in Ireland. In my judgment it would not; indeed, I think it would be a travesty of justice. Not only would the plaintiffs be required to relitigate matters which have twice been extensively investigated and decided in their favour in the natural forum, but it would run the risk of inconsistent verdicts being reached, not only as between the English and Irish courts, but as between the defendants themselves. The Waites have not appealed Sir Peter Pain's judgment, and they were quite right not to do so. The plaintiffs will no doubt proceed to execute their judgment against them. What could be a greater source of injustice, if in years to come, when the issue is finally decided, a different decision is reached in Mr Macleod's case? Public policy requires that there should be an end of litigation and that a litigant should not be vexed more than once in the same cause.' (See [1990] 2 All ER 990 at 1000, [1991] 1 QB 241 at 255.)

Arnold v National Westminster Bank plc [1991] 3 All ER 41, [1991] 2 AC 93 was a case of issue estoppel. Tenants invited the court to construe the terms of a rent review provision in the sub-underlease under which they held premises. The provision had been construed in a sense adverse to them in earlier proceedings before Walton J, but they had been unable to challenge his decision on appeal. Later cases threw doubt on his construction. The question was whether the rules governing issue estoppel were subject to exceptions which would permit the matter to be reopened. The House held that they were. Lord Keith of Kinkel said:

> 'In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to

courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss* case [1966] 2 All ER 536 at 573, [1967] 1 AC 853 at 947.' (See [1991] 3 All ER 41 at 50, [1991] 2 AC 93 at 109.)

In the passage referred to Lord Upjohn had said:

'All estoppels are not odious but must be applied so as to work justice and not injustice, and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.'

Talbot v Berkshire CC [1993] 4 All ER 9, [1994] QB 290 arose out of a motor accident in which both the driver and his passenger were severely injured. The passenger sued the driver. The driver's insurers, without notice to the driver, made a third party claim against Berkshire County Council, claiming contribution as between joint tortfeasors but including no claim for the driver's own injuries. Not until after the expiry of the limitation period for bringing a personal claim did the driver learn of the third party claim against the county council. At trial, the passenger succeeded in full, damages being apportioned between the driver and the county council. The driver then sued the county council to recover damages for his own injuries. On the trial of preliminary issues, the judge held that the driver was prima facie estopped from bringing the action but that there were special circumstances which enabled the court to permit the action to be pursued. The county council successfully challenged that conclusion on appeal. Stuart-Smith LJ said:

'There can be no doubt that the plaintiff's personal injury claim could have been brought at the time of Miss Bishop's action. It could have been included in the original third party notice issued against the council (RSC Ord 16, r 1(b) and (c)); it could have been started by a separate writ and consolidated with or ordered to be tried with the Bishop action (Ord 4, r 9). The third party proceedings could have been amended at any time before trial and perhaps even during the trial to include such a claim, notwithstanding that it was statute barred, since it arose out of the same or substantially the same facts as the cause of action in respect of which relief was already claimed, namely contribution or indemnity in respect of Miss Bishop's claim (Ord 20, r 5). In my opinion, if it was to be pursued, it should have been so brought.' (See [1993] 4 All ER 9 at 15, [1994] QB 290 at 298.)

Stuart-Smith LJ considered that the insurers' solicitors appeared to have been negligent but that the claim against the county council should be struck out unless there were special circumstances, and concluded that there were not. With his conclusions Mann and Nourse LJJ agreed. Since the driver's claim against the county council was held by the judge to be statute-barred, a claim against the solicitors may have offered the driver his only hope of recovery.

The plaintiff in *C (a minor) v Hackney London BC* [1996] 1 All ER 973, [1996] 1 WLR 789 lived in the house of which her mother was tenant. She suffered from Down's Syndrome and claimed in this action to have suffered personal injury caused by the negligence and breach of statutory duty of the borough council as housing authority. Her mother had previously made a similar claim which had been the subject of a consent order in the county court. The borough council

applied to set aside a judgment entered in the plaintiff's favour in default of defence and to strike out the claim on the ground that the plaintiff's action was an abuse of the process of the court. Reliance was placed in particular on the *Yat Tung* case and *Talbot's* case. This argument was accepted by the judge, who held that the plaintiff's action should have been advanced at the same time as her mother's, the more so as the plaintiff was dependent on her mother. The plaintiff's appeal against this decision succeeded. Simon Brown LJ said:

> 'I therefore reject entirely the submission that *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* justifies extending the *Talbot v Berkshire CC* principle—that an unlitigated monetary claim is barred if it could have been advanced and established in earlier proceedings (itself to my mind an extended application of the res judicata doctrine)—to those not themselves party to the earlier proceedings. It follows from all this that in my judgment the doctrine of res judicata even in its widest sense has simply no application to the circumstances of the present case and that the judge erred in ruling to the contrary. One does not, therefore, reach the point of asking here whether special circumstances exist to exclude it; C's erstwhile solicitors' suggested negligence is, frankly, an irrelevance. Nor, in my judgment, does this case come within measurable distance of any other form of abuse of process based on public policy considerations analogous to those underlying the res judicata doctrine—see, for instance, the Court of Appeal decision in *Ashmore v British Coal Corp* [1990] 2 All ER 981, [1992] 2 QB 338. All that said, this judgment should not be taken as any encouragement to lawyers or their clients to follow the course in fact adopted here. As the judge rightly recognised, in circumstances such as these, it is plainly in the public interest to have a single action in which the claims of all affected members of the household are included, rather than a multiplicity of actions.' (See [1996] 1 All ER 973 at 978–979, [1996] 1 WLR 789 at 794.)

Barrow v Bankside Members Agency Ltd [1996] 1 All ER 981, [1996] 1 WLR 257 was one of the flood of cases which arose out of losses in the Lloyd's insurance market. Mr Barrow was a member of an action group which had successfully sued a number of members' agents for negligent underwriting. Having substantially succeeded, but recovered only a proportion of the damages he had claimed, Mr Barrow issued fresh proceedings against his members' agent on a different ground. It was clear that this claim, even if made earlier, would not have been tried at the same time as the earlier action, since the scheduling of cases was the subject of detailed management by the Commercial Court. The members' agent contended that to bring this further claim, not raised at the time of the earlier proceedings, was an abuse. In the Court of Appeal it was said:

> 'The rule in *Henderson v Henderson* (1843) 3 Hare 100, [1843–60] All ER Rep 378 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion, but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the

desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.' (See [1996] 1 All ER 981 at 983, [1996] 1 WLR 257 at 260.)

The rule was described as a salutary one ([1996] 1 All ER 981 at 986, [1996] 1 WLR 257 at 263), and the court suggested that its application should not be circumscribed by unnecessarily restrictive rules. On the facts it was held that the procedure adopted by Mr Barrow was not an abuse. The court also held that if, contrary to its opinion, the case did fall within the mischief at which *Henderson v Henderson* was directed, there were special circumstances which justified non-application of the rule.

In *Manson v Vooght* [1999] BPIR 376, the plaintiff had sued administrative receivers of a company of which he had been managing director and principal shareholder in a 1990 action which culminated in a judgment adverse to him in 1993. There were other proceedings leading to other judgments, also given in 1993, relating to certain of the same issues: proceedings to disqualify the plaintiff as a director, in which findings adverse to him were made; and summonses issued in the liquidation of the company, when the court refused to allow issues which had been decided in the disqualification proceedings to be relitigated. In 1994 the plaintiff issued a further writ making claims against the administrative receivers and others. His proceedings against the administrative receivers were struck out on the ground that these claims should have been raised, if at all, in the 1990 action. This decision was upheld by the Court of Appeal. Giving the leading judgment May LJ said (at 387–388):

'In my view, the use in this context of the phrase "res judicata" is perhaps unhelpful, and this not only because it is Latin. We are not concerned with cases where a court has decided the matter; but rather cases where the court has not decided the matter, but where in a (usually late) succeeding action someone wants to bring a claim which should have been brought, if at all, in earlier concluded proceedings. If in all the circumstances the bringing of the claim in the succeeding action is an abuse, the court will strike it out unless there are special circumstances. To find that there are special circumstances may, for practical purposes, be the same thing as deciding that there is no abuse, as Sir Thomas Bingham MR came close to holding on the facts in *Barrow*. The bringing of a claim which could have been brought in earlier proceedings may not be an abuse. It may in particular cases be sensible to advance cases separately. It depends on all the circumstances of each case. Once the court's consideration is directed clearly towards the question of abuse, it will be seen that the passage from Sir James Wigram V-C's judgment in *Henderson* is a full modern statement of the law so long as it is not picked over semantically as if it were a tax statute. The extent of any coincidence of causes of action, facts or even the capacities in which parties are sued, though relevant, will not necessarily determine the outcome.'

May LJ continued (at 388–389):

'[Counsel for Mr Manson] submits that the kind of abuse of process relied on by the first defendant in this appeal is to be narrowly confined and precisely defined so that legitimate claims are not stifled and so that potential litigants know where they stand. Otherwise they may be driven to include in one proceedings related but distinct claims which might sensibly be left for

later consideration. The law should not thus encourage premature litigation which may prove unnecessary. He further submits that delay is the subject of the law of limitation and should not feature additionally as an element of abuse. It is of course axiomatic that the court will only strike out a claim as an abuse after most careful consideration. But the court has to balance a plaintiff's right to bring before the court genuine and legitimate claims with a defendant's right to be protected from being harassed by multiple proceedings where one should have sufficed. Abuse of process is a concept which defies precise definition in the abstract. In particular cases, the court has to decide whether there is abuse sufficiently serious to justify preventing the offending litigant from proceeding. In cases such as the present, the abuse is sufficiently defined in *Henderson* which itself is encapsulated in the proposition that the litigant could and should have raised the matter in question in earlier concluded proceedings. Special circumstances may negative or excuse what would otherwise be an abuse. But there may in particular cases be elements of abuse additional to the mere fact that the matter could and should have been raised in the earlier proceedings.'

May LJ added (at 389):

> 'Mr Manson relies on special circumstances to negative or excuse the abuse. He says that the scope of the 1990 action was limited because he had legal expenses insurance for that action which only covered some of his claims and that the insurers were not prepared to support the claims which he now wants to bring. Although this may be an explanation, in my view it does not excuse the abuse nor does it amount to special circumstances. It is commonplace for litigants to have difficulties in affording the cost of litigation. But lack of means cannot stand as an excuse for abuse of process.'

Last in this series of cases comes *Bradford & Bingley Building Society v Seddon (Hancock and ors, t/a Hancocks (a firm), third parties)* [1999] 4 All ER 217, [1999] 1 WLR 1482, a decision later in time than the Court of Appeal's judgment in the present case but given by two of the same Lords Justices. Mr Seddon had made an investment on the advice of an accountant, Mr Hancock, which he had financed by taking a mortgage loan from the Bradford & Bingley Building Society. The investment failed. Mr Seddon claimed damages or an indemnity against Mr Hancock, who admitted liability to indemnify Mr Seddon to the extent of about 75% of Mr Seddon's claim. Judgment was entered in Mr Seddon's favour for this admitted sum and Mr Hancock was given leave to defend as to the balance. Mr Seddon was unable to enforce his judgment as Mr Hancock had no money, and the residual claim was not pursued. The building society then proceeded against Mr Seddon to enforce the debt owed to it under the mortgage loan. Mr Seddon sought to join as third parties Mr Hancock, in order to pursue the residual claim, and two of his partners, Mr Seddon's contention being that the advice tended to him had been given by the firm to which Mr Hancock and his partners belonged. An application to strike out the third party claim was upheld by the judge and Mr Seddon appealed. In the course of a judgment with which Nourse and Ward LJJ agreed, Auld LJ said:

> 'In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the courts' subsequent application of the above dictum. The former, in its cause of action estoppel form, is an absolute bar

to relitigation, and in its issue estoppel form also, save in "special cases" or "special circumstances": see *Thoday v Thoday* [1964] 1 All ER 341 at 352, [1964] P 181 at 197–198 per Diplock LJ and *Arnold v National Westminster Bank plc* [1991] 3 All ER 41, [1991] 2 AC 93. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter ... Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or the issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue.' (See [1999] 4 All ER 217 at 225, [1999] 1 WLR 1482 at 1490.)

Auld LJ continued:

'In my judgment, mere "re"litigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process. Equally, the maintenance of a second claim, which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process. Rules of such rigidity would be to deny its very concept and purpose. As Kerr LJ and Sir David Cairns emphasised in *Bragg*'s case [1982] 2 Lloyd's Rep 132 at 137 and 138–139 respectively, the courts should not attempt to define or categorise fully what may amount to an abuse of process; see also per Stuart-Smith LJ in *Ashmore v British Coal Corp* [1990] 2 All ER 981 at 988,[1990] 2 QB 338 at 352. Bingham MR underlined this in *Barrow v Bankside Members Agency Ltd* [1996] 1 All ER 981 at 986, [1996] 1 WLR 257 at 263, stating that the doctrine should not be "circumscribed by unnecessarily restrictive rules" since its purpose was the prevention of abuse and it should not endanger the maintenance of genuine claims; see also [1996] 1 All ER 981 at 989, [1996] 1 WLR 257 at 266 per Saville LJ. Some additional element is required, such as a collateral attack on a previous decision (see e g *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727, [1982] AC 529, *Bragg*'s case [1982] 2 Lloyd's Rep 132 at 137 and 139 per Kerr LJ and Sir David Cairns respectively and *Ashmore v British Coal Corp*), some dishonesty (see e g *Bragg*'s case at 139 per Stephenson LJ and *Morris v Wentworth-Stanley* [1999] 2 WLR 470 at 480 and 481 per Potter LJ) or successive actions amounting to unjust harassment (see e g *Manson v Vooght* [1999] BPIR 376 ...)' (See [1999] 4 All ER 217 at 227–228, [1999] 1 WLR 1482 at 1492.)

The Court of Appeal held that Mr Seddon's third party proceedings were not an abuse of process, and the appeal succeeded.

It may very well be, as has been convincingly argued (Watt 'The Danger and Deceit of the Rule in *Henderson v. Henderson*: A new approach to successive civil actions arising from the same factual matter' (2000) 19 CJQ 287), that what is now taken to be the rule in *Henderson v Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation

and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

Mr ter Haar QC, for Mr Johnson, submitted (as the judge had held) that GW was estopped by convention from contending that the bringing of an action to enforce his personal claims was an abuse of process. In resisting GW's complaint of abuse, Mr ter Haar relied, as he did in the courts below, on three features of this case in particular. The first was the acute financial predicament in which Mr Johnson personally and WWH found themselves as a result, as Mr Johnson alleges, of GW's negligence. The burden of financing the continuing operation of WWH, and of its very expensive litigation against GW, fell on him. His means was stretched to the utmost. The only hope of financial salvation lay in an early and favourable outcome to the company's claim against GW. Mr Johnson did not have a full legal aid certificate to pursue a personal claim. In any event, the addition of a personal claim would have complicated and delayed the trial of the company's claim, which might well have jeopardised the company's survival. Secondly, Mr ter Haar relied on the conduct of the parties after the settlement agreement was made (if, contrary to his earlier submission, there was no estoppel by convention). He pointed out that four and a half years elapsed from the issue of Mr Johnson's writ in this action before GW first intimated their intention to apply to strike out the proceedings as an abuse of the court's process, during which period pleadings and evidence were exchanged, considerable costs were incurred, a substantial payment into court was made and a trial date fixed. This

procedural history, he submitted, was evidence of the expectation of the parties at the time when the company's action was settled, and was in itself ground for rejecting GW's application; *Halliday v Shoesmith* [1993] 1 WLR 1 at 5. Thirdly, Mr ter Haar submitted that, to the extent that issues litigated in the company's action were to be relitigated in this action, it was because GW had insisted on this and rejected the invitation of Mr Johnson to treat the evidence given in the earlier action as if given in this action.

Two subsidiary arguments were advanced by Mr ter Haar in the courts below and rejected by each. The first was that the rule in *Henderson v Henderson* did not apply to Mr Johnson since he had not been the plaintiff in the first action against GW. In my judgment this argument was rightly rejected. A formulaic approach to application of the rule would be mistaken. WWH was the corporate embodiment of Mr Johnson. He made decisions and gave instructions on its behalf. If he had wished to include his personal claim in the company's action, or to issue proceedings in tandem with those of the company, he had power to do so. The correct approach is that formulated by Sir Robert Megarry V-C in *Gleeson v J Whippell & Co Ltd* [1977] 3 All ER 54 at 60, [1977] 1 WLR 510 at 515 where he said:

> 'Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject-matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase "privity of interest".'

On the present facts that test was clearly satisfied.

The second subsidiary argument was that the rule in *Henderson v Henderson* did not apply to Mr Johnson since the first action against GW had culminated in a compromise and not a judgment. This argument also was rightly rejected. An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing.

On the estoppel by convention issue, Mr Steinfeld QC for GW submitted that the Court of Appeal had been right and the judge wrong. There had been no common understanding between the parties on the issue of abuse, a topic which had never been raised. There was nothing to suggest that GW had tacitly agreed to forgo any defence properly open to it. Mr Steinfeld further submitted that the present proceedings did amount to an abuse, as the Court of Appeal had rightly held. Mr Johnson could have advanced his personal claim at the same time as the company's claim and therefore should have done so. The consequence of his not doing so was to expose GW to the harassment of further proceedings canvassing many of the same issues as had been canvassed in the earlier action, with

consequential waste of time and money and detriment to other court users. The facts relied on to excuse his earlier inaction were not accepted. He should have sought a full legal aid certificate earlier. He could not rely on lack of means. Any loss caused to Mr Johnson by GW's delay in applying to strike out could be compensated in costs.

Neither party challenged the correctness in principle of Lord Denning MR's statement in *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577 at 584, [1982] QB 84 at 122 which, despite its familiarity, I quote:

> 'The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietory estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence; estoppel cannot give rise to a cause of action; estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.'

The question is whether the parties to the settlement of WWH's action (relevantly, Mr Johnson and GW) proceeded on the basis of an underlying assumption that a further proceeding by Mr Johnson would not be an abuse of process and whether, if they did, it would be unfair or unjust to allow GW to go back on that assumption. In my judgment both these conditions were met on the present facts. Mr Johnson was willing in principle to try to negotiate an overall settlement of his and the company's claims but this was not possible in the time available and it was GW's solicitor who said that the personal claim 'would be a separate claim and it would really be a matter for separate negotiation in due course'. It is noteworthy that Mr Johnson personally was party to the settlement agreement, and that the agreement contained terms designed to preclude (in one instance) and limit (in another) personal claims by him. Those provisions only made sense on the assumption that Mr Johnson was likely to make a personal claim. GW did not, of course, agree to forgo any defence the firm might have to Mr Johnson's claim if brought, and the documents show that GW's solicitor was alert to issues of remoteness and duplication. Had Mr Johnson delayed unduly before proceeding, a limitation defence would have become available. But an application to strike out for abuse of process is not a defence, it is an objection to an action being brought at all. The terms of the settlement agreement and the exchanges which preceded it in my view point strongly towards acceptance by both parties that it was open to Mr Johnson to issue proceedings to enforce a personal claim, which could then be tried or settled on its merits, and I consider that it would be unjust to permit GW to resile from that assumption.

If, contrary to my view, GW is not estopped by convention from seeking to strike out Mr Johnson's action, its failure to take action to strike out over a long

period of time is potent evidence not only that the action was not seen as abusive at the time but also that, on the facts, it was not abusive. The indicia of true abuse are not so obscure that an experienced professional party, advised by leading counsel (not, at that stage, Mr Steinfeld), will fail to recognise them. It is accepted that Mr Johnson had reasons which he regarded as compelling to defer prosecution of his personal claim. If, as he contended, the urgency of obtaining an early and favourable decision in the company's action was itself a result of GW's breach of duty to the company and to him, it would seem to me wrong to stigmatise as abusive what was, in practical terms, unavoidable. I agree with GW that it would certainly have been preferable if the judge who tried the company's action, and thereby became familiar with much of the relevant detail and evidence, had been able at the same time or shortly thereafter to rule on the personal claim. That would have been efficient and economical. But there were reasons accepted at least implicitly by both parties at the time for not proceeding in that way, and GW could, if it wishes, limit the extent to which issues extensively canvassed in the earlier action are to be reopened. It is far-fetched to suggest that this action involves a collateral attack on GW's non-admission of liability in the first action when that action was settled by insurers on terms quite inconsistent with any realistic expectation that GW would not be found liable.

In my opinion, based on the facts of this case, the bringing of this action was not an abuse of process. The Court of Appeal adopted too mechanical an approach, giving little or no weight to the considerations which led Mr Johnson to act as he did and failing to weigh the overall balance of justice. I would allow Mr Johnson's appeal.

The recoverability of the damages claimed by Mr Johnson

By its notice of cross-appeal GW challenged the Court of Appeal's ruling that all the heads of damage pleaded on behalf of Mr Johnson (with one exception) were or might be recoverable in principle if the pleaded facts were fully proved.

GW's first argument before the House, applicable to all save two of the pleaded heads of damage, was in principle very simple. It was that this damage, if suffered at all, had been suffered by WWH and Mr Johnson, being for this purpose no more than a shareholder in the company, could not sue to recover its loss. As the Court of Appeal pointed out in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 at 357, [1982] Ch 204 at 210:

> 'A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and therefore the person in whom the cause of action is vested.'

Here, it was argued, Mr Johnson was seeking to recover damage which had been suffered by WWH.

Mr Johnson's response was equally simple. It was accepted, for purposes of the application to strike out the damages claim, that GW owed a duty to him personally and was in breach of that duty. Therefore, subject to showing that the damage complained of was caused by GW's breach of duty and was not too remote, which depended on the facts established at trial and could not be determined on the pleadings, he was entitled in principle to recover any damage which he had himself suffered as a personal loss separate and distinct from any loss suffered by the company.

a On this issue we were referred to a number of authorities which included *Lee v Sheard* [1955] 3 All ER 777, [1956] 1 QB 192; *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354, [1982] Ch 204; *Heron International Ltd v Lord Grade* [1983] BCLC 244; *Howard (RP) Ltd & Richard Alan Witchell v Woodman Matthews and Co (a firm)* [1983] BCLC 117; *Fischer (George) (GB) Ltd v Multi-Construction Ltd* [1995] 1 BCLC 260; *Christensen v Scott* [1996] 1 NZLR 273; b *Barings plc (in administration) v Coopers & Lybrand (a firm)* [1997] 1 BCLC 427; *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443; *Stein v Blake* [1998] 1 All ER 724; and *Watson v Dutton Forshaw Motor Group Ltd* [1998] CA Transcript 1284.

These authorities support the following propositions. (1) Where a company c suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party d responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. So much is clear from *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 esp at 366–367, [1982] Ch 204 esp at 222–223, *Heron International Ltd v Lord Grade* [1983] BCLC 244 esp at 261–262, *Fischer (George) (GB) Ltd v Multi-Construction Ltd* [1995] 1 BCLC 260 esp at 266 and 270–271, the *Gerber* case and *Stein v Blake* [1998] e 1 All ER 724 esp at 726–729. (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. This is supported by *Lee v Sheard* [1955] 3 All ER 777 at 778, [1956] 1 QB 192 at 195–196, the *Fischer* case and f the *Gerber* case. (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other. I take this to be the effect of *Lee v Sheard* [1955] 3 All ER 777 at 778, [1956] g 1 QB 192 at 195–196, *Heron International Ltd v Lord Grade* [1983] BCLC 244 esp at 262, *Howard (RP) Ltd & Richard Alan Witchell v Woodman Matthews and Co (a firm)* [1983] BCLC 117 esp at 123, the *Gerber* case and *Stein v Blake* [1998] 1 All ER 724 esp at 726. I do not think the observations of Leggatt LJ in *Barings plc (in administration) v Coopers & Lybrand (a firm)* [1997] 1 BCLC 427 at 435 and of the h Court of Appeal of New Zealand in *Christensen v Scott* [1996] 1 NZLR 273 at 280, lines 25–35, can be reconciled with this statement of principle.

These principles do not resolve the crucial decision which a court must make on a strike-out application, whether on the facts pleaded a shareholder's claim is sustainable in principle, nor the decision which the trial court must make, j whether on the facts proved the shareholder's claim should be upheld. On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation. The problem can be resolved only by close scrutiny of the pleadings

at the strike-out stage and all the proven facts at the trial stage: the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible, and whether (to use the language of *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 at 367, [1982] Ch 204 at 223) the loss claimed is 'merely a reflection of the loss suffered by the company'. In some cases the answer will be clear, as where the shareholder claims the loss of dividend or a diminution in the value of a shareholding attributable solely to depletion of the company's assets, or a loss unrelated to the business of the company. In other cases, inevitably, a finer judgment will be called for. At the strike-out stage any reasonable doubt must be resolved in favour of the claimant.

I turn to consider the heads of claim now pleaded by Mr Johnson. (1) CPV and Adfocus. The claim is for sums which Mr Johnson, acting on GW's advice, invested in these companies and lost. This claim is unobjectionable in principle, as Mr Steinfeld came close to accepting. (2) Cost of personal borrowings: loan capital and interest. The claim is for sums which Mr Johnson claims he was obliged to borrow at punitive rates of interest to fund his personal outgoings and those of his businesses. Both the ingredients and the quantum of this claim will call for close examination, among other things to be sure that it is not a disguised claim for loss of dividend, but it cannot at this stage be struck out as bad on its face. The same is true of Mr Johnson's claims for bank interest and charges and mortgage charges and interest (which will raise obvious questions of remoteness). (3) Diminution in value of Mr Johnson's pension and majority shareholding in WWH. In part this claim relates to payments which the company would have made into a pension fund for Mr Johnson: I think it plain that this claim is merely a reflection of the company's loss and I would strike it out. In part the claim relates to enhancement of the value of Mr Johnson's pension if the payments had been duly made. I do not regard this part of the claim as objectionable in principle. An alternative claim, based on the supposition that the company would not have made the pension payments, that its assets would thereby have been increased and that the value of Mr Johnson's shareholding would thereby have been enhanced, is also a reflection of the company's loss and I would strike it out. (4) Loss of 12·5% of Mr Johnson's shareholding in WWH. Mr Johnson claims that he transferred these shares to a lender as security for a loan and that because of his lack of funds, caused by GW's breach of duty, he was unable to buy them back. This claim is not in my view objectionable in principle. (5) Additional tax liability. If proved, this is a personal loss and I would not strike it out.

The second limb of GW's argument on the cross-appeal was directed to Mr Johnson's claim for damages for mental distress and anxiety. This is a claim for general damages for—

> 'the mental distress and anxiety which he has suffered as a result of the protracted litigation process to which he has been subjected, the extreme financial embarrassment in which he and his family have found themselves, and the deterioration in his family relationships, particularly with his wife and son, as a result of the matters complained of in the re-amended statement of claim.'

Closely allied to this was a claim, pleaded at length, for aggravated damages 'by reason of the fact that the manner of the commission of [GW's] tort was such as to injure his pride and dignity'. GW contended that damages for mental distress and anxiety did not lie for breach of a commercial contract such as the present and

that this was not a class of case in which aggravated damages were in principle recoverable. Mr ter Haar took issue with both these points.

The general rule laid down in *Addis v Gramophone Co Ltd* [1909] AC 488, [1908–10] All ER Rep 1 was that damages for breach of contract could not include damages for mental distress. Cases decided over the last century established some inroads into that general rule (see, generally, *McGregor on Damages* (16th edn, 1997) at paras 98–104). But the inroads have been limited and *McGregor* describes as a useful summary a passage in *Watts v Morrow* [1991] 4 All ER 937 at 959–960, [1991] 1 WLR 1421 at 1445:

> 'A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy. But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead.'

Your Lordships' House had occasion to touch on this question in *Ruxley Electronics and Construction Ltd v Forsyth, Laddingford Enclosures Ltd v Forsyth* [1995] 3 All ER 268, [1996] AC 344, an unusual case in which the issue concerned the measure of compensation recoverable by a building owner against a contractor who had built a swimming pool which was 18 inches shallower at the deep end than the contract specified. Lord Lloyd of Berwick said:

> '*Addis v Gramophone Co Ltd* established the general rule that in claims for breach of contract, the plaintiff cannot recover damages for his injured feelings. But the rule, like most rules, is subject to exceptions. One of the well-established exceptions is when the object of the contract is to afford pleasure, as, for example, where the plaintiff has booked a holiday with a tour operator. If the tour operator is in breach of contract by failing to provide what the contract called for, the plaintiff may recover damages for his disappointment (see *Jarvis v Swans Tours Ltd* [1973] 1 All ER 71, [1973] QB 233 and *Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92, [1975] 1 WLR 1468). This was, as I understand it, the principle which Judge Diamond applied in the present case. He took the view that the contract was one "for the provision of a pleasurable amenity". In the event, Mr Forsyth's pleasure was not so great as it would have been if the swimming pool had been 7 ft 6 in deep. This was a view which the judge was entitled to take. If it involves a further inroad on the rule in *Addis v Gramophone Co Ltd* then so be it. But I prefer to regard it as a logical application or adaptation of the existing exception to a new situation.' (See [1995] 3 All ER 268 at 289, [1996] AC 344 at 374.)

I do not regard this observation as throwing doubt on the applicability of the *Addis* case in a case such as the present. It is undoubtedly true that many breaches of contract cause intense frustration and anxiety to the innocent party. I am not, however, persuaded on the argument presented on this appeal that the general applicability of the *Addis* case should be further restricted.

I would strike out Mr Johnson's claim for damages for mental distress and anxiety. I would also strike out his claim for aggravated damages: I see nothing

in the pleaded facts which would justify any award beyond the basic compensatory measure of damages.

Conclusion

For these reasons I would allow Mr Johnson's appeal and dismiss GW's cross-appeal, save that I would strike out his claims (identified in (3) above) for pension payments and the enhanced value of his shareholding, and for damages for mental distress and anxiety and aggravated damages. I would order GW to pay Mr Johnson's costs before the Court of Appeal and the judge, and the costs of the appeal and the cross-appeal to this House.

LORD GOFF OF CHIEVELEY. My Lords,

(1) THE APPEAL

(a) *Abuse of process*

On the question whether there was an abuse of process on the part of the appellant, my noble and learned friend Lord Bingham of Cornhill has reviewed the facts and the relevant authorities in lucid detail. I find myself to be in complete agreement with his analysis of the authorities, and with his conclusion that on the facts there was no abuse of process on the part of the appellant; and I do not propose to burden this opinion with a repetition of his reasoning. I only wish to add a few words on the separate question of estoppel, with regard to the nature of the estoppel on which the appellant could, if necessary, have relied.

(b) *Estoppel*

The conclusion of the learned judge, and the contention of Mr ter Haar QC for the appellant, was that the relevant estoppel was estoppel by convention. Reliance was placed in particular on a well-known passage in the judgment of Lord Denning MR in *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd Ltd* [1981] 3 All ER 577 at 584, [1982] QB 84 at 122, where he said:

> 'The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietory estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence; estoppel cannot give rise to a cause of action; estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.'

This broad statement of law is most appealing. I yield to nobody in my admiration for Lord Denning: but it has to be said that his attempt in this passage

to identify a common criterion for the existence of various forms of estoppel—he refers in particular to proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel—is characteristically bold; and that the criterion which he chooses, viz that the parties to a transaction should have proceeded on the basis of an underlying assumption, was previously thought to be relevant only in certain cases (for example, it was adopted by Oliver J (as he then was) in his important judgment in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897, [1982] QB 133) and, in particular, in the case of estoppel by convention, a species of estoppel which Lord Denning does not mention. Furthermore, if he intended that his broad statement of principle should apply in the case of estoppel by convention, a further problem arises in that, in relation to that doctrine, it has been authoritatively stated in Spencer Bower and Turner *Law Relating to Estoppel by Representation* (1977), in the scholarly and much admired third edition by Sir Alexander Turner, at pp 167–168, that:

> 'Just as the representation which supports an estoppel *in pais* must be a representation of *fact*, the assumed state of affairs which is the necessary foundation of an estoppel by convention must be an assumed state of facts presently in existence ... No case has gone so far as to support an estoppel by convention precluding a party from resiling from a promise or assurance, not effective as a matter of contract, as to future conduct or as to a state of affairs not yet in existence. And there is no reason to suppose that the doctrine will ever develop so far. To allow such an estoppel would amount to the abandonment of the doctrine of consideration, and to accord contractual effect to assurances as to the future for which no consideration has been given.' (Author's emphasis.)

I myself suspect that this statement may be too categorical; but we cannot ignore the fact that it embodies a fundamental principle of our law of contract. The doctrine of consideration may not be very popular nowadays; but although its progeny, the doctrine of privity, has recently been abolished by statute, the doctrine of consideration still exists as part of our law.

I myself was the judge of first instance in *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1981] 1 All ER 923, [1982] QB 84. I remember the doctrine of estoppel by convention being urged upon me; but the case was concerned with the scope of a guarantee, which was a matter of law, and, in the light of the passage in Spencer Bower and Turner which I have just quoted, I hesitated to adopt the doctrine. Cautiously, and I still think wisely, I founded my conclusion on a broader basis of unconscionability. In the Court of Appeal, however, both Eveleigh LJ and Brandon LJ (as he then was) expressly founded the relevant parts of their judgments on the doctrine of estoppel by convention. They did so relying on the statement of principle from Spencer Bower and Turner which I have already cited, which limits the doctrine to cases where there has been an agreed assumption as to *facts*, but nevertheless applied that statement to a case where the agreed assumption (as to the scope of the guarantee) was one of law. If Lord Denning's statement of principle is to be read as applying to the case of estoppel by convention, he implicitly rejected the statement of the law in Spencer Bower and Turner, holding that there could be an estoppel whether the common underlying assumption was one of fact or of law.

I accept that in certain circumstances an estoppel may have the effect of enabling a party to enforce a cause of action which, without the estoppel, would

not exist. Examples are given in my judgment in *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1981] 1 All ER 923 at 936–938, [1982] QB 84 at 105–107. But in my opinion it is not enough for that purpose that the estoppel may be characterised as an estoppel by convention, or that it can be said to be founded upon a common assumption by the parties.

Against this background I am, despite my great admiration for Lord Denning, reluctant to proceed on the basis of estoppel by convention in the present case. The function of the estoppel is here said to be to preclude the respondent firm from contending that Mr Johnson, by personally advancing a separate claim to damages against the respondent firm instead of doing so at the same time as pursuing his company's claim, was abusing the process of the court. That, as I see it, must relate to a matter of law. It could, however, be appropriate subject matter for an estoppel by representation, whether in the form of promissory estoppel or of acquiescence, on account of which the firm is, by reason of its prior conduct, precluded from enforcing its strict legal rights against Mr Johnson (to claim that his personal proceedings against the firm constituted an abuse of the process of the court). Such an estoppel is not, as I understand it, based on a common underlying assumption so much as on a representation by the representor that he does not intend to rely upon his strict legal rights against the representee which is so acted on by the representee that it is inequitable for the representor thereafter to enforce those rights against him. This approach, as I see it, is consistent with the conclusion of my noble and learned friend Lord Millett, who considers that the firm would be so precluded by virtue of its acquiescence in the manner in which Mr Johnson had conducted the litigation hitherto. In the context of the present case, moreover, I can see no material difference between invoking promissory estoppel or acquiescence as the ground on which the respondent firm should be precluded from asserting that the appellant had abused the process of the Court. The truth of the matter is that the respondent firm, by its conduct and in particular by participating in negotiations for settlement of the company's claim against it on the basis that Mr Johnson would thereafter be free to pursue his own personal claim against it, lulled Mr Johnson into a sense of security that he was free to pursue such a claim against the firm, without objection, in separate proceedings, with the effect that it became unconscionable for the firm to contend that his personal proceedings constituted an abuse of the process of the court. In the end, I am inclined to think that the many circumstances capable of giving rise to an estoppel cannot be accommodated within a single formula, and that it is unconscionability which provides the link between them.

For these reasons I would, like the remainder of your Lordships, allow the appeal; and I now turn to the cross-appeal of the respondent firm.

(2) THE CROSS-APPEAL

Here the question is whether certain heads of claim advanced by the appellant, Mr Johnson, against the respondent firm, should be struck out. The relevant heads of claim are usefully recorded in the opinion of my noble and learned friend, Lord Bingham of Cornhill. I do not propose to repeat them in this opinion. The Court of Appeal held that each of the heads of damage pleaded in paras 23 and 24 of the re-amended statement of claim is recoverable as a matter of law by the appellant by way of damages for the breaches of duty pleaded by him, and so should not be struck out. It is against that decision that the respondent firm now cross-appeals to your Lordships' House.

The principal ground on which it is said by the respondent firm that some of these heads of claim should be struck out is derived from the well-known case of *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354, [1982] Ch 204. I agree with the analysis of that case, and of the other cases following upon it, set out in the opinion of my noble and learned friend Lord Millett (which I have had the opportunity of reading in draft). I accordingly agree with his conclusion that:

> 'On the assumption which we are bound to make for the purpose of this appeal, which is that the firm was in breach of a duty of care owed to Mr Johnson personally, then he is in principle entitled to recover damages in respect of all heads of non-reflective consequential loss which are not too remote.'

On that basis I, like Lord Millett, agree with my noble and learned friend Lord Bingham that the heads of damage specified by him as items 1, 2, 4 and 5 are unobjectionable and should not be struck out. Item 3 relates to the diminution in value of the appellant's pension policy set up by the company and accruing to the benefit of the appellant as part of his remuneration in his capacity as director of the company. In so far as the claim relates to payments which the company would have made into a pension fund for the appellant, I agree that the claim is merely a reflection of the company's loss and should therefore be struck out. But in so far as it relates to enhancement of the value of his pension if the payments had been made, it is unobjectionable and should be allowed to stand.

The second ground relates to the appellant's claims for general damages for mental distress, and for aggravated damages based on the fact that the manner of commission of the respondent firm's wrong was 'such as to injure his pride and dignity'. I agree with my noble and learned friend Lord Bingham that, as a matter of principle, damages on these grounds are not generally recoverable: see *Addis v Gramophone Co Ltd* [1909] AC 488, [1908–10] All ER Rep 1; *Watts v Morrow* [1991] 4 All ER 937 at 959, [1991] 1 WLR 1421 at 1445 per Bingham LJ; *McGregor on Damages* (16th edn, 1997) paras 98–104. It is true that there has in recent years been a softening of this principle in certain respects (see *McGregor* and *Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1, [1998] AC 20), but none of these developments has, so far as I can see, gone so far as to allow recovery on the broad grounds here pleaded. I also would therefore strike out these two heads of claim.

For these reasons, I agree with the order proposed by my noble and learned friend Lord Bingham as to the disposal of both the appeal and the cross-appeal. I also agree with the order proposed by him as to costs.

LORD COOKE OF THORNDON. My Lords, having had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill, I agree with all that he says on the subject of abuse of process. The course adopted by the parties of settling Westway Homes Ltd's claim against Gore Wood & Co, but leaving open any personal claim by Mr Johnson against the same solicitors, subject to a cap on certain heads of damages and an undertaking concerning personal guarantees, strikes me as a sensible one: the personal claim against the solicitors plainly involves different and more difficult issues. The belated raising by the defendants of the contention, more ingenious than realistic, that the settlement had the effect of preventing the personal claim

seems to me closer to abuse of process than the plaintiff's conduct in pursuing the claim. The defendants are saved from that stigma by the acceptance of their contention by the Court of Appeal, but I agree that on this part of the case the appeal of the plaintiff must be allowed.

On the recoverability of personal damages, I have much more difficulty, for the following reasons. It will be convenient to deal first with the claim for quantifiable financial loss, secondly with the claim based on other forms of suffering.

Damages for quantifiable financial loss

As the present is an action by one claiming to be a personal client against solicitors, not an action by a shareholder against a company and directors, the case of *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354, [1982] Ch 204, including the well-known passage ([1982] 1 All ER 354 at 366–367, [1982] Ch 204 at 222–223), has only a limited bearing. The cash box illustration given by the Court of Appeal (Cumming-Bruce, Templeman and Brightman LJJ) is not helpful in this case because it does not envisage any loss except of the company's £100,000. It is by no means self-evident that, if the controlling shareholder had lost a valuable business opportunity for want of prompt access to the company's money, he would have been unable to recover damages for that loss caused by the defendant's deceit and theft of the cash box. The court did give as a possible instance of a recoverable personal loss the cost caused to the shareholder in consequence of a fraudulent circular, such as the cost of attending a meeting; but this single specific example is not fully illuminating. Nothing that I am about to say involves any criticism of the decision in the *Prudential* case or anything said in it. My point is simply that it was not concerned with the kind of issue arising in the present case and contains no observations about this kind of issue. The same applies to *Stein v Blake* [1998] 1 All ER 724.

I respectfully agree that the three numbered propositions set out in the speech of Lord Bingham are supported by the English authorities cited by him. But these authorities and the propositions are not comprehensive. Nor, as my noble and learned friend also indicates, do they resolve the crucial question arising on a strike-out application in a case such as the present. This is a case about solicitors' negligence. The English authorities cited include only one relating to the not uncommon situation of a solicitor acting both for a client personally and for a company controlled by the latter. This is *Howard (RP) Ltd & Richard Alan Witchell v Woodman Matthews and Co (a firm)* [1983] BCLC 117. In that case the solicitor was negligent in failing initiate a timely application for statutory protection of the company's lease. The company negotiated with the landlord a new lease on terms less favourable than could have been obtained with the bargaining power of an extant application (loss A). The new lease also stipulated that the shareholder could not sell his shares without the landlord's consent (loss B). Against the solicitor Staughton J (as he then was) awarded the company loss A and the shareholder loss B. Although it flowed from the company's loss of bargaining power, loss B was not suffered by the company. So, too, in the present case Mr Johnson claims that at least the greater part of the losses for which he sues were not suffered by the company.

As the report of *Christensen v Scott* [1996] 1 NZLR 273 may not be readily available in England, it is as well to reproduce here the whole of the relevant passage in the judgment of the Court of Appeal delivered by Thomas J. I must not conceal that I was a member of the court of five on behalf of whom the judge

spoke, although I confess to little independent recollection of the case. It was a case in which the defendants, firms of chartered accountants and solicitors, acted for the plaintiffs personally and in the course of doing so advised on channelling their assets into a company taking a lease of farm land. Naturally the defendants came to act for the company as well. By reason of alleged negligence on the part of the defendants the consent of the landlord's mortgagees was not obtained, nor was a caveat registered against the title. Consequently the land was lost and the company failed. The company's claim against the defendants was settled by the liquidator for a sum alleged by the plaintiffs to be totally inadequate. The Court of Appeal held that the personal claims should not be struck out before trial. Thomas J said (at 280–281):

> 'We do not need to enter upon a close examination of the [*Prudential*] decision. It has attracted not insignificant and, at times, critical comment. See eg L C B Gower, *Gower's Principles of Modern Company Law* (5th ed, 1992) at pp 647–653; L S Sealy, "Problems of Standing, Pleading and Proof in Corporate Litigation" in *Company Law in Change* (ed B G Pettet) (1987) at p 1 esp at pp 6–10; and M J Sterling, "The Theory and Policy of Shareholder Actions in Tort" (1987) 50 MLR 468, esp at pp 470–474. It may be accepted that the Court of Appeal was correct, however, in concluding that a member has no right to sue directly in respect of a breach of duty owed to the company or in respect of a tort committed against the company. Such claims can only be bought by the company itself or by a member in a derivative action under an exception to the rule in *Foss v Harbottle* ((1843) 2 Hare 461, 67 ER 189). But this is not necessarily to exclude a claim brought by a party, who may also be a member, to whom a separate duty is owed and who suffers a personal loss as a result of a breach of that duty. Where such a party, irrespective that he or she is a member, has personal rights and these rights are invaded, the rule in *Foss v Harbottle* is irrelevant. Nor would the claim necessarily have the calamitous consequences predicted by counsel in respect of the concept of corporate personality and limited liability. The loss arises not from a breach of duty owed to the company but from a breach of duty owed to the individuals. The individual is simply suing to vindicate his own right or redress a wrong done to him or her giving rise to a personal loss. We consider, therefore, that it is certainly arguable that, where there is an independent duty owed to the plaintiff and a breach of that duty occurs, the resulting loss may be recovered by the plaintiff. The fact that the loss may also be suffered by the company does not mean that it is not also a personal loss to the individual. Indeed, the diminution in the value of Mr and Mrs Christensen's shares in the company is by definition a personal loss and not a corporate loss. The loss suffered by the company is the loss of the lease and the profit which would have been obtained from harvesting the potato crop. That loss is reflected in the diminution in the value of Mr and Mrs Christensen's shares. They can no longer realise their shares at the value they enjoyed prior to the alleged default of their accountants and solicitors. (For a discussion of the policy issues which arise in considering these questions, see Sterling (supra) at pp 474–491.) In circumstances of this kind the possibility that the company and the member may seek to hold the same party liable for the same loss may pose a difficulty. Double recovery, of course, cannot be permitted. The problem does not arise in this case, however, as the company has chosen to settle its claim. Peat Marwick and

McCaw Lewis accepted a compromise in the knowledge that Mr and Mrs Christensen's claim was outstanding. It may well be, as was acknowledged by Mr Pidgeon in the course of argument, that an allowance will need to be made for the amount already paid to the liquidator in settlement of the company's claim. It is to be acknowledged, however, that the problem of double recovery may well arise in other cases. No doubt, such a possibility is most likely with smaller private companies where the interrelationship between the company, the directors and the shareholders may give rise to independent duties on the part of the professional advisers involved. But the situation where one defendant owes a duty to two persons who suffer a common loss is not unknown in the law, and it will need to be examined in this context. It may be found that there is no necessary reason why the company's loss should take precedence over the loss of the individuals who are owed a separate duty of care. To meet the problem of double recovery in such circumstances it will be necessary to evolve principles to determine which party or parties will be able to seek or obtain recovery. A stay of one proceeding may be required. Judgment, with a stay of execution against one or other of the parties, may be in order. An obligation to account in whole or in part may be appropriate. The interest of creditors who may benefit if one party recovers and not the other may require consideration. As the problem of double recovery does not arise in this case, however, it is preferable to leave an examination of these issues to a case where that problem is squarely in point. Essentially, Mr and Mrs Christensen are alleging that as a result of Peat Marwick and McCaw Lewis's breach of duty owed to them personally they suffered a personal loss, that is, a reduction in the value of their assets. Their assets in this case had been channelled into their company. Thus, it is arguable that the diminution in the value of their shareholding is the measure of that loss. It may well be that when the evidence is heard it will be apparent that Mr and Mrs Christensen's claim is inflated, but that is a matter for the trial. We are not prepared to hold at this stage that they do not have an arguable case to recover damages for the breach of an acknowledged duty.'

When that passage is read as a whole, two features will be noted. It will be seen not only that the whole passage is throughout guarded and provisional, but also that the court recognised both that double recovery cannot be permitted and that the interests of creditors may require consideration. In this field, if a client is suing his own solicitor, it would appear that only the problems of double recovery or prejudice to the company's creditors would justify denying or limiting the right to recover personal damages which, on ordinary principles of foreseeability, would otherwise arise. One other observation should be made about the passage in Thomas J's judgment. Although he did mention that the *Prudential* case had not gone without criticism, he did not find it necessary to examine that case closely. I would repeat that in no way am I criticising it. On the contrary I accept it to the full.

The next closest of the English reported cases cited is *Barings plc (in administration) v Coopers & Lybrand (a firm)* [1997] 1 BCLC 427 at 435. In that case (arising from the activities of Mr Leeson) a United Kingdom company was suing the auditors of its Singapore subsidiary; the auditors were also responsible for supplying audit information for the group accounts. On a pre-trial appeal, Leggatt LJ stated the

law in terms which, albeit briefer, are much the same as those of Thomas J in *Christensen*'s case, which case was cited by Leggatt LJ

Gerber Garment Technology Inc v Lectra Systems Ltd [1997] RPC 443 is more distant from the present case on the facts. It was a suit for infringement of patents in which some of the lost profits for which the plaintiff company claimed damages were suffered by subsidiary companies in which it held all the shares. The decision was that, when a shareholder has a cause of action but his company has none, he can recover damages measured by the reduction in value of his shareholding; but that the plaintiff must prove the amount of his own loss and that it cannot be assumed that this is the same as the loss suffered by the company. Such relevance as the case has lies in the reasoning of Hobhouse LJ (as he then was) in the Court of Appeal. He described (at 474) *Christensen*'s case as 'a good illustration of the application of the relevant principles'. After an extensive quotation from the judgment in that case, he added (at 475):

> 'There is no reason to suppose that this case would have been differently decided in England. The decision helpfully illustrates that, provided that the plaintiff can establish a personal cause of action and can prove a personal loss caused by the defendant's actionable wrong, then the fact that the loss is felt by the plaintiff in the form of the loss of the value of the plaintiff's shares in a company is no answer to the plaintiff's claim. (In that case, as in the present case, no question of remoteness arose.)'

Thus *Christensen*'s case does not appear to have caused problems for English judges hitherto, and I would hope that this position might continue. But it is necessary to add some further discussion of principle, as on the facts the present case is not on all fours with that case or any of the others cited in argument.

Assuming that this is a fairly typical case of a man carrying on business wholly or partly through a company or companies controlled by him, the first question at a trial will be whether Gore Wood & Co owed duties to Mr Johnson personally as well as to Westway Homes Ltd. Such personal duties could arise from a contract of retainer or in tort because of the closeness of relations ('proximity'), or from both sources concurrently. *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506, [1995] 2 AC 145 finally established in English law the legitimacy of recognising that professional advisers may owe to the same client a duty to exercise reasonable care and skill derived from both contract and tort law. Conceivably the rules as to remoteness or the measure of damages could produce different consequences; but in the interests of justice and the clarity of the law this should obviously be avoided unless forced upon the courts. The duty in such a case is most simply seen as a civil law obligation to conform to professional standards. In the argument it was not suggested that for the purposes of this appeal there is any material difference.

Although more elaborately pleaded here, the duty owed to the personal claimant would be to exercise reasonable care and professional skill in handling the legal side of his affairs and those of his relevant company. In this case it would include the elementary responsibility of exercising efficiently the company's option to purchase Mr Moores' land, on the basis that the risk of personal loss to Mr Johnson from a questionable exercise of the option was reasonably foreseeable by Gore Wood & Co. The duty was one of taking reasonable steps to safeguard his interests, not one of indemnity. Subject to that important qualification, there is some analogy with a contract of insurance. When a solicitor is acting for both a shareholder personally and his company, the essence

of the personal relationship is that the individual looks to the solicitor for care to provide personal financial protection.

That brings the discussion to what is perhaps the crucial point in this case. The required degree of personal protection will extend, I think, to protection against the operation of rules of law that might foreseeably restrict the individual's right to recover damages if no duty were owed to him personally by the solicitor. In cases of the present class, two such rules may be relevant among other factors. One may be called the rule in the *Prudential* case, using that as a shorthand to convey that a shareholder in a company has as such no right to recover from a third party damages for breach of the latter's duty to the company. The other may be called the rule in *The Lips*, using that as shorthand for the proposition in *President of India v Lips Maritime Corp, The Lips* [1987] 3 All ER 110 at 117, [1988] AC 395 at 425 per Lord Brandon of Oakbrook:

> 'There is no such thing as a cause of action in damages for late payment of damages. The only remedy which the law affords for delay in paying damages is the discretionary award of interest pursuant to statute.'

But for the solicitor's duty owed to the individual client, such restrictions could result in inability on the part of the latter to recover damages caused to him by the solicitor's negligence. Thus in the present case, whereas the option should have been exercised in a unquestionable manner in February 1988, it was not until more than four years later that the land was belatedly conveyed to Westway Homes Ltd, and not until a further period of about eight months had elapsed that the company obtained a monetary settlement of its claim against the solicitors.

Mr Johnson alleges (inter alia) that in the meantime the property market had collapsed, the development project had ceased to be financially advantageous, and he had incurred very high interest charges for personal borrowings. To the extent that he can establish at a trial that the delay in the obtaining by the company of the land or monetary compensation was caused or materially contributed to by negligence on the part of the defendant solicitors, there would appear to be no sound reason for denying him personal relief for any damages foreseeably caused to him personally by the delay: provided always that double recovery is not sanctioned and the interests of the company's creditors are protected.

While double recovery has to be avoided, at this pre-trial stage I would not rule out the possibility that, on the close scrutiny at trial spoken of by Lord Bingham of Cornhill, it will be found that the ultimate agreed payment to the company was not intended to and did not in fact adequately compensate Mr Johnson for the company's want of title to the land in early 1988. It may be chiefly a matter of the timing. The rule in *The Lips* would not exclude the plaintiff's personal claim; he is not claiming damages for delay in paying damages to him. Rather he is claiming damages for the fact that his company did not have the land in 1988—a claim outside the provenance and the purview of the rule in *The Lips*.

Thus the true scope of the settlement in 1992 is one of the matters requiring examination. In the instant case the settlement covered a very large part of the company's claim. It may well have been a reasonable settlement, reached after having due regard to the interests of the company's creditors, who could not successfully claim that more should have been recovered. There may nevertheless be some possibility that, in addition to any other right to personal damages that he may have against the solicitors, Mr Johnson could be heard to say against them that in any event he should be compensated for his company not having

recovered fully. Such a possibility may be more significant in a case like *Christensen's* case where the shareholder has opposed and complains of the inadequacy of the company's settlement; but I do not think that it can be ignored in the present case at this stage.

In a company winding-up the liquidator may be liable to the company for negligence on his part in making a compromise: see *Re Windsor Steam Coal Co (1901) Ltd* [1929] 1 Ch 151; *Re Home and Colonial Insurance Co* [1930] 1 Ch 102, [1929] All ER Rep 231. Accordingly I think that in cases within that principle the court should avoid sanctioning not only double recovery, but also any real prospect of double recovery. As this aspect was not explored in argument, it need not now be explored further.

Apart from the question of any shortfall in the company's recovery, I think that Mr Johnson could have a good personal claim against the solicitors for compensation on the basis already stated, that is to say on the basis that the damages claimed by him were not suffered by the company. Accordingly I agree with Lord Bingham that the claimed heads of damages numbered in his speech 1, 2, 4 and 5 should not be struck out before trial, and that the same applies to the part of head 3 relating to the enhancement of the value of Mr Johnson's pension if the payments had been duly made. I am rather less clear that the remaining parts of head 3 should be struck out. Certainly, however, these claims relating to lost payments into a pension fund or retention of corresponding amounts in the company's assets look very much like claims for double recovery. As the other members of your Lordships' Appellate Committee are in no doubt that they should be struck out, I am content to concur in that conclusion.

In short, agreeing that at the strike-out stage any reasonable doubt must be resolved in favour of the claimant, I think it safer to avoid fine distinctions, especially before trial; and, with the very limited exceptions just mentioned, to leave all the extant claims in this case of complicated facts open for examination at trial. The open questions would include remoteness. And I would add one other cautionary remark. The trial judge would have to consider, not only issues of double recovery by Mr Johnson and the company, but also any issue of overlapping among Mr Johnson's claims themselves.

Damages for general suffering

In *Watts v Morrow* [1991] 4 All ER 937 at 959–960, [1991] 1 WLR 1421 at 1445, Bingham LJ (as he then was) said:

> 'A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy. But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category. In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort.

> If those effects are foreseeably suffered during a period when defects are repaired I am prepared to accept that they sound in damages even though the cost of the repairs is not recoverable as such. But I also agree that awards should be restrained, and that the awards in this case far exceeded a reasonable award for the injury shown to have been suffered. I agree with the figures which Ralph Gibson LJ proposes to substitute.'

I regard that as an authoritative statement of the present law of England regarding commercial contracts. The exceptional category is not confined, in my view, to contracts to provide pleasure and the like. For example, breaches of contracts for status such as membership of a trade union or a club may carry damages for injured feelings; but it is unnecessary to go into that area further, as I accept that, if there was a contract between Mr Johnson and Gore Wood & Co, it is to be classified in English law as commercial in the sense that damages for mere distress are not available. Contract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude. For present purposes it may be assumed that the same principle applies in so far as the claim is grounded in tort: see *Hayes v James & Charles Dodd (a firm)* [1990] 2 All ER 815 at 826–827 per Purchas LJ. A fuller discussion of these various matters can be found in *Mouat v Clark Boyce* [1992] 2 NZLR 559 (a stage of the litigation not under consideration by the Privy Council in *Clark Boyce v Mouat* [1993] 4 All ER 268, [1994] 1 AC 428).

But that does not quite dispose of Mr Johnson's claim for non-quantifiable damage. He alleges extreme financial embarrassment; it is said that from a state of some prosperity he was reduced to subsistence on social security benefit. He also alleges deterioration in his family relationships, particularly with his wife and son. Although the pleader has treated them as mental distress, such consequences are in truth significantly more than mental distress. They are more akin to the physical inconvenience and discomfort referred to in Bingham LJ's third paragraph. In my opinion the common law would be defective and stray too far from reality, humanity and justice if it remorselessly shut out even a restrained award under these heads. Hence I would leave the claim in this part of the case standing also, although only on the footing that damages could not be awarded merely for injured feelings, nor could aggravated damages be awarded merely on that account.

English case law has fluctuated as to the recoverability of damages in contract for mental distress, as is detailed in *McGregor on Damages* (16th edn, 1997) paras 98–106. See also Dr Harvey McGregor's preface at pp vii–viii. But it has been established since Victorian times that, by contrast with mere mental distress, damages are recoverable for substantial inconvenience and discomfort. Thus in *Hobbs v London & South Western Rly Co* (1875) LR 10 QB 111, [1874–80] All ER Rep 458 a court including Cockburn CJ and Blackburn and Mellor JJ upheld an award to a husband and wife for the inconvenience of having to walk home with young children four or five miles late on a drizzling night, although the wife's catching of a cold was found too remote. That case was applied by Barry J in *Bailey v Bullock* [1950] 2 All ER 1167 in awarding damages against solicitors for the inconvenience to the plaintiff of having to live in an overcrowded house. Such authorities are treated in *McGregor*, paras 93–96, as surviving the recent restriction of damages for mental distress. The third paragraph already quoted from Bingham LJ in *Watts'* case is largely supported by them. The line may not always be easy to draw, and it is particularly difficult before trial to assess the

weight of the claims in the present case. But both a changed way of life because of poverty and damaged family relationships can be grievous forms of non-pecuniary harm. I am respectfully unable to agree that they should be ruled out of the law's purview.

Before parting with the case I would say something about *Addis v Gramophone Co Ltd* [1909] AC 488, [1908–10] All ER Rep 1. In severely confining damages for wrongful dismissal, your Lordships' House of those days appears to have seen the relationship of employer and employee as no more than an ordinary commercial one. This is a world away from the concept now, and in *Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1, [1998] AC 20 the House accepted that there is an implied obligation of mutual trust and confidence, and that an employer is under an implied obligation that he will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage that relationship. Damages for financial loss, including impaired employment prospects, caused by harm to reputation could be recovered. It is true that the *Addis* case was distinguished on the ground that it related to injury to feelings caused by the manner of termination of the relationship, which question did not arise in *Mahmud*'s case: see [1997] 3 All ER 1 at 8 and 20, [1998] AC 20 at 38 and 51 per Lord Nicholls of Birkenhead and Lord Steyn respectively. But the philosophy is altogether different, as is the philosophy embodied in modern employment legislation. Again, as Lord Bingham has pointed out, the *Addis* case was not applied in *Ruxley Electronics and Construction Ltd v Forsyth, Laddingford Enclosures Ltd v Forsyth* [1995] 3 All ER 268, [1996] AC 344. The *Addis* case has not uniformly been followed in the Commonwealth: see *Brown v Waterloo Regional Board of Comrs of Police* (1982) 136 DLR (3d) 49, a judgment of Linden J (the author of *Canadian Tort Law*, now in its sixth edition). The decision was reversed on other grounds, but Linden J's statements of principle were substantially accepted ((1983) 150 DLR (3d) 729). According to that authority, an employee wrongfully dismissed may recover damages for mental distress in some circumstances. To the same effect is *Whelan v Waitaki Meats Ltd* [1991] 2 NZLR 74, which contains an instructive survey of the authorities by Gallen J. I take leave to doubt the permanence of the *Addis* case in English law. But it is not a question arising in the present case either; I make these observations only to avoid being identified with any approbation of the *Addis* case.

For the reasons already given, I would allow Mr Johnson's appeal and would dismiss the cross-appeal except as to the two claims identified by Lord Bingham in his head 3 and as to aggravated damages. In the result the one point on which I differ concerns the claims for damages for financial embarrassment and injury to family relationships: those I would permit to go to trial. I concur in the order for costs proposed by Lord Bingham.

LORD HUTTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I am in full agreement with his speech on the subject of abuse of process and I wish to confine my observations to the issue whether the damages claimed by Mr Johnson are recoverable as a matter of law.

The case advanced by Mr Johnson is that he instructed a firm of solicitors, Gore Wood & Co (GW), to advise him personally as to the conduct of his businesses, including the business of property development which he carried on through a company, Westway Homes Ltd (WWH), of which he was the managing director

and in which he held the entire shareholding with the exception of two shares, and that acting on behalf of WWH he also instructed GW to advise that company. He contends that in advising him as to the business affairs of the company, GW owed him a duty of care in contract and tort and in breach of that duty caused him very substantial financial loss. The question whether the damages claimed are recoverable comes before the House as a preliminary issue and is to be approached on the basis that the facts pleaded by Mr Johnson are capable of establishing a breach of a duty owed to him which caused him loss.

I consider it to be clear that where a shareholder is personally owed a duty of care by a defendant and a breach of that duty causes him loss, he is not debarred from recovering damages because the defendant owed a separate and similar duty of care to the company, provided that the loss suffered by the shareholder is separate and distinct from the loss suffered by the company. This principle was recently stated in the judgment of the Court of Appeal delivered by Sir Christopher Slade in *Walker v Stones* [2000] 4 All ER 412, the court stating that a claimant is entitled to recover damages where:

> '131.(a) the claimant can establish that the defendant's conduct has constituted a breach of some legal duty owed to him personally (whether under the law of contract, torts, trusts or any other branch of the law) AND
>
> 132.(b) on its assessment of the facts, the Court is satisfied that such breach of duty has caused him personal loss, separate and distinct from any loss that may have been occasioned to any corporate body in which he may be financially interested.
>
> 133. I further conclude that, if these two conditions are satisfied, the mere fact that the defendant's conduct may also have given rise to a cause of action at the suit of a company in which the claimant is financially interested (whether directly as a shareholder or indirectly as, for example, a beneficiary under a trust) will not deprive the plaintiff of his cause of action; in such a case, a plea of double jeopardy will not avail the defendant.'

But a more difficult question arises where the shareholder claims a loss which is not separate and distinct from the loss suffered by the company but his loss flows from loss suffered by the company. In *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354, [1982] Ch 204, the claimants sued the directors of the company alleging that they had issued a circular to the shareholders containing a fraudulent misrepresentation concerning the true value of certain assets, and the court stated:

> 'But what [a shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3%, shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not

affect the shares; it merely enables the defendant to rob the company.' (See [1982] 1 All ER 354 at 366–367, [1982] Ch 204 at 222–223.)

I shall call this statement 'the *Prudential Assurance* principle'.

In *Christensen v Scott* [1996] 1 NZLR 273 the Court of Appeal of New Zealand decided that where a plaintiff alleges a breach of duty owed to him personally by accountants and solicitors he is entitled to recover damages notwithstanding that his loss flows from loss suffered by a company in which he is a shareholder through a similar breach of duty owed to the company. In that case two shareholders claimed damages for the diminution in the value of their shareholding in a company caused by the negligence of their accountants and solicitors. In delivering the judgment of the court, after setting out part of the above passage in the judgment in the *Prudential* case, Thomas J stated (at 280):

> 'It may be accepted that the Court of Appeal was correct, however, in concluding that a member has no right to sue directly in respect of a breach of duty owed to the company or in respect of a tort committed against the company. Such claims can only be bought by the company itself or by a member in a derivative action under an exception to the rule in *Foss v Harbottle* ((1843) 2 Hare 461, 67 ER 189). But this is not necessarily to exclude a claim brought by a party, who may also be a member, to whom a separate duty is owed and who suffers a personal loss as a result of a breach of that duty. Where such a party, irrespective that he or she is a member, has personal rights and these rights are invaded, the rule in *Foss v Harbottle* is irrelevant. Nor would the claim necessarily have the calamitous consequences predicted by counsel in respect of the concept of corporate personality and limited liability. The loss arises not from a breach of duty owed to the company but from a breach of duty owed to the individuals. The individual is simply suing to vindicate his own right or redress a wrong done to him or her giving rise to a personal loss. We consider, therefore, that it is certainly arguable that, where there is an independent duty owed to the plaintiff and a breach of that duty occurs, the resulting loss may be recovered by the plaintiff. The fact that the loss may also be suffered by the company does not mean that it is not also a personal loss to the individual. Indeed, the diminution in the value of Mr and Mrs Christensen's shares in the company is by definition a personal loss and not a corporate loss.'

The approach taken by the Court of Appeal of New Zealand has been approved in a number of judgments of the Court of Appeal. In *Barings plc (in administration) v Coopers & Lybrand (a firm)* [1997] 1 BCLC 427 the plaintiff, a company holding shares in a subsidiary company, claimed damages against the defendants, a firm of accountants, in respect of loss it suffered through loss sustained by its subsidiary, BFS, on the ground that the defendants were in breach of duties of care owed both to the plaintiff and to the subsidiary in carrying out an audit of the subsidiary's accounts. The defendants applied to set aside service of the writ in reliance on the *Prudential Assurance* principle. The defendants' application was rejected by the Court of Appeal and Leggatt LJ stated (at 435):

> 'The *Prudential Assurance* case decides that a shareholder in a company has no independent right of action based on an allegation of diminution in the value of his shares occasioned by damage to the company. Mr Kentridge seeks to rely on it as authority for the proposition that where a company may have a cause of action for damage caused to it by a tortfeasor, a person who

enjoys an independent right of action against the tortfeasor cannot sue him, at least in so far as his damages are measured by a diminution in the value of the company's shares. But in my judgment that is a misapplication of the principle. If C&LS are in breach of a duty of care owed to Barings in respect of audit information supplied to them and the breach causes damage, Barings cannot be disentitled from suing merely because the damages for which C&LS are said to be liable to Barings would or might include damages for which they are said to be liable to BFS. For C&LS are also in breach of a different duty, whether contractual or tortious, owed to BFS. Whereas complications might arise if these claims were made in separate actions, any risk of double jeopardy or of double recovery, such as were envisaged by the New Zealand Court of Appeal in *Christensen v Scott* [1996] 1 NZLR 273 at 280-281, can be avoided if both claims are made in the same action. It may be, for instance, that C&LS are not liable to Barings for loss of the value of the shares in either BFS or any company which has a cause of action against C&LS for such loss. The present case differs from the *Prudential Assurance* case because here the person in the position of shareholder, namely Barings, has a right of action independent of the company, BFS. On the other hand, unlike the situation in the *George Fischer* case, BFS does have a right of action itself. As that case shows, there is no legal principle that a holding company is unable to recover damages for loss in the value of its subsidiaries, resulting directly from a breach of duty owed to it, as distinct from a duty owed (or not owed as the case may be) to the subsidiaries.'

In *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 the plaintiff was entitled to damages for infringement of patent rights held by it and sought to recover damages for losses suffered by subsidiary companies in which it held all the shares, and which themselves had no cause of action, and the defendant contended that the claim was barred by the *Prudential Assurance* principle. That argument was rejected by the Court of Appeal and Hobhouse LJ (as he then was) cited the judgment of the Court of Appeal of New Zealand in *Christensen*'s case and stated (at 475):

'There is no reason to suppose that this case would have been differently decided in England. The decision helpfully illustrates that, provided that the plaintiff can establish a personal cause of action and can prove a personal loss caused by the defendant's actionable wrong, then the fact that the loss is felt by the plaintiff in the form of the loss of the value of the plaintiff's shares in a company is no answer to the plaintiff's claim. (In that case, as in the present case, no question of remoteness arose.)'

The judgments in the *Prudential* case and *Christensen*'s case are difficult to reconcile, and it is also difficult to reconcile the judgment in the *Barings* case with the judgment in the former case because the ground on which Leggatt LJ sought to distinguish it, namely, that in the *Prudential* case the shareholders did not have an individual right of action, is invalid, the court in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 at 336–337, [1982] Ch 204 at 222–223 stating that the defendants owed the shareholders a duty to give sound advice. The *Gerber* case can be distinguished from the *Prudential* case on the ground that the companies in which the plaintiff held shares did not themselves have a cause of action against the defendant. But I consider that the ruling in the *Prudential* case that the shareholders could not recover damages cannot be

explained on the ground of causation, which was the explanation advanced by Hobhouse LJ ([1997] RPC 443 at 471); I think, in agreement with the Court of Appeal of New Zealand in *Christensen*'s case, that the shareholders can be regarded as suffering a loss caused by breach of duty of the defendant notwithstanding that their loss is reflective of loss suffered by the company. Therefore I consider that the issue to be decided is whether this House should follow the reasoning set out in the *Prudential* case or the reasoning set out in *Christensen*'s case.

My Lords, I consider, with respect, that part of the reasoning in the *Prudential* case is open to criticism. In my opinion the view of the Court of Appeal of New Zealand that the loss suffered by a shareholder through the diminution in the value of this shareholding is a personal loss is a more realistic assessment than the view of the Court of Appeal in the *Prudential* case that the shareholder's loss is merely a reflection of the loss suffered by the company and that the shareholder suffers no personal loss. This view has been criticised in an article by Mr M J Sterling on 'The Theory and Policy of Shareholder Actions in Tort' (1987) 50 MLR 468 at 470–471:

> 'The description of the Court of Appeal is not wrong, in that the value of a share is related to the present and expected future levels of dividend of the company and the right to receive dividends is a right of participation in the company, but it is suspiciously limited because a share is commonly treated as a piece of personal property. The fact that a share is valuable because it is a right of participation in a company does not preclude one as a matter of logic from regarding it as a piece of property ... The Court of Appeal gave no reason for preferring their description of a share to one which includes its nature as an item of personal property but some good reason is surely necessary to justify exclusion of this obvious characteristic. It is therefore suggested that, if necessary, a share can be regarded as a piece of personal property and a shareholder could be allowed to sue for injury to it.'

In my respectful opinion there is force in this criticism. However, even if this criticism be accepted, there remains the need to ensure that there is no double recovery and that creditors and the other shareholders of the company are protected. It was this need which was emphasised by Millett LJ (as he then was) in *Stein v Blake* [1998] 1 All ER 724 at 730, as the reason why the principle in the *Prudential* case should be followed:

> 'If this action were allowed to proceed and the plaintiff were to recover for the lost value of his shareholding from the first defendant, this would reduce his ability to meet any judgment which might thereafter be obtained by the liquidators, or by any of the old companies which were not in liquidation, to the prejudice of their creditors. The plaintiff would have obtained by a judgment of the court the very same extraction of value from the old companies at the expense of their creditors that the first defendant is alleged to have obtained by fraud and deceit.'

In *Christensen*'s case the court considered that the problem of double recovery did not arise in that case as the defendants had settled the company's claim with the knowledge that the plaintiffs' claim was outstanding. But the court recognised that double recovery cannot be permitted and that the interests of the creditors of a company must be protected. In my opinion the resolution of the conflict between the *Prudential* case and *Christensen*'s case narrows down to the issue

whether, as held in the former case, the shareholder is debarred from bringing to trial an action claiming loss where such loss is merely reflective of loss suffered by the company, or whether the shareholder is entitled to proceed to trial on such a claim, it being a matter for the trial judge, if the plaintiff establishes his claim, to ensure that there is no double recovery and that creditors and other shareholders of the company do not suffer loss, which was the course which Pumfrey J held should be followed.

My Lords, whilst in a case such as *Christensen's* case there may be merit in permitting an individual shareholder to sue, the decision in the *Prudential* case has stood in England for almost 20 years and, whilst the decision has sometimes been distinguished on inadequate grounds, it has been regarded as establishing a clear principle which the Court of Appeal has followed in other cases. I further consider that the principle has the advantage that, rather than leaving the protection of creditors and other shareholders of the company to be given by the trial judge in the complexities of a trial to determine the validity of the claim made by the plaintiff against the defendant, where conflicts of interest may arise between directors and some shareholders, or between the liquidator and some shareholders, the principle ensures at the outset of proceedings that where the loss suffered by the plaintiff is sustained because of loss to the coffers of the company, there will be no double recovery at the expense of the defendant nor loss to creditors of the company and other shareholders. Therefore whilst I think that this House should uphold the *Prudential Assurance* principle, I also consider that it is important to emphasise that the principle does not apply where the loss suffered by the shareholder is separate and distinct from the loss suffered by the company.

The five heads of claim pleaded by Mr Johnson have been set out in the speech of my noble and learned friend Lord Bingham of Cornhill. I consider that the losses claimed in heads 1, 2, 4 and 5 are separate and distinct from loss sustained by WWH and that those heads of claim should not be struck out. In respect of head 3 I am also in agreement with the opinion of Lord Bingham that because it is not a separate and distinct loss, Mr Johnson cannot claim in respect of the moneys which WWH would have paid into a pension fund for him if those moneys had been available to it, and that that part of the claim should be struck out, but that Mr Johnson can claim in respect of enhancement of the value of the pension if the payments had been made.

For the reasons given by Lord Bingham I would strike out Mr Johnson's claims for damages for mental distress and anxiety and for aggravated damages. Accordingly, I would allow Mr Johnson's appeal and dismiss GW's cross-appeal, save that I would strike out his claim in head 3 for pension payments (or, in the alternative, for the increase in the value of his shareholding if those pension payments had not been made), and for damages for mental distress and anxiety and for aggravated damages. I would concur in the order for costs proposed by Lord Bingham.

LORD MILLETT. My Lords, my noble and learned friend Lord Bingham of Cornhill has recounted the facts and I need not set them out again at any length. The appellant, Mr Johnson, is an entrepreneur who carried on business through a number of companies which he owned and controlled. One of them was Westway Homes Ltd (the company). Mr Johnson was its managing director and virtually only shareholder. The respondent firm (the firm) is a firm of solicitors. Mr Johnson was in the habit of instructing the firm from time to time to act for him in connection with his personal affairs as well as for his various companies.

In 1988 the company held a valuable option to buy land for development. Mr Johnson instructed the firm to exercise the option on the company's behalf. The firm accepted his instructions and served the appropriate notice, but failed to do so in a manner which was incapable of challenge by the vendor. The vendor claimed that the option had not been validly exercised, and the company was obliged to bring proceedings for specific performance against him in the Chancery Division ('the Chancery proceedings'). These were not straightforward, and although the company was ultimately successful it was unable to obtain title to the land until April 1992, that is to say more than four years after it had exercised the option. It was awarded damages and costs against the vendor, but these proved to be irrecoverable.

The firm's failure to deal with the option in a manner which put its exercise beyond dispute caused the company substantial loss. As well as having to bear the costs of the Chancery proceedings, it sustained heavy financial loss as a result of the delay in obtaining title to the land. This loss was of two kinds. First, until the company established its title, it was unable to offer the land as security for its borrowings and so obtain a reduction in the very high interest charges it was paying. Secondly, delay in obtaining title to the land caused a corresponding delay in the commencement and completion of the development and thus in the time when the company could hope to realise any profit from the venture. As it happens, the delay frustrated the development altogether, for the collapse in the property market which took place during the currency of the Chancery proceedings made the venture unprofitable. But this was obviously not foreseeable in 1988, or Mr Johnson would not have caused the company to exercise the option and the vendor would not have resisted its claim to have done so.

In January 1991 the company brought proceedings against the firm for professional negligence. The firm admitted that it had been retained by the company to exercise the option and that it had owed the company a duty of care in doing so. But it denied both liability and quantum. The action came on for trial in October 1992 and was estimated to last 10–12 days. In December 1992, after the trial had already lasted for six weeks and evidence was still being given on behalf of the firm, the case was settled upon payment by the firm of £1,480,000 and £320,000 towards the company's costs. The sum of £1,480,000 represented the greater part of the damages claimed.

Mr Johnson has always claimed that the firm's negligence in the manner in which it exercised the option also caused substantial financial loss to him personally. In April 1993 he brought his own proceedings against the firm. This can have come as no surprise. Mr Johnson had made no secret of his intention to bring such a claim. He had indicated as much in January 1991, well before the company's action came to trial, and his solicitors had been in correspondence with the firm's insurers during 1991–1992. On the eve of the trial his solicitors told those representing the firm that his personal claim would be pursued whether the current proceedings resulted in judgment or settlement. During the settlement negotiations in December 1992 the parties' respective solicitors discussed the possibility of an overall settlement of both Mr Johnson's personal claim and the company's claim, but the paucity of information to enable his personal claim to be quantified made this impossible. It was left that it was a separate claim which would be a matter for separate negotiation in due course. In agreeing the terms on which the company's claim was settled, Mr Johnson submitted to having most of his personal claim capped at £250,000 excluding interest and costs, and the company agreed to apply the settlement moneys in the

discharge of liabilities of the company in respect of which Mr Johnson had given personal guarantees. This was designed to avoid the possibility of double recovery in respect of these liabilities if Mr Johnson brought his own proceedings and was successful.

For the next four and a half years the proceedings brought by Mr Johnson followed the normal course. The parties served and amended their pleadings and exchanged witness statements. Mr Johnson served expert evidence. The firm made a payment into court. A trial date was obtained. But then came a sudden change of tack. The firm instructed fresh leading counsel. In December 1997 the firm's solicitors indicated, for the first time, that it intended to apply inter alia for an order to strike the action out as an abuse of the process of the court. In February 1998 the court ordered the trial of two preliminary issues: (i) whether the proceedings should be struck out as an abuse of the process of the court; and (ii) to what extent (if at all) and assuming the truth of the facts pleaded the heads of damages pleaded in paras 23 and 24 of the re-amended statement of claim were irrecoverable by Mr Johnson as a matter of law by way of damages for the pleaded breaches of duty owed to him.

Mr Johnson pleaded his claim in both contract and tort, and alleged that he had retained the firm to act for him personally as well as for the company in connection with the exercise of the company's option. He alleged that the firm had acted negligently in the manner in which it caused the option to be exercised, and that it had from time to time negligently and with unwarranted optimism advised him personally as to the likely duration and outcome of the Chancery proceedings.

On the first question, the judge (Pumfrey J) found that the proceedings might well have been an abuse of the process of the court, but that in the light of the circumstances in which the company's action had been settled the firm was estopped by convention from contending that they were. Both parties had acted on the common assumption that Mr Johnson would bring his own proceedings and that these would be entertained by the court. On the second question he ruled that none of the heads of damage pleaded was irrecoverable in law.

The Court of Appeal (Nourse, Ward and Mantell LJJ) allowed the firm's appeal. It held that there was no excuse for Mr Johnson's failure to launch his own claims when the company brought its action. 'If he could have done so', Mantell LJ said, 'he should have done so'. It held that there was no estoppel by convention; the parties shared a common assumption that Mr Johnson would bring his own proceedings, but they made no assumption one way or the other whether the court would entertain them; they never thought about the matter. On the second question the Court differed from the judge on the authorities, which it agreed were in an unsatisfactory state, but held that, with only one exception, the pleaded heads of damage were arguably recoverable. Both parties now appeal to the House. Mr Johnson appeals on the first question; the firm cross-appeals on the second.

Mr Johnson's appeal: abuse of process

In describing the proceedings brought by Mr Johnson as an abuse of the process of the court, the Court of Appeal was seeking to apply the well-known principle which Sir James Wigram V-C formulated in *Henderson v Henderson* (1843) 3 Hare 100 at 114, [1843–60] All ER Rep 378 at 381–382 as follows:

> 'I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, *and of adjudication by*, a court

of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. *The plea of res judicata applies*, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' (My emphasis.)

As the passages which I have emphasised indicate, Sir James Wigram V-C did not consider that he was laying down a new principle, but rather that he was explaining the true extent of the existing plea of res judicata. Thus he was careful to limit what he was saying to cases which had proceeded to judgment, and not, as in the present case, to an out of court settlement. Later decisions have doubted the correctness of treating the principle as an application of the doctrine of res judicata, while describing it as an extension of the doctrine or analogous to it. In *Barrow v Bankside Members Agency Ltd* [1996] 1 All ER 981, [1996] 1 WLR 257, Sir Thomas Bingham MR explained that it is not based on the doctrine in a narrow sense, nor on the strict doctrines of issue or cause of action estoppel. As May LJ observed in *Manson v Vooght* [1999] BPIR 376 at 387, it is not concerned with cases where a court has decided the matter, but rather cases where the court has not decided the matter. But these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions. While the exact relationship between the principle expounded by Sir James Wigram and the defences of res judicata and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented.

In one respect, however, the principle goes further than the strict doctrine of res judicata or the formulation adopted by Sir James Wigram V-C, for I agree that it is capable of applying even where the first action concluded in a settlement. Here it is necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding.

However this may be, the difference to which I have drawn attention is of critical importance. It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression. In *Brisbane City Council v A-G for Queensland* [1978] 3 All ER 30 at 36, [1979] AC 411 at 425

Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in *Henderson v Henderson* is abuse of process and observed that it— a

> 'ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.' b

There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of the process of the court for Mr Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the company's action. This question must be determined as at the time when Mr Johnson brought the present proceedings and in the light of everything that had then happened. There is, of course, no doubt that Mr Johnson *could* have brought his action as part of or at the same time as the company's action. But it does not at all follow that he *should* have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of the process of the court. As May LJ observed in *Manson v Vooght* [1999] BPIR 376 at 387, it may in a particular case be sensible to advance claims separately. In so far as the so-called rule in *Henderson v Henderson* suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action. c d e

The rule in *Henderson v Henderson* cannot sensibly be extended to the case where the defendants are different. There is then no question of double vexation. It may be reasonable and sensible for a plaintiff to proceed against A first, if that is a relatively simple claim, in order to use the proceeds to finance a more complex claim against B. On the other hand, it would I think normally be regarded as oppressive or an abuse of process for a plaintiff to pursue his claims against a single defendant separately in order to use the proceeds of the first action to finance the second, at least where the issues largely overlap so as to form, in Sir James Wigram V-C's words, 'the same subject of litigation'. f

Particular care, however, needs to be taken where the plaintiff in the second action is not the same as the plaintiff in the first, but his privy. Such situations are many and various, and it would be unwise to lay down any general rule. The principle is, no doubt, capable in theory of applying to a privy; but it is likely in practice to be easier for him to rebut the charge that his proceedings are oppressive or constitute an abuse of process than it would be for the original plaintiff to do so. g

Mr Johnson conceded that he and the company are privies. He was in a position to decide when to pursue the two claims and whether to pursue them together or separately, and that is enough for present purposes. But Mr Johnson and the company are different legal persons, each with its own creditors, and that is a fact of critical significance. Mr Johnson's personal claims raised difficult issues not present in the company's action: (i) did he retain the firm to act for him personally; (ii) should the firm have foreseen that failure to exercise the option properly would cause loss to Mr Johnson personally as well as to the company; (iii) which if any of his personal losses were recoverable (the issues in the cross-appeal); and (iv) quantum. It was not in the company's interest for his personal claims to be joined with its own much simpler claim, or for its case to be delayed until Mr Johnson's own case was ready for trial. Had the company been h j

in liquidation and its action brought by the liquidator, he would have been well advised to insist on separate trials and to object to any delay in the trial of the company's action.

In these circumstances I am satisfied that Mr Johnson, who was bound to have regard to the interests of the company and its creditors, was entitled to defer the bringing of his own claims until after the company's claim had been resolved. Even if he had chosen to join the two claims in the same writ, it would have been both possible and appropriate for separate trials to be held of (i) liability (ii) quantum (Company) (iii) Mr Johnson's title to sue and (iv) quantum (Mr Johnson); and for (iii) and (iv) to be held over until after (i) and (ii) had been determined. Even as things are, there is no real question of double vexation. The firm was always liable to be sued by two different plaintiffs each with its own cause of action and its own heads of loss. The only area of overlap is in relation to the standard of care which the firm observed. Given that Mr Johnson and the company are privies, neither of them could re-open an adverse judgment on this, being bound by issue estoppel; while the parties could make their own arrangements in the event of a settlement.

Accordingly, I would reject the firm's contention that it was an abuse of process for Mr Johnson to bring his action after the company's claim had been resolved. Even if this were not the case, however, I agree with the trial judge that it would be unconscionable for the firm to raise the issue after the way in which it handled the negotiations for the settlement of the company's action. I would not myself put it on the ground of estoppel by convention. Like the Court of Appeal, I have some difficulty in discerning a common assumption in regard to a matter about which neither party thought at all. This is not to say that estoppel has no part to play in this field. I would regard it as operating in the opposite way. Given that Mr Johnson was entitled to defer the bringing of his own proceedings until after the company's claims had been resolved, it would have been unconscionable for him to have stood by without disclosing his intentions and knowingly allowed the firm to settle the company's action in the belief that it was dealing finally with all liability arising from its alleged negligence in the exercise of the option. To bring his own claim in such circumstances would, in my opinion, amount to an abuse of the process of the court. But nothing like this took place.

This makes it unnecessary to deal with Mr Johnson's submission that it is too late for the firm to raise the issue. If necessary, however, I should have regarded the delay as fatal. Indeed, I should have regarded it as more than delay; I think it amounted to acquiescence. There is no proper analogy with the case which discloses no cause of action. Although it is obviously desirable to apply to strike out a claim which is doomed to fail at the earliest opportunity, there is no point in proceeding with a trial which serves no useful purpose. Even if the point is taken at the trial itself, it is a matter for the trial judge to decide whether to hear the evidence and adjudicate on the facts before deciding whether they give rise to liability, or to assume that the plaintiff will establish his allegations and decide whether, as a matter of law, they give rise to liability.

But the premise in the present case is that Mr Johnson has a good cause of action which he should have brought earlier if at all. I do not consider that a defendant should be permitted to raise such an objection as late as this. A defendant ought to know whether the proceedings against him are oppressive. It is not a question which calls for nice judgment. If he defends on the merits, this should be taken as acquiescence. It might well be otherwise if the ground on

which the proceedings are alleged to be an abuse of process were different. But in a case of the present kind the court is not so much protecting its own process as the interests of the defendant.

Accordingly, I would allow Mr Johnson's appeal on the first question.

The firm's cross-appeal: recoverable heads of damage

A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholders. If the company has a cause of action, this represents a legal chose in action which represents part of its assets. Accordingly, where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. No action lies at the suit of a shareholder suing as such, though exceptionally he may be permitted to bring a derivative action in right of the company and recover damages on its behalf: see *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 at 357, [1982] Ch 204 at 210. Correspondingly, of course, a company's shares are the property of the shareholder and not of the company, and if he suffers loss as a result of an actionable wrong done to him, then prima facie he alone can sue and the company cannot. On the other hand, although a share is an identifiable piece of property which belongs to the shareholder and has an ascertainable value, it also represents a proportionate part of the company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares. The correspondence may not be exact, especially in the case of a company whose shares are publicly traded, since their value depends on market sentiment. But in the case of a small private company like this company, the correspondence is exact.

This causes no difficulty where the company has a cause of action and the shareholder has none; or where the shareholder has a cause of action and the company has none, as in *Lee v Sheard* [1955] 3 All ER 777, [1956] 1 QB 192, *Fischer (George) (GB) Ltd v Multi-Construction Ltd* [1995] 1 BCLC 260, and *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443. Where the company suffers loss as a result of a wrong to the shareholder but has no cause of action in respect of its loss, the shareholder can sue and recover damages for his own loss, whether of a capital or income nature, measured by the diminution in the value of his shareholding. He must, of course, show that he has an independent cause of action of his own and that he has suffered personal loss caused by the defendant's actionable wrong. Since the company itself has no cause of action in respect of its loss, its assets are not depleted by the recovery of damages by the shareholder.

The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder.

These principles have been established in a number of cases, though they have not always been faithfully observed. The position was explained in a well-known passage in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 at 336–337, [1982] Ch 204 at 222–223:

> 'But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3% shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unincumbered property. The deceit practised on the plaintiff does not affect the shares; it merely enables the defendant to rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100,000 to nil. There are two wrongs, the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The plaintiff obviously cannot recover personally some £100,000 damages in addition to the £100,000 damages recoverable by the company.'

It is indeed obvious that (on the given facts, where no consequential losses are stated to have arisen) the defendant cannot be made liable for more than £100,000 in total. It is equally obvious, however, that if the damages were recoverable by the shareholder instead of by the company, this would achieve the same extraction of the company's capital to the prejudice of the creditors of the company as the defendant's misappropriation had done.

It has sometimes been suggested (see, for example, *Fischer (George) (GB) Ltd v Multi-Construction Ltd* [1995] 1 BCLC 260 at 266) that the *Prudential* case is authority only for the proposition that a shareholder cannot recover for the company's loss, and is confined to the case where the defendant is not in breach of any duty owed to the shareholder personally. That is not correct. The example of the safe-deposit box makes this clear. It is the whole point of the somewhat strained business of the key. The only reason for this is to demonstrate that the principle applies even where the loss is caused by a wrong actionable at the suit of the shareholder personally.

The *Prudential* case was followed in *Stein v Blake* [1998] 1 All ER 724, where the facts bore some resemblance to the illustration in the earlier case. The defendant was a 50% shareholder and the sole director of a group of companies ('the old companies'). The plaintiff, who was the other 50% shareholder, alleged that, in

breach of fiduciary duty, the defendant had misappropriated the assets of the old companies by purchasing them at an undervalue and transferring them to other companies in his sole ownership. The plaintiff, who could have brought a derivative action on behalf of the old companies, chose instead to bring a personal action, claiming that he had been deprived of the opportunity to sell his shares in the old companies at their proper value and had suffered personal loss. The Court of Appeal set aside an earlier grant of leave to appeal from the judge's order striking out the plaintiff's action.

The plaintiff sought to distinguish the *Prudential* case by arguing that the defendant was in breach of a duty owed to him personally. But, as I pointed out, that was not the problem. The problem was that the only conduct relied upon as constituting a breach of that duty was the misappropriation of assets belonging to the old companies, so that the only loss suffered by the plaintiff consisted of the diminution in the value of his shareholding which reflected the depletion of the assets of the old companies. The old companies had their own cause of action to recover their loss, and the plaintiff's own loss would be fully remedied by the restitution to the companies of the value of the misappropriated assets. It was not alleged that the plaintiff had been induced or compelled to dispose of his shares in the companies; he still had them. If he were allowed to recover for the diminution in their value, and the companies for the depletion of their assets, there would be double recovery. Moreover, if the action were allowed to proceed and the plaintiff were to recover for the lost value of his shares, the defendant's ability to meet any judgment which the old companies or their liquidators might obtain against him would be impaired, to the prejudice of their creditors. The plaintiff would have obtained by a judgment of the court the very same extraction of value from the old companies at the expense of their creditors as the defendant was alleged to have obtained by fraud. *Heron International Ltd v Lord Grade* [1983] BCLC 244 was a case on the other side of the line. In the course of a contested take-over bid, the directors of the target company, who owned a majority of the company's voting shares, were alleged, in breach of their duties both to the company and to its shareholders, to have accepted proposals which would reduce the value of the company's assets and hence of its shares and induce the shareholders to accept the lower of two rival offers. The Court of Appeal granted the shareholders injunctive relief. It observed out that the decision of the directors, if implemented, would cause loss in two directions. First, the company would suffer loss to the extent that the value of its assets would be depreciated. That loss would be borne exclusively by the company. It was not a loss in respect of which the shareholders could recover, even if the market value of their shares fell in consequence. The other loss would be to the pockets of the shareholders because they were deprived of the opportunity of accepting the higher offer. That loss would be suffered exclusively by the shareholders. It was not a loss to the coffers of the company, which would remain totally unaffected. That could readily be demonstrated. If, as a result of the decision of the board which was impugned, the take-over went through and the entire shareholding in the company became vested in one bidder at a lower price than was available from the other, the recovery of damages by the company would not compensate the former shareholders for their loss. Only a direct action by those shareholders in their own right, and not in right of the company, could provide the necessary compensation.

In *Howard (RP) Ltd & Richard Alan Witchell v Woodman Matthews and Co (a firm)* [1983] BCLC 117 a company and its principal shareholder brought an action in

negligence against a firm of solicitors, alleging that, as a result of the firm's failure to advise an application for a new tenancy under the Landlord and Tenant Act 1954, the company had been obliged to accept a new lease on terms less favourable than those it would have obtained under the Act. In addition, the principal shareholder was obliged to agree that he would not sell his controlling interest in the company without the landlord's consent. The judge (Staughton J) distinguished the *Prudential* case on the ground that the shareholder was not seeking to recover a sum which merely reflected the loss suffered by the company but his own independent loss because his shares were less easily saleable and therefore had a lesser market value. This is capable of being misunderstood, but was correct on the facts, since the shareholder's claim was rightly limited to the loss arising from the requirement to obtain the landlord's consent to any sale of the shares. This was additional to and did not reflect the loss suffered by the company as a result of the terms of the new lease. The shareholder made no claim on his own account in respect of the diminution in the value of his shares due to this.

In *Barings plc (in administration) v Coopers & Lybrand (a firm)* [1997] 1 BCLC 427 a parent company brought an action in negligence against the auditors of a wholly-owned subsidiary. Leggatt LJ correctly distinguished both the *Prudential* case, where the shareholder had no independent cause of action of his own, and the *Fischer* case, where the company had none. Here each of them had its own cause of action. But he stated (at 435) that if the shareholder suffered loss as a result of a breach of duty on the part of the defendant owed to it, it cannot be disentitled from suing merely because the damages claimed would or might include damages for which the defendant was liable to the company. There was, he said, no legal principle which debarred a holding company from recovering damages for loss in the value of its subsidiaries resulting directly from the breach of a duty owed to the holding company as distinct from a duty owed to the subsidiaries. I do not accept this as correct.

In *Christensen v Scott* [1996] 1 NZLR 273 the company carried on the business of potato farming on tenanted land. The landlord defaulted on a mortgage of the land and the mortgagee entered into possession and exercised its power of sale. Access to the standing crop was refused and the company was unable to harvest it, with disastrous financial consequences. The company went into liquidation and receivership, and the receiver and the liquidator brought proceedings for negligence against the company's professional advisers. The action was settled. The shareholders, who had guaranteed the company's debts, opposed the settlement, alleging that the sums offered by way of settlement were totally inadequate. In due course they brought their own proceedings, alleging that the defendants owed duties of care to them personally. They claimed damages representing the diminution in the value of their shareholdings arising from the defendants' negligence. The judge held that such damages reflected the company's loss and could not be recovered by the shareholders. The Court of Appeal of New Zealand allowed the shareholders' appeal.

In giving the judgment of the court, Thomas J distinguished the *Prudential* case on the ground that it did not necessarily exclude a claim brought by a shareholder to whom a separate duty was owed and who suffered his own personal loss as a result of that breach of duty. So far, of course, this is correct: the *Heron* case and the *Howard* case are just such cases. The judge observed that the fact that the loss was also suffered by the company did not mean that it was not also a personal loss suffered by the shareholder. 'Indeed', he added ([1996] 1 NZLR 273 at 280):

> '... the diminution in the value of Mr and Mrs Christensen's shares in the company is by definition a personal loss and not a corporate loss. The loss suffered by the company is the loss of the lease and the profit which would have been obtained from harvesting the potato crop. That loss is reflected in the diminution in the value of Mr and Mrs Christensen's shares. They can no longer realise their shares at the value they enjoyed prior to the alleged default of their accountants and solicitors.'

I cannot accept this reasoning as representing the position in English law. It is of course correct that the diminution in the value of the plaintiffs' shares was by definition a personal loss and not the company's loss, but that is not the point. The point is that it merely reflected the diminution of the company's assets. The test is not whether the company could have made a claim in respect of the loss in question; the question is whether, treating the company and the shareholder as one for this purpose, the shareholder's loss is franked by that of the company. If so, such reflected loss is recoverable by the company and not by the shareholders.

Thomas J acknowledged that double recovery could not be permitted, but thought that the problem did not arise where the company had settled its claim. He considered that it would be sufficient to make an allowance for the amount paid to the liquidator. With respect, I cannot accept this either. As Hobhouse LJ observed in *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 471, if the company chooses not to exercise its remedy, the loss to the shareholder is caused by the company's decision not to pursue its remedy and not by the defendant's wrongdoing. By a parity of reasoning, the same applies if the company settles for less than it might have done. Shareholders (and creditors) who are aggrieved by the liquidator's proposals are not without a remedy; they can have recourse to the Companies Court, or sue the liquidator for negligence.

But there is more to it than causation. The disallowance of the shareholder's claim in respect of reflective loss is driven by policy considerations. In my opinion, these preclude the shareholder from going behind the settlement of the company's claim. If he were allowed to do so then, if the company's action were brought by its directors, they would be placed in a position where their interest conflicted with their duty; while if it were brought by the liquidator, it would make it difficult for him to settle the action and would effectively take the conduct of the litigation out of his hands. The present case is a fortiori; Mr Johnson cannot be permitted to challenge in one capacity the adequacy of the terms he agreed in another.

Reflective loss extends beyond the diminution of the value of the shares; it extends to the loss of dividends (specifically mentioned in the *Prudential* case) and all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds. All transactions or putative transactions between the company and its shareholders must be disregarded. Payment to the one diminishes the assets of the other. In economic terms, the shareholder has two pockets, and cannot hold the defendant liable for his inability to transfer money from one pocket to the other. In principle, the company and the shareholder cannot together recover more than the shareholder would have recovered if he had carried on business in his own name instead of through the medium of a company. On the other hand, he is entitled (subject to the rules on remoteness of damage) to recover in respect of a loss which he has sustained by reason of his inability to have recourse to the company's funds and which the company would not have sustained itself.

The same applies to other payments which the company would have made if it had had the necessary funds even if the plaintiff would have received them qua employee and not qua shareholder and even if he would have had a legal claim to be paid. His loss is still an indirect and reflective loss which is included in the company's claim. The plaintiff's primary claim lies against the company, and the existence of the liability does not increase the total recoverable by the company, for this already includes the amount necessary to enable the company to meet it.

On the assumption which we are bound to make for the purpose of this appeal, which is that the firm was in breach of a duty of care owed to Mr Johnson personally, he is in principle entitled to recover damages in respect of all heads of non-reflective consequential loss which are not too remote. Mr Johnson's principal complaint is that the firm negligently failed to exercise the company's option in a manner which would be incontestable. Even if this constituted the breach of a duty owed to Mr Johnson personally as well as to the company, there was a single breach which made it impossible for the company to establish that it had exercised the option without litigation. In the event this delayed by four years the commencement of the development by the company and the time when the company could raise money at normal commercial rates of interest on the security of the land and commence the proposed development. Damages in respect of these heads of damage are recoverable by the company, and insofar as they are reflected in the diminution in the value of Mr Johnson's shares in the company, are not recoverable by him.

There is a subsidiary complaint, that the firm represented both to the company and to Mr Johnson personally that the Chancery proceedings were certain of success and that judgment would be obtained within a relatively short time. These are separate representations which may be separately sued upon by each representee. In so far as Mr Johnson relied upon the representation made to him and suffered a separate and distinct loss qua representee and not merely qua shareholder or potential recipient of money from the company, he is entitled to recover.

Lord Bingham of Cornhill has identified the various heads of financial loss alleged in the statement of claim. I agree with his analysis and do not wish to add anything except in relation to Mr Johnson's pension. Mr Johnson claims that, but for its lack of funds resulting from the firm's failure to exercise the option properly, the company would have continued to make contributions to Mr Johnson's pension scheme. For the reasons I have endeavoured to state, Mr Johnson cannot recover the amount of the contributions which the company would have made if it had had the necessary funds; this merely reflects the company's loss and is included in its own claim. Nor can Mr Johnson claim interest in respect of the lost contributions for the same reason. But Mr Johnson's claim in respect of the enhancement of his pension is a different matter. The problem here is one of remoteness of damage, not reflective loss, for the loss (or strictly the net loss) is one which the company could not have sustained itself. Had Mr Johnson carried on business in his own name instead of through the medium of the company, then (subject only to the question of remoteness) he would have been entitled to recover a sum representing the lost increase in the value of his pension after giving credit for the amount saved in respect of the contributions and interest. Such loss is separate and distinct from the loss suffered by the company, and while Mr Johnson's claim to recover it faces obvious difficulties, it should not be struck out at this stage. But if he does establish his claim, he will have to give credit for the contributions which would have been required,

whether by the company (reflective loss) or himself (which he has saved) together with interest thereon. a

For the reasons given by Lord Bingham, I too would strike out Mr Johnson's claims to damages for mental distress and anxiety and aggravated damages.

Accordingly, I would dismiss the cross-appeal while varying the order of the Court of Appeal in the manner proposed.

Appeal allowed. Cross-appeal dismissed.

Dilys Tausz Barrister.

R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner

QUEEN'S BENCH DIVISION, DIVISIONAL COURT
BUXTON LJ AND PENRY-DAVEY J
16, 17 OCTOBER, 8 NOVEMBER 2000

Privilege – Legal professional privilege – Solicitor and client – Communications between legal adviser and client – Inspector of taxes exercising statutory investigatory power – Whether provision authorising inspector to require disclosure of material subject to legal professional privilege – Taxes Management Act 1970, s 20(1), (7) – Human Rights Act 1998, Sch 1, art 8.

A merchant bank, MG, devised a tax-related scheme involving a tax arbitrage based on property and discussed it with the inspector of taxes. The inspector decided to investigate further, making use of the powers conferred on him by the Taxes Management Act 1970. Under s 20(1)[a] of that Act, an inspector could by notice in writing require a person to deliver to him such documents as were in the person's possession or power and as (in the inspector's reasonable opinion) contained, or might contain, information relevant to any tax liability to which the person was or might be subject, or the amount of such liability. In contrast to various other investigatory provisions under the 1970 Act, s 20(1) did not expressly protect from disclosure material subject to legal professional privilege. By virtue of s 20(7), a notice under s 20(1) could only be given with the consent of a General or Special Commissioner. On the inspector's application, the Special Commissioner gave his consent to the issue of a s 20(1) notice against MG in respect of various documents, including instructions to, and advice received from, counsel. MG applied for judicial review of the commissioner's decision, contending that s 20(1) did not authorise the inspector to require disclosure of material subject to legal professional privilege. In so contending, they relied not only on the common law rule of legal professional privilege, but also on a person's right to respect for his private life and correspondence under art 8[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the convention). MG also challenged the commissioner's decision that he had no jurisdiction under s 20(7) or otherwise to grant them an oral inter partes hearing, contending that such a hearing was required by the principle of natural justice.

Held – On its true construction, s 20(1) of the 1970 Act authorised an inspector of taxes to issue a notice requiring a taxpayer to disclose material subject to legal professional privilege. That conclusion derived from a consideration of the investigatory provisions of the 1970 Act, which could properly be regarded as a single code, taken as a whole. Such a consideration established that the common law rule of legal professional privilege was excluded from those provisions save

a Section 20, so far as material, is set out at p 538 *e* to *g*, post

b Article 8, so far as material, provides: '1. Everyone has a right to respect for his private ... life ... and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society ... '

where it was expressly incorporated. It was a necessary implication of that premise that arguments based on legal professional privilege could not be used to resist an application for disclosure under s 20(1). Moreover, although interference by the state with material subject to legal professional privilege engaged art 8 of the convention in principle, there was nothing either in authority or in principle to lead the court to think that the convention jurisprudence would forbid that interference when it was exercised for the reasons, and on the legal grounds, that existed in the instant case; particularly bearing in mind that the material was subject to such stringent protection in national law. Further, the requirements of natural justice did not entail the reading into s 20(7) of a jurisdiction to order an oral hearing, as opposed to giving the taxpayer the opportunity to make ex parte submissions. MG had no right to require an oral hearing that was engaged by the commissioner's decision—a decision which controlled a step in the investigation rather than determining the final rights of the parties—and the commissioner had no jurisdiction to afford such a hearing under s 20(7). His decision to give consent to the issue of the notice could not be challenged, and accordingly the application would be dismissed (see p 541 *h* to p 542 *a*, p 543 *d* to *e* to p 544 *a*, p 545 *f g*, p 546 *b*, p 567 *b* to *f*, p 548 *c* to *e* and p 549 *e* to *g*, post).

B (a minor) v DPP [2000] 1 All ER 833 and *R v IRC, ex p Taylor (No 2)* [1990] 2 All ER 409 considered.

Notes

For communications subject to legal professional privilege, see 3(1) *Halsbury's Laws* (4th edn reissue) para 526 and 44(1) *Halsbury's Laws* (4th edn reissue) para 90, and for an inspector's power to require a taxpayer to produce documents in respect of his own liability, see 23 *Halsbury's Laws* (4th edn reissue) para 1626.

For the Taxes Management Act 1970, s 20, see 42 *Halsbury's Statutes* (4th edn) (1996 reissue) 178.

For the Human Rights Act 1998, Sch 1, art 8, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 524.

Cases referred to in judgment

A M & S Europe Ltd v Commission of the European Communities Case 155/79 [1983] 1 All ER 705, [1983] 1 QB 878, [1983] 3 WLR 17, [1982] ECR 1575, ECJ.

B (a minor) v DPP [2000] 1 All ER 833, [2000] 2 WLR 452, HL.

Buttes Gas and Oil Co v Hammer (No 3) [1980] 3 All ER 475, [1981] QB 223, [1980] 3 WLR 668, CA.

Coombs (T C) & Co (a firm) v IRC [1991] 3 All ER 623, sub nom *R v IRC, ex p T C Coombs & Co* [1991] 2 AC 283, [1991] 2 WLR 682, HL.

Gammon (Hong Kong) Ltd v A-G of Hong Kong [1984] 2 All ER 503, [1985] AC 1, [1984] 3 WLR 437, PC.

General Mediterranean Holdings SA v Patel [1999] 3 All ER 673, [2000] 1 WLR 272.

IR Comr v West-Walker [1954] NZLR 191, NZ CA.

Niemietz v Germany (1992) 16 EHRR 97, ECt HR.

Parry-Jones v Law Society [1968] 1 All ER 177, [1969] 1 Ch 1, [1968] 2 WLR 397, CA.

R v Derby Magistrates' Court, ex p B [1995] 4 All ER 526, [1996] AC 487, [1995] 3 WLR 681, HL.

R v IRC, ex p Taylor (No 2) [1990] 2 All ER 409, CA.

R v Secretary of State for the Home Dept, ex p Simms [1999] 3 All ER 400, [2000] 2 AC 115, [1999] 3 WLR 328, HL.

Sweet v Parsley [1969] 1 All ER 347, [1970] AC 132, [1969] 2 WLR 470, HL.

Ventouris v Mountain, The Italia Express [1991] 3 All ER 472, [1991] 1 WLR 607, CA.
Walker (Inspector of Taxes) v Centaur Clothes Group Ltd [2000] 2 All ER 589, [2000] 1 WLR 799, HL.
Wiseman v Borneman [1969] 3 All ER 275, [1971] AC 297, [1969] 3 WLR 706, HL.

Application for judicial review

Morgan Grenfell & Co Ltd (MG) applied for judicial review of the decision of a Special Commissioner (Stephen Oliver QC) on 28 September 1999 giving consent to the issue by the respondent inspector of taxes of a notice under s 20(1) of the Taxes Management Act 1970 requiring MG to disclose certain documents in relation to a potential tax liability. The facts are set out in the judgment of the court.

Michael Beloff QC and *Giles Goodfellow* (instructed by *Slaughter & May*) for MG.
Timothy Brennan and *Ingrid Simler* (instructed by the *Solicitor of Inland Revenue*) for the Crown.

Cur adv vult

8 November 2000. The following judgment of the court was delivered.

BUXTON LJ.

Background

1. These proceedings arise in the context of a tax-related scheme called Sale With Tax Enhanced Leasing Arbitrage (STELA) devised and operated by Morgan Grenfell & Co Ltd (MG), the well-known merchant bank. The scheme was commended to clients by MG as enabling them to secure extremely low-cost term funding through a tax arbitrage based on property.

2. It will be necessary to describe STELA in somewhat more detail at a later stage of this judgment. Its essence, however, was that (to quote MG's documentation promoting the scheme) the client (in the example at which these proceedings are directed, Tesco plc)—

> 'grants a long leasehold interest in property that it already owns to [MG] and then leases it back under a sub-lease in a highly tax efficient manner ... The lump sum obtained from the grant of the property interest is amortised through rental payments made by Tesco under the sub-lease. Tesco receives the sale proceeds tax free (or sheltered from tax) and obtains a tax deduction for the rental payments which repay both the principal and the interest.'

3. That is the tax advantage obtained by Tesco. The substantial premium paid by MG for the granting of the leasehold interest, seen by Tesco as the proceeds of the sale of the lease, would not be expected to attract tax as a capital receipt in the hands of Tesco, because it would be subject to some form of relief; most usually, a set-off against capital losses. For the scheme to be attractive to MG, however, it also had to obtain protection from tax charges that would otherwise accrue in respect of the transactions comprising the scheme. That was achieved, or sought to be achieved, by treating the premium paid by MG not as a capital item, which was the status that it held once it was in the hands of Tesco, but as a trading payment or expense. It would therefore be treated as a charge reducing MG's trading profit, rather than as capital expenditure.

4. MG emphasise that they have throughout been open with the inspector of taxes: there is no suggestion here of tax evasion, and, as MG contended, no question of tax avoidance either. However, on the scheme being discussed with him the inspector expressed concern about the element crucial to MG's position, the treatment of the premium in MG's hands. He questioned whether the assumption that justified that treatment, that the transactions of which the Tesco arrangement was part fell within MG's normal trading as a merchant bank, was in fact correct. An alternative analysis, in the inspector's view, was that the leases had been acquired as capital items, and should be taxed as would be any other leasing transaction: with a consequent and significant adverse effect on MG's tax position.

5. In order to investigate the transaction further, the inspector sought to make use of his statutory powers of investigation contained in the Taxes Management Act 1970. We therefore next set out the essential provisions of the 1970 Act; though it will be necessary to look at much more of that Act as the parties' arguments are reviewed.

The Taxes Management Act 1970 and the issues

6. The central provisions of the 1970 Act with which we are concerned are s 20(1) and (7). Section 20(1) provides that—

> 'an inspector may by notice in writing require a person—(a) to deliver to him such documents as are in the person's possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to—(i) any tax liability to which the person is or may be subject, or (ii) the amount of any such liability ...'

Section 20(7) provides that notices under s 20(1) are not to be given by an inspector unless he is authorised by the Board of Inland Revenue; and:

> '(a) a notice is not to be given by him except with the consent of a General or Special Commissioner; and (b) the Commissioner is to give his consent only on being satisfied that in all the circumstances the inspector is justified in proceeding under this section.'

7. In the present case, the inspector sought, amongst other documents, the instructions to and advice received from counsel in relation to the Tesco transaction: documents that MG contended were subject to the protection of legal professional privilege (LPP). However, when the inspector applied for consent under s 20(7) of the 1970 Act to the Special Commissioner, Stephen Oliver QC, Mr Oliver consented to the issuing by the inspector of the notice, including the calling for the production of the documents subject to LPP. Further, although he was prepared to receive, and did receive, substantial written submissions from MG as to whether he should give his consent, he held that he had no jurisdiction under s 20(7) or otherwise to grant MG the oral inter partes hearing that it sought.

8. MG objects, as a matter of principle, to disclosure of its LPP material. It also complains of Mr Oliver's view of his jurisdiction; and, in more particular relation to the circumstances of the present case, contends that Mr Oliver should not in any event have granted consent to the issuance of the notice that the inspector sought. Various relief is sought in pursuit of those contentions, but the case before us proceeded on the basis of a number of issues or questions, which can be stated as follows.

I. Does s 20(1) of the 1970 Act authorise an inspector to issue a notice requiring disclosure by a taxpayer of LPP material?

II. Does a commissioner hearing an application by an inspector under s 20(7) of the 1970 Act have jurisdiction to permit the intended recipient of the inspector's notice to attend the hearing and make representations?

III. In the present case, could the inspector have held the reasonable opinion that the LPP material contained or might contain information relevant to MG's tax liability, as s 20(1) of the 1970 Act requires?

IV. To the extent that it is a separate issue from III, did the commissioner err in law in consenting to the issue of the notice in relation to the LPP material?

9. Of these questions, that of by far the most general importance, and which occupied by far the greatest time in argument, is question I. We will therefore address that first, dealing separately with each of the steps in the argument.

Legal professional privilege: the general rule

10. The books are replete with strong statements stressing the importance of the protection of LPP: not merely litigation privilege, which relates to documents produced, not necessarily by a lawyer, for use in or the promotion of litigation; but also legal advice privilege, extending to all communications between client and legal adviser for the purpose of obtaining advice, whether in contemplation of litigation or otherwise. The distinction between the two species of LPP is expounded by Lord Denning MR in *Buttes Gas and Oil Co v Hammer (No 3)* [1980] 3 All ER 475 at 483–485, [1981] QB 223 at 242–244, and Bingham LJ in *Ventouris v Mountain, The Italia Express* [1991] 3 All ER 472 at 481–482, [1991] 1 WLR 607 at 618. In our case we are concerned with legal advice privilege. In the words of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court, ex p B* [1995] 4 All ER 526 at 540–541, [1996] AC 487 at 507:

> 'The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.'

The strength of this principle is underlined by the singular circumstances in which it was applied in *Ex p B*. It has more recently been further illuminated by the very full and careful judgment of Toulson J in *General Mediterranean Holdings SA v Patel* [1999] 3 All ER 673, [2000] 1 WLR 272. The general principle was common ground between the parties before us.

The principle of legality

11. The rule of LPP is not only important in itself, but important also because it is, or at least was accepted before us as being, one of the fundamental, virtually constitutional, rules that are protected by what has recently come to be referred to as the principle of legality. That principle places limitations on the power of Parliament to legislate to abrogate or undermine those fundamental rules. True to the doctrine of Parliamentary sovereignty the principle remains a rule of construction, and not itself a fundamental constitutional rule, but it is a rule of construction of striking force. The position was expressed by Lord Hoffman in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 412, [2000] 2 AC 115 at 131:

> 'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.'

12. There is no express language in s 20(1) or elsewhere in the 1970 Act abrogating the rule of LPP that unless effectively removed by statute prevents the inspector's access to LPP material. What then of necessary implication?

Necessary implication

13. Neither of the parties offered a definition of what is meant by *necessary* implication. Mr Beloff QC, for MG, however, argued that we were assisted in that regard by the speeches in their Lordships' House in *B (a minor) v DPP* [2000] 1 All ER 833, [2000] 2 WLR 452.

14. That case concerned the much debated issue of the universality of application of the mens rea principle in the criminal law, and in particular with relation to sexual offences. In a speech the conclusions of which were specifically approved by Lord Irvine of Lairg LC and Lord Mackay of Clashfern, Lord Nicholls of Birkenhead said:

> '"Necessary implication" connotes an implication that is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence.' (See [2000] 1 All ER 833 at 839, [2000] 2 WLR 452 at 458.)

A similar analysis, cited with approval in the *B (a minor)* case by Lord Hutton ([2000] 1 All ER 833 at 853, [2000] 2 WLR 452 at 472), was adopted by Lord Scarman in *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1984] 2 All ER 503 at 508, [1985] AC 1 at 14, in particular in Lord Scarman's numbered paras (4)–(5).

Bearing in mind what Lord Nicholls in *B (a minor) v DPP* [2000] 1 All ER 833 at 836, [2000] 2 WLR 452 at 455 described as Lord Reid's magisterial statement in the leading case of *Sweet v Parsley* [1969] 1 All ER 347 at 349–350, [1970] AC 132 at 148–149 that 'it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary', Lord Nicholls had little difficulty in finding that none of the grounds that he had adumbrated for potentially excluding that fundamental rule by necessary implication were met in the case before him (see [2000] 1 All ER 833 at 835, [2000] 2 WLR 452 at 459).

15. Necessary implication can, however, arise not only from the nature and circumstances of the statutory provision under review, but also from rules governing that provision that are to be deduced from other related provisions. Such implication is implication in its true sense, of logical necessity, rather than, as in the examples cited in para 14 above, of assumption from the surrounding circumstances of what the policy intentions must have been. In the *B (a minor)* case it was an implication by logical deduction from other statutory provisions that was relied on by the Crown as displacing the normal rule of mens rea. In particular, under ss 14 and 15 of the Sexual Offences Act 1956 offences of indecent assault were committed even though the defendant was ignorant of, or in error as to, the age of the girl who was his victim. The Crown argued that it thus followed that the legislative scheme, looked at overall, recognised a rule that the defendant's belief as to the victim's age was irrelevant to his guilt. Since the Indecency with Children Act 1960 was part of that scheme, it must follow, as an exercise in logical deduction or inference, that the instant offence, of inciting a child aged under 14 to commit an act of gross indecency, contrary to s 1(1) of the 1960 Act, was committed even though the defendant held an honest belief that the child was over the age of 14.

16. This mode of argument was regarded by the House as a valid and serious approach to statutory construction, and a clear example of the way in which necessary implication could be used to displace even a rule as strong as that stated in *Sweet v Parsley*. The argument, however, failed because the legislative provisions relied on did not reveal any sufficiently clear general rule. Lord Mackay summarised that conclusion by saying:

> '... there is no sufficiently detailed legislative policy manifested by the Sexual Offences Act 1956 to which the 1960 Act is an appendix to provide a basis for the necessary implication in respect of what was in 1960 a new offence.' (See [2000] 1 All ER 833 at 835, [2000] 2 WLR 452 at 454.)

Expanding on that point, both Lord Nicholls and Lord Hutton ([2000] 1 All ER 833 at 841, 855, [2000] 2 WLR 452 at 460, 474) emphasised the chaotic and unprincipled nature of the previous legislation, including the Offences Against the Person Act 1861 as well as the 1956 Act. As Lord Steyn ([2000] 1 All ER 833 at 847, [2000] 2 WLR 452 at 466) put it, dealing with the argument advanced by the Crown that the 1960 and 1956 Acts were a code: 'If the 1956 Act is to impress a particular meaning on the 1960 Act it must be on the basis that its concrete terms provide a consistency of theme.' In the House's view, the statutory provisions relied on before it to establish the premise from which the implication followed did not satisfy Lord Steyn's test.

Necessary implication from the terms of the Taxes Management Act 1970

17. The Revenue, however, argued that the present case was different. Applying the approach adopted in the *B (a minor)* case to the circumstances of this case, it was possible to extrapolate from the terms of the 1970 Act a general principle or premise that material subject to LPP was not protected from the investigatory provisions of that Act unless it was specifically excluded by the terms of the Act itself. This argument involved, first, consideration of the general structure and nature of the 1970 Act; and, second, analysis of various of its particular provisions. Although they stand as part of the 1970 Act, ss 20–20D thereof were introduced as a new and much more extensive scheme for obtaining information as to a taxpayer's affairs by Sch 6 to the Finance Act 1976. To the

extent that the scheme has been amended or added to, that has been achieved by amendment of the provisions of ss 20–20D as they stand in the 1970 Act, rather than by the creation of other Acts of Parliament. In our judgement, therefore, the relevant provisions of the 1970 Act do pass the first requirement set out in the *B (a minor)* case, in that they can properly be regarded as a single code, legislated by Parliament in that form, and intended to serve as such. We turn therefore to the indications to be found in the terms of the code as to a general rule with regard to LPP.

18. The Revenue relied on five provisions of the code as demonstrating a general principle that where LPP was protected a specific provision was included to that effect: with the corollary that there was a general premise that otherwise LPP was not protected. Of these, s 20B(2) of the 1970 Act, exempting a person from delivering documents relating to the conduct of any pending appeal, does not carry the matter further, since, as was pointed out, appeals may be conducted by persons other than lawyers, and the documents in question may therefore go beyond those subject to LPP. The other examples need more detailed scrutiny.

19. By s 20(3) of the 1970 Act the inspector may give notice to third parties to deliver documents that contain information about the taxpayer's liability, even in certain circumstances if he does not know the identity of the taxpayer. By s 20A of that Act he may require any 'tax accountant' who has been convicted of an offence in relation to tax to deliver documents relevant to the tax liability of any client of his. However, by s 20B(3) such notices cannot be given to a barrister, advocate or solicitor by the inspector, but only by the Board; and by s 20B(8):

> 'A notice under section 20(3) or 8A or section 20A(1) does not oblige a barrister, advocate or a solicitor to deliver or make available, without his client's consent, any document with respect to which a claim to professional privilege could be maintained.'

20. The Revenue argued that this provision would be otiose if there were a general rule that LPP material was protected. If Parliament had intended to incorporate the principle in *R v Derby Magistrates' Court, ex p B* [1995] 4 All ER 526, [1996] AC 487 into the code, the LPP material would by the application of that principle be protected in the lawyer's hands. The ability of the client, whose privilege it is, to waive the protection was similarly established as an integral part of the general doctrine of LPP, and as such not needing any specific legislative protection.

21. The force of these contentions is illustrated by a New Zealand case that was shown to us, *IR Comr v West-Walker* [1954] NZLR 191. The Commissioner of Taxes acting under statutory powers served a notice on a solicitor requiring him to produce correspondence and documents relating to the affairs of a named client. The statute made no reference to LPP material. The Court of Appeal of New Zealand held that such a statute, and such an order, could not be read as extending to material subject to the common law legal advice privilege. Such being the common law rule, its repetition in s 20B(8) was otiose unless the scheme of the 1970 Act was to exclude the LPP rule unless expressly otherwise stated.

22. If s 20B(8) were the only example in the 1970 Act code of a reference to LPP, it might be difficult to conclude that one can deduce from it a consistency of theme in the terms sought by Lord Steyn in the *B (a minor)* case (see para 16 above). But it is not the only such provision. Section 20C of the 1970 Act gives power to enter premises and seize documents where there are reasonable

grounds for suspecting that they are connected with an offence involving serious fraud. Section 20C(4) originally provided that the provisions did not authorise 'the seizure and removal of documents in the possession of a barrister, advocate or solicitor with respect to which a claim to professional privilege could be maintained'.

That provision was, by s 150 of the Finance Act 2000, widened so that it now excludes from the operation of s 20C of the 1970 Act any 'seizure and removal of items subject to legal privilege'.

23. Section 20BA of the Act provides for orders for the delivery of documents in cases where there is reasonable ground for suspecting the existence of an offence involving serious fraud. Paragraph 5 of Sch 1AA to the 1970 Act provides that the provisions of s 20BA do not apply to 'items subject to legal privilege'. Paragraph 5 then proceeds to define the latter concept in some detail but, so far as we could see, entirely consistently with the common law definitions of LPP.

24. We find it difficult or impossible to understand why these specific provisions were included in the code unless the code itself does not recognise the common law rule of LPP. In particular, it is very difficult to rationalise the successive versions of s 20C(4) (set out in para 22 above) if, as MG contended, references in the code to LPP are merely confirmatory of a general rule to which the code is necessarily subject. It is a necessary element in that argument that the exclusion of LPP material in the hands of legal advisers was merely a specifically stated instance of a general, though unexpressed, protection of LPP. But, if that were so, and the terms of the statute were originally thought sufficient to address every incidence of LPP, why was it changed to make specific reference to LPP as a whole?

25. Mr Beloff sounded two warnings in respect of this line of argument. First, he pointed to ss 20BA and 20C of the 1970 Act as both being concerned with the investigation of serious fraud. It was to be expected that the general rule as to LPP would be specifically reinforced in such a case. We see no reason why that follows. If it were thought necessary to give a special reminder of the importance of LPP in some particular case or cases, that might be thought more appropriate in a case such as the present, arising under s 20(1) of the 1970 Act, where no fraud is alleged or suspected.

26. Second, Mr Beloff characterised the Revenue's argument as an argument from redundancy, and reminded us of the view expressed by Lord Hoffman in *Walker (Inspector of Taxes) v Centaur Clothes Group Ltd* [2000] 2 All ER 589 at 595, [2000] 1 WLR 799 at 805 that such arguments carried little weight, since it is not unusual for Parliament to say expressly what the courts would have inferred anyway. The present inquiry however is wider than a consideration of the implications of the redundancy of a single provision in a statute, of the type that Lord Hoffman was addressing in *Walker*'s case. The inquiry in this case is into whether there can fairly be deduced from the terms of the 1970 Act code taken as a whole a consistency of theme that requires, within that code, specific provision to be made for the recognition of LPP. To hold that the cases that we have reviewed do not demonstrate that, but are merely examples of Parliament saying expressly what the courts would infer anyway, would be to say that, within a lengthy series of related provisions, addressing a wide range of different though related situations, Parliament has expressly referred to the rule of LPP in some, though not all, of those situations: the cases for express reminder not being selected on any obviously coherent basis.

27. We are therefore driven to conclude that the provisions of the 1970 Act taken as a whole do demonstrate a premise that the rule of LPP is excluded from them save where it is expressly incorporated. Applying then the approach in the *B (a minor)* case referred to in para 16 above, it is a necessary implication from that premise that arguments based on LPP cannot be used to resist an application for disclosure under s 20(1) of the 1970 Act.

R v IRC, ex p Taylor (No 2)

28. The Revenue argued that we were in any event bound to reach that conclusion because the Court of Appeal had decided in *R v IRC, ex p Taylor (No 2)* [1990] 2 All ER 409, in a judgment delivered by Bingham LJ that was concurred with in full by Lord Donaldson of Lymington MR, that the 1970 Act code did indeed exclude the protection of LPP.

29. In *Ex p Taylor* the Board of Inland Revenue, acting under its powers under s 20(2) of the 1970 Act, required a solicitor to deliver to it documents relating to the solicitor's own tax liability. He objected that some of the material sought included or might include LPP material which his clients had a right to have protected, arguing that Parliament could not, by s 20(2), have intended to override the client's right to LPP in respect of documents in the hands of a legal adviser. Bingham LJ rejected that argument. He pointed to Parliament's having had the position of professional legal advisers clearly in mind, as evidenced by s 20B(8). He continued (at 414):

> 'But there is no preservation of legal professional privilege and no limited protection where the notice relates to a lawyer in his capacity as a taxpayer who is served with a notice under s 20(2). The clear inference is, in my judgment, that a client's ordinary right to legal professional privilege, binding in the ordinary way on a legal adviser, does not entitle such legal adviser as a taxpayer to refuse disclosure. That is not, to my mind, a surprising intention to attribute to Parliament. In different circumstances the Court of Appeal has held that the Law Society is entitled to override a client's right to legal professional privilege when investigating a solicitor's accounts: see *Parry-Jones v Law Society* ([1968] 1 All ER 177, [1969] 1 Ch 1). It is, as I think, altogether appropriate that the Revenue, being charged with the duty of collecting the public revenue, should enjoy a similar power.'

30. Our conclusions in respect of the relevance of *Ex p Taylor* to the present case are as follows. First, we accept that, because the specific issue addressed in *Ex p Taylor* was the ability of a solicitor to hide behind his client's LPP, the case did not decide as a matter of ratio, narrowly understood, that LPP is excluded by the whole of the 1970 Act code. Second, we see the force of Mr Beloff's observation that Bingham LJ did not address the case in the manner required by more recent pronouncements in relation to the principle of legality, treating LPP as an overriding value only to be displaced by clear implication to the contrary; but, rather, applied more limited rules of construction, that excluded the unstated rule of LPP unless an inference to the contrary could be established. That said, however, two further things are striking about the case. First, the Court of Appeal cannot have been ignorant of the significance of the rule of LPP. Although *Ex p B* was decided some years after *Ex p Taylor*, and is a very striking application of the rule of LPP, in its statement of the importance of the principle itself it made, and purported to make, no new law. Second, it is not possible to reconcile the outcome of *Ex p Taylor* with the position contended for by MG in our case. If LPP

is indeed an overriding value, which is not excluded by any necessary implication from the terms of the 1970 Act code, then in the absence of waiver by the client his LPP documents were protected in the hands of his solicitor, whatever the purpose for which those documents were sought.

31. In the event, therefore, while we are unable to act on *Ex p Taylor* in the terms urged on us by the Revenue, the approach and conclusions of the Court of Appeal in that case are wholly consistent with the conclusion as to the construction of the 1970 Act that we have reached on other grounds.

The European Convention on Human Rights

32. At the stage of construing the notice, no question arises under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to the Human Rights Act 1998) (the convention). MG, however, argued that it was at least materially assisted by the provisions as to private life contained in art 8. Invasion of confidential material, such as a lawyer's advice, was a breach of the client's art 8(1) rights, and therefore had to be justified under art 8(2): which could not be achieved in the present case. In support of that argument MG cited the judgment of the European Court of Human Rights in *Niemietz v Germany* (1992) 16 EHRR 97, where a search of a lawyer's office was held to involve a breach of art 8(1). However, two things stand out from the report of that case. First, the privacy that engaged the court was that of the lawyer, not of the client. Second, although the court made reference to the confidential nature of the lawyer's relations with his client, it is clear from para 28 (at 111) of the judgment that it regarded that as but one element, amongst potentially many, in the private life of a practising lawyer. Nothing in the case suggested that what in English terms would be called LPP was given the overriding status that it enjoys in English law, and we were shown no other authority to that effect.

33. Accordingly, while we accept that in principle interference by the state with LPP material potentially engages art 8, we see nothing either in authority or in principle to lead us to think that the convention jurisprudence would forbid that interference when it was exercised for the reasons and on the legal grounds that exist in the present case; in particular bearing in mind that the material is subject to such stringent protection in national law. We do not think that the convention jurisprudence even arguably provides greater protection in this case than is provided by domestic law.

34. Mr Beloff also claimed to gain some assistance from the law of the European Union, in that in his opinion in *A M & S Europe Ltd v Commission of the European Communities* Case 155/79 [1983] 1 All ER 705 at 732–733, [1983] 1 QB 878 at 913, [1982] ECR 1575 at 1654 Advocate General Sir Gordon Slynn considered that the rule of protection of legal advice, whether under the common law rule of LPP, or under the civil law rule of *secret professionnel*, applied equally whether the advice were in the hands of the lawyer or of the client. Absurdity would otherwise result: an absurdity that Mr Beloff suggested would be reproduced in English domestic law if s 20B(8) of the 1970 Act protected LPP material in the hands of the lawyer, but the general rule of the common law did not operate to protect it in the hands of the client. However, the Advocate General in the *A M & S Europe* case was addressing the extent of the general principle, rather than its application in particular cases; and in relation to the 1970 Act there are clear reasons, unconnected with the general principles applying to LPP material, why a lawyer should not be required to breach his client's LPP. And, more generally,

the law of the European Union is an uncertain guide in this field, since it is clear from the judgment of the Court of Justice of the European Communities in *A M & S Europe v Commission of the European Communities* Case 155/79 [1983] 1 All ER 705 at 742, [1983] 1 QB 878 at 913, [1982] ECR 1575 at 1611 (para 21) that the privilege there recognised is to protect the rights of defence of the client in the particular Community proceedings that he faces: that is to say, a restricted version of what in English terms would be litigation privilege, rather than the wider category, in issue in our case, of legal advice privilege.

Conclusion as to issue I

35. For the reasons indicated above, we conclude that s 20(1) of the 1970 Act authorises an inspector to issue a notice requiring disclosure by a taxpayer of LPP material.

Issue II: the jurisdiction of the commissioner under s 20(7) of the Taxes Management Act 1970

36. As we have seen, Mr Oliver concluded that he had no jurisdiction to afford MG an inter partes hearing. The Revenue, in support of that conclusion, urged on structural grounds that the commissioner's decision was an administrative or preliminary decision, not apposite for a contested hearing; and on policy grounds that the inspector, in order to convince the commissioner, might need to relate information of which the taxpayer was unaware, including potentially the names and state of knowledge of informers, which it was wrong for the taxpayer to know at that stage of the proceedings, or possibly at all. MG, while acknowledging the force of the latter considerations, said that it none the less did not follow that there must be a blanket rule prohibiting a hearing in all cases, and much less that Parliament had so decided. The effect of the commissioner's decision was to apply to the present case considerations, and reasons for refusing a hearing, that were more appropriate to a case of suspected fraud or dishonesty: which this was not.

37. The Revenue presented a detailed argument based on comparison with other parts of the 1970 Act code where it was contended that an oral hearing would clearly be inappropriate, for instance where a warrant was sought to permit a raid under s 20C of that Act; so, it was argued, oral hearings must be excluded by the code as a whole. That argument, however, cut both ways. A s 20(1) notice must be preceded by a 'precursor notice' under s 20B(1), giving the taxpayer reasonable opportunity to deliver the sought documents voluntarily; so the considerations of secrecy, important in suspected fraud cases, cannot apply. Rather, the issue is whether there should be implied into s 20(7) a discretion, and MG emphasised that it argued for no more than a discretion, to afford an inter partes hearing.

38. MG said that the answer was straightforward. The commissioner stood between the taxpayer and an over-zealous authority. He decided a matter that could be of substantial importance and concern to the taxpayer, as the present case demonstrated. General principle required the application of the rule of audi alteram partem, including an oral hearing, as well as the opportunity to put forward written submissions that MG had indeed been afforded. As to authority, what appeared to be the assumption of the House of Lords in *T C Coombs & Co (a firm) v IRC* [1991] 3 All ER 623, sub nom *R v IRC, ex p T C Coombs & Co* [1991] 2 AC 283 that applications under s 20(7) of the 1970 Act would take place in the absence of the taxpayer was not a matter of decision nor specifically raised in the

case; and even though the House of Lords had in *Wiseman v Borneman* [1969] 3 All ER 275, [1971] AC 297 not insisted on the taxpayer seeing the Revenue's submissions to the special tribunal involved in that case, it had been emphasised that considerations of natural justice should generally be imported unless to do so would frustrate the purpose of the legislation, and that in any event the tribunal should not be prevented from seeking further information from the taxpayer if it thought that necessary (see [1969] 3 All ER 275 at 278, [1971] AC 297 at 308, per Lord Reid).

39. Two considerations have determined our approach to this question. First, although, as we have said, the commissioner's decision is taken in circumstances different from some other decisions as to methods of investigation that are provided for in the code, it is still a decision controlling a step in the investigation, rather than anything determining the final rights of the parties. We have not overlooked what was said in *Wiseman's* case about the need for the principles of natural justice to apply to all decisions, and not just to those that are final. But those principles are in their application not a uniform and rule-bound code, but vary according to the demands of fairness in the particular situation to which they are applied. We find it difficult to see cogent reasons demanding an inter partes hearing, as opposed to a reasonable opportunity to make representations, at the s 20(7) stage.

40. Second, as Lord Reid said, such principles as are introduced should not frustrate the intention of the legislation. We explored with Mr Beloff how MG considered the commissioner should exercise his discretion if he had one; and how he should explain to the taxpayer any decision not to permit an inter partes hearing. In the first category, so far as access to LPP material was concerned, the commissioner was seen as obliged to give substantial weight to the importance of the issue urged by the taxpayer; so it would be difficult for him to refuse a hearing in any such case. In the second category it rapidly became apparent that in sensitive cases, such as those involving informers, it would be impossible for the commissioner to give acceptable reasons for not exercising his discretion without effectively giving the game away. And in the modern climate of public law a refusal to give any reasons at all would hardly pass unchallenged.

41. We are therefore not persuaded that there are cogent reasons why the requirements of natural justice entail the reading into s 20(7) of the 1970 Act of a jurisdiction to order an oral hearing, as opposed to giving the taxpayer opportunity to make ex parte submissions.

42. We mention two further points. First, some weight was placed on the observation of Lord Reid in *Wiseman's* case (see para 40 above) that the tribunal was not precluded from affording the taxpayer opportunity to make representations if it thought that any point needed elucidation; but his Lordship clearly did not have in mind inter partes representations, as opposed to submissions direct to the tribunal.

43. Second, when the inspector, having obtained consent from the commissioner, serves his notice, he is obliged by s 20(8E) of the 1970 Act to give the taxpayer notice of his reasons for applying for that consent. However, by s 20(8G) of that Act he can omit from the notice anything related to an informer, or any matter that the commissioner has ruled may be omitted. These provisions do not sit well with a system that would provide that consent can or may be sought inter partes. They underline the difficulties that we have referred to in para 40 above; and they clearly demonstrate that Parliament did not intend the taxpayer to have

a right to know, at the consent stage, everything that was then being relied on by the inspector.

44. Substantial reliance was placed in MG's skeleton on the provisions of the convention, but we understood Mr Beloff to agree in argument that a decision under s 20(7) of the 1970 Act did not in itself engage art 6 of the convention, since it was not a decision on MG's civil rights. Rather, the requirements of art 6 were introduced in the present case by the fact that what was under threat was MG's civil right to its LPP material, which was protected under art 8 of the convention.

45. Since this argument is particular to the present case it involves different considerations from those just reviewed. It will also be noted that if the argument is well founded it obliges, and does not merely give the commissioner a discretion to grant, an oral hearing. We have not found it easy to follow all of the elements of the argument, but we would venture the following comments.

46. First, to the extent that the argument depends on MG possessing an assertable right under art 8, as opposed to a right to LPP in English domestic law, it fails for the reasons indicated in para 33 above. Second, the art 6 right to an oral hearing is usually thought to be associated with and to flow from a right to a *public* hearing (see for instance the analysis in Grosz, Beatson and Duffy *Human Rights: The 1998 Act and the European Convention* (2000) p 251 (para C6-77)). But the concept of the public hearing of a s 20(7) application seems completely inept, not to mention its being far from what would be desired by most taxpayers. Third, the test under art 6 is always whether the procedure taken as a whole was fair. We are wholly unpersuaded that for the commissioner, making the particular type of decision facing him, to confine MG to (extensive) written submissions was unfair so as to call for intervention under art 6.

47. We conclude, therefore, that MG had no right to require an oral hearing that was engaged by a decision such as the present. On the more general question raised by issue II we conclude that the commissioner has no jurisdiction to afford the intended recipient of the notice an inter partes hearing in respect of an application for consent under s 20(7).

48. If we are wrong on either of those points, that does not affect the actual consent granted by the commissioner. Whatever hearing he did or did not grant to MG, he would have been bound in law, for the reasons given in the first part of this judgment, not to withhold consent on the ground urged by MG, that the notice extended to LPP material.

Issues III and IV: the inspector's reasonable opinion, and the commissioner's consent

49. It is convenient to take these two issues together, since unless MG can demonstrate that the condition precedent to the commissioner's decision (that the inspector held the *reasonable* opinion that the LPP material contained or might contain information relevant to MG's tax affairs) was not fulfilled, then there is no ground on which the commissioner's decision can be sensibly challenged in public law.

50. The test for determining the existence of that condition precedent is not whether the inspector was right in his opinion, but whether no reasonable inspector could have entertained that opinion; it being noticeable that the state of mind that the inspector has to entertain is an opinion, not a judgement or finding. The Revenue said that it was plainly open to the inspector to hold the opinion that the perception of the STELA transactions as revealed by MG's discussion of

them with their legal advisers might cast light on whether the transactions were regarded as part of MG's regular trade as bankers.

51. MG countered this contention with a detailed argument that set out the circumstances and terms of the STELA transactions as they were apparent from the documents already held by the inspector. MG submitted that it was plain from that that the transaction was a banking loan, albeit of an unusual sort, not a capital investment, and thus on the same level as the rest of MG's trade.

52. We trust that we will be forgiven for not going into that material in detail, because it did not seem to us to illuminate the question that we had to answer. The arguments will no doubt be very apposite when the substantive issue comes to be determined. But the question for us is whether the inspector was unreasonable in thinking that he might obtain assistance from the LPP material. The transaction was unusual. It involved a merchant bank with no obvious interest in property transactions and no obvious expertise in that area becoming involved in a series of leasing arrangements of what appear to be, as supermarkets and the like, very substantial properties. When the question, as here, is not what the nature of those transactions is in themselves, but whether they are part of the bank's trading, then it seems to us that knowledge of how the transactions were presented to the bank's advisers in that very context must be potentially germane to the inspector's inquiries. It may of course well be that such information will fully vindicate MG's claims; but that would equally demonstrate that it was information relevant to MG's tax liability.

53. MG's real complaint, indeed, was not that the information was not potentially relevant to MG's tax liability, but that in the circumstances of the disclosed information it was unreasonable, excessive or disproportionate for the inspector to seek it and for the commissioner to give consent to its being sought. For the reasons that we have indicated, none of those contentions can be sustained. The decisions are for the inspector and the commissioner, and this court will only intervene if they have erred in public law. There are sufficient features of this transaction to attract the notice of the inspector to make it impossible to argue, simply on the basis of the disclosed information, that it is unreasonable to investigate further.

Conclusion

We would answer questions I and III set out in para 8 above Yes and questions II and IV No; with the result that we dismiss this application in its entirety.

Application dismissed.

Celia Fox Barrister.

Post Office v Foley

HSBC Bank plc (formerly Midland Bank plc) v Madden

COURT OF APPEAL, CIVIL DIVISION

NOURSE, MUMMERY AND RIX LJJ

25, 26, 31 JULY 2000

Unfair dismissal – Determination whether dismissal fair or unfair – Dismissal for misconduct – Correct approach to determining fairness of dismissal – Employment Rights Act 1996, s 98.

(1) When applying s 98(1)[a], (2) and (4) of the Employment Rights Act 1996, employment tribunals should give to those provisions the same interpretation as has been placed for many years by the Court of Appeal and the Employment Appeal Tribunal (EAT) on the equivalent provisions in s 57(1), (2) and (3) of the Employment Protection (Consolidation) Act 1978. Thus the 'band or range of reasonable responses' approach to the issue of the reasonableness or unreasonableness of a dismissal remains binding on the Court of Appeal, as well as on employment tribunals and the EAT. Disapproval of that approach, on the basis (i) that the expression was a 'mantra' which led employment tribunals into applying what amounts to a perversity test of reasonableness, instead of the statutory test of reasonableness, and (ii) that it prevented members of employment tribunals from approaching the issue of reasonableness by reference to their own judgment of what they would have done if they had been the employers, is an unwarranted departure from binding authority. The 'range of reasonable responses' approach does not become one of perversity, nor is it rendered unhelpful, by the fact that there may be extremes and that dismissal is the ultimate sanction. Further, that approach is not, in practice, required in every case, and there will be cases in which there is no band or range to consider. In between the extremes, however, there will be cases where there is room for reasonable disagreement among reasonable employers as to whether the dismissal for the particular misconduct is a reasonable or unreasonable response, and in such cases it will be helpful for tribunals to consider the 'range of reasonable responses'. Their members must not simply consider whether they personally think that the dismissal is fair and they must not substitute their decision (ie their subjective view) of what was the right course to adopt for that of the employer. Rather, their proper function is to determine whether the

a Section 98, so far as material, provides: '(1) In determining for the purposes of this Part whether the dismissal is fair or unfair, it is for the employer to show—(a) the reason (or, if more than one reason, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it … (b) relates to the conduct of the employee …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—(a) depends on whether in the circumstances … the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case …'

decision to dismiss the employee fell within the reasonable responses which a reasonable employer might have adopted (see p 553 *c* to *g j*, p 554 *c d*, p 557 *h* to p 558 *d* and p 561 a *f*, post); *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 approved; *Haddon v Van den Bergh Foods Ltd* [1999] IRLR 672 disapproved.

(2) Similarly, the tripartite approach to the reason for, and the reasonableness or unreasonableness of, a dismissal for a reason relating to the conduct of the employee, remains binding on the Court of Appeal, as well as on employment tribunals and the EAT. Any departure from that approach (for example, by suggesting that reasonable grounds for belief in the employee's misconduct, and the carrying out of a reasonable investigation into the matter, relate to establishing the reason for the dismissal rather than its reasonableness) is inconsistent with binding authority. An employment tribunal must not act as if it were conducting a rehearing of, or an appeal against, the merits of the employer's decision to dismiss. The employer, not the tribunal, is the proper person to conduct the investigation into the alleged misconduct. The tribunal's function is to decide whether that investigation was reasonable in the circumstances and whether the decision to dismiss, in the light of the results of that investigation, was a reasonable response (see p 553 *g* to *j*, p 554 *c d*, p 560 *h j* and p 561 *a f*, post); *British Home Stores Ltd v Burchell* [1980] ICR 303 approved.

Decision of the Employment Appeal Tribunal sub nom *Midland Bank plc v Madden* [2000] 2 All ER 741 reversed.

Notes

For unfair dismissal in the context of alleged misconduct, see 16 *Halsbury's Laws* (4th edn reissue) para 335.

For the Employment Rights Act 1996, s 98, see 16 *Halsbury's Statutes* (4th edn) (2000 reissue) 692.

Cases referred to in judgments

Beedell v West Ferry Printers Ltd [2000] IRLR 650, EAT.
British Home Stores Ltd v Burchell [1980] ICR 303, EAT.
Campion v Hamworthy Engineering Ltd [1987] ICR 966, CA.
Clark v Civil Aviation Authority [1991] IRLR 412, EAT.
Devis (W) & Sons Ltd v Atkins [1977] 3 All ER 40, [1977] AC 931, [1977] 3 WLR 214, HL.
Gilham v Kent CC (No 2) [1985] ICR 233, CA.
Haddon v Van den Bergh Foods Ltd [1999] IRLR 672, EAT.
Iceland Frozen Foods Ltd v Jones [1983] ICR 17, EAT.
Inco Europe Ltd v First Choice Distribution (a firm) [2000] 2 All ER 109, [2000] 1 WLR 586, HL.
Morgan v Electrolux Ltd [1991] ICR 369, CA.
Neale v Hereford and Worcester CC [1986] ICR 471, CA.
Weddel (W) & Co Ltd v Tepper [1980] ICR 286, CA.
Whitbread & Co plc v Mills [1988] ICR 776, EAT.
Wilson v Ethicon Ltd [2000] IRLR 4, EAT.

Cases also cited or referred to in skeleton arguments

Abernethy v Mott Hay & Anderson [1974] ICR 323, CA.
Boys and Girls Welfare Society v McDonald [1996] IRLR 129, EAT.
British Leyland UK Ltd v Swift [1981] IRLR 91, CA.
Conlin v United Distillers [1994] IRLR 169, Ct of Sess.

Dobie v Burns International Security Services (UK) Ltd [1984] 3 All ER 333, [1985] 1 WLR 43, CA.
Earl v Slater & Wheeler (Airlyne) Ltd [1973] 1 All ER 145, [1973] 1 WLR 51, NIRC.
Gair v Bevan Harris Ltd [1983] IRLR 368, Ct of Sess.
ILEA v Gravett [1988] IRLR 497, EAT.
Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 All ER 285, [1959] 1 WLR 698, CA.
Lock v Cardiff Railway Co Ltd [1998] IRLR 358, EAT.
Polkey v A E Dayton Services Ltd [1987] 3 All ER 974, [1988] AC 344, HL.
Vickers Ltd v Smith [1977] IRLR 11, EAT.
Watling (N C) & Co Ltd v Richardson [1978] ICR 1049, EAT.
West Midlands Co-op Society Ltd v Tipton [1986] 1 All ER 513, [1986] AC 536, HL.
Yates v British Leyland (UK) Ltd [1974] IRLR 367.

Appeals

Post Office v Foley

The defendant, the Post Office, appealed with permission of Peter Gibson LJ granted on 14 July 1999 from the decision of the Employment Appeal Tribunal (Holland J, I Ezekiel and D Warwick) on 30 March 1999 allowing an appeal by the respondent, John Foley, from the decision of an employment tribunal sitting at London (North), communicated to the parties on 16 April 1998, dismissing his claim for unfair dismissal. The facts are set out in the judgment of Mummery LJ.

HSBC Bank plc (formerly Midland Bank plc) v Madden

The defendant, HSBC Bank plc (formerly Midland Bank plc), appealed with permission from the decision of the Employment Appeal Tribunal (Lindsay J (President), PM Smith and Professor PD Wickens OBE) on 7 March 2000 ([2000] 2 All ER 741) dismissing its appeal from the decision of an employment tribunal sitting at London (North) on 17 July 1999 allowing a claim for unfair dismissal by the respondent, John Madden. The facts are set out in the judgment of Mummery LJ.

David Bean QC and *Robin White* (instructed by *Mark Landon*) for the Post Office.
David Reade (instructed by *Simpson Millar*) for Mr Foley.
Peter McMaster (instructed by *Addleshaw Booth & Co*, Leeds) for the bank.
Manjit Gill QC and *Edward Fitzpatrick* (instructed by *Procaccini Farrell & Co*) for Mr Madden.

Cur adv vult

31 July 2000. The following judgments were delivered.

1. **NOURSE LJ.** Mummery LJ will deliver the first judgment on these appeals.

2. **MUMMERY LJ.**

3. BACKGROUND TO APPEALS

4. The court expedited the hearing of these two appeals in view of the current state of uncertainty in the employment tribunals on some fundamental aspects of the law of unfair dismissal following two recent decisions of the Employment Appeal Tribunal: *Haddon v Van den Bergh Foods Ltd* [1999] IRLR 672, which has

a been followed in *Wilson v Ethicon Ltd* [2000] IRLR 4, but was settled while under appeal to this court; and *Midland Bank plc v Madden* [2000] 2 All ER 741, from which we have heard the appeal, along with the appeal in *Post Office v Foley* (30 March 1999), an unreported case decided by the Employment Appeal Tribunal before *Haddon*'s case and *Madden*'s case were decided. The judgments in both *Haddon*'s case and *Madden*'s case are analysed in detail, in the context of both the b legislative history of unfair dismissal and the development of judicial interpretation, in yet another recent decision of the Employment Appeal Tribunal: *Beedell v West Ferry Printers Ltd* [2000] IRLR 650, in which judgment on behalf of the tribunal was given by Judge Peter Clark.

5. GENERAL INTRODUCTION

c 6. Since employment tribunals throughout Great Britain decide thousands of unfair dismissal cases every month, it is crucial that uncertainty about the law to be applied by them should be dispelled as soon as possible.

7. In my judgment, the employment tribunals should continue to apply the law enacted in s 98(1), (2) and (4) of the Employment Rights Act 1996, giving to d those provisions the same interpretation as was placed for many years by this court and the Employment Appeal Tribunal on the equivalent provisions in s 57(1), (2) and (3) of the Employment Protection (Consolidation) Act 1978.

8. This means that for all practical purposes:

9. (1) 'The band or range of reasonable responses' approach to the issue of the reasonableness or unreasonableness of a dismissal, as expounded by e Browne-Wilkinson J in *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 at 24–25 and as approved and applied by this court (see *Gilham v Kent CC (No 2)* [1985] ICR 233; *Neale v Hereford and Worcester CC* [1986] ICR 471; *Campion v Hamworthy Engineering Ltd* [1987] ICR 966; and *Morgan v Electrolux Ltd* [1991] ICR 369), remains binding on this court, as well as on the employment tribunals and the Employment Appeal f Tribunal. The disapproval of that approach in *Haddon v Van den Bergh Foods Ltd* [1999] IRLR 672 at 676 on the basis that (a) the expression was a 'mantra' which led employment tribunals into applying what amounts to a perversity test of reasonableness, instead of the statutory test of reasonableness as it stands, and that (b) it prevented members of employment tribunals from approaching the issue of reasonableness by reference to their own judgment of what they would g have done had they been the employers, is an unwarranted departure from binding authority.

10. (2) The tripartite approach to (a) the reason for, and (b) the reasonableness or unreasonableness of, a dismissal for a reason relating to the conduct of the employee, as expounded by Arnold J in *British Home Stores Ltd v Burchell* [1980] h ICR 303 at 304 and 308, and as approved and applied by this court in *Weddel (W) & Co Ltd v Tepper* [1980] ICR 286, remains binding on this court, as well as on employment tribunals and the Employment Appeal Tribunal. Any departure from that approach indicated in *Madden*'s case (for example, by suggesting that reasonable grounds for belief in the employee's misconduct and the carrying out j of a reasonable investigation into the matter relate to establishing the reason for dismissal rather than to the reasonableness of the dismissal) is inconsistent with binding authority.

11. Unless and until the statutory provisions are differently interpreted by the House of Lords or are amended by an Act of Parliament, that is the law which should continue to be applied to claims for unfair dismissal. In so holding I am aware that there is a body of informed opinion which is critical of this

interpretation of the 1996 Act. Those views have been comprehensively debated in the able arguments advanced on these appeals by Mr David Bean QC, Mr Reade, Mr McMaster and Mr Manjit Gill QC.

12. A reminder of the fundamental constitutional difference between the interpretation of legislation, which is a judicial function, and the enactment and amendment of legislation, which is a parliamentary function, is required in view of the number of occasions on which reference was made in the submissions to a 'judicial gloss' on the legislation. As Lord Nicholls of Birkenhead said in *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109 at 115, [2000] 1 WLR 586 at 592:

> 'The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature.'

13. In this case the interpretation placed by the tribunals and courts, including this court, on the provisions of the 1978 Act in the *Iceland Frozen Foods* case and *Burchell*'s case has not led Parliament to amend the relevant provisions, even though Parliament has from time to time made other amendments to the law of unfair dismissal, since those authoritative rulings on interpretation were first made. So those rulings, which have been followed almost every day in almost every employment tribunal and on appeals for nearly 20 years, remain binding.

14. They should be applied to the two cases under appeal with the result that both appeals should be allowed and both claims for unfair dismissal fail.

15. (A) THE POST OFFICE APPEAL

16. Mr John Foley was employed by the Post Office as a postal worker from 18 September 1998 until 19 June 1997, when he was dismissed for a reason relating to his conduct. On 3 November 1997 he presented a complaint of unfair dismissal to the employment tribunal which held, as explained in the extended reasons sent to the parties on 16 April 1998, that he was not unfairly dismissed. His appeal against that decision was allowed by the Employment Appeal Tribunal on 30 March 1999 and the case was remitted to the employment tribunal for a remedies hearing. The Post Office appeals with the permission of Peter Gibson LJ.

17. *The decision of the tribunal*

18. The tribunal found that the reason for Mr Foley's dismissal was 'unauthorised absence for part or whole of a duty on 16 May 1997', that that was a reason relating to conduct within s 98(2)(b) of the 1996 Act and that the decision to dismiss him for the conduct alleged, though 'harsh', was reasonable pursuant to s 98(4) of the 1996 Act. It was fair. The tribunal was 'mindful that we must not impose our decision upon that of a reasoned on the spot management decision'. The dismissal was 'within the range of reasonable responses'.

19. *The facts*

20. That conclusion was based on the following findings of fact.

21. (1) Mr Foley was on a late shift on Friday 16 May 1997 at the Princess Royal Distribution Centre, Stonebridge Park, London NW10. The shift was due to finish at 11.00pm. His wife telephoned him at 7.30pm from home at 56 Portland Road, London W11, saying she was in a bad state of nerves and required his

attention. His immediate line manager, Mr Martin Joyce, gave him permission to leave work early. He left between 7.30 and 7.45pm.

22. (2) At about 8.47pm another manager, Mr Simon Kowalski, who was off duty, reported that he saw Mr Foley at the Innisfree Public House in Harrow Road, Wembley, which was about 12 minutes away from the depot, and notified Mr Joyce on his mobile phone. The late shift manager, Ms Susan Johnson, sent two managers (the indoor patrol) to the pub, but Mr Foley could not be seen.

23. (3) On 20 May Ms Johnson instructed Mr Kowalski to conduct a fact-finding interview. He then passed the papers to Ms Johnson, who sent a charge letter to Mr Foley on 3 June 1997.

24. (4) On 11 and 12 June a disciplinary hearing was conducted by Ms Johnson. Mr Foley was accompanied by his trade union representative. There was a dispute about the timing of the events on 16 May. Mr Foley's case was that he was not in the pub at the time when Mr Kowalski said he had seen him. He had gone into the pub at about 8.00pm to phone for a taxi as he wished to get home early and the bus would not arrive for another 18 minutes. The taxi came at 8.20pm. According to Mrs Foley, he arrived home at 8.40pm.

25. (5) Ms Johnson dismissed Mr Foley, who had a clean conduct record, for the alleged misconduct. The hearing was not, however, 'conducted as fairly as it might have been'. Ms Johnson had not followed up lines of inquiry with the licensee of the pub, Mr Mulvaney, who supplied a letter saying that he had called a minicab for Mr Foley at 8.00pm and that it had arrived at 8.20pm, nor with the minicab company, which supplied a document from driver number 98 indicating a time of 8.00pm.

26. (6) Mr Foley appealed. His appeal, at which he was accompanied by his trade union representative, was heard by the appeals manager, Miss Susan Little, on 19 August 1997. Miss Little 'considered the issues with great care and in great depth' and investigated the documentation in relation to the licensee of the pub and the minicab company. She could see no reason for disbelieving Mr Kowalski and concluded that Mr Foley was in the pub after 8.20pm. She attempted unsuccessfully to obtain more information from the minicab company about the time of the pick-up. There was uncontradicted evidence in the chairman's notes of evidence that, like Ms Johnson, she considered the range of responses to the conduct of Mr Foley before concluding that dismissal was the appropriate remedy. It was a permissible option in the Post Office Conduct Code, which provided in section 12.5 (by way of a general guide) that the possible penalties ('not automatic') for 'unauthorised absence for all or part of duty' were 'warning or dismissal'. Her 'careful conduct of the appeal hearing rectified an otherwise unfair dismissal'. Mr Foley was informed on 3 October 1997 of the decision to uphold the dismissal.

27. *The legal position*

28. An appeal from the employment tribunal only lies on a question of law. In my judgment, there was no error of law in the extended reasons for dismissing Mr Foley's claim. The Employment Appeal Tribunal was not entitled to reverse its decision.

29. The legal position is as follows:

30. (1) Reason for dismissal

31. Why did the Post Office dismiss Mr Foley?

32. The Post Office established to the satisfaction of the employment tribunal that the reason for the dismissal of Mr Foley related to his conduct within the meaning of s 98(2)(b), ie unauthorised absence from duty for part of a duty on 16 May 1997. That was the reason for dismissal in the accepted sense that it was a set of facts known to the Post Office, or a set of beliefs held by it, which caused it to dismiss Mr Foley: *Devis (W) & Sons Ltd v Atkins* [1977] 3 All ER 40 at 48, [1977] AC 931 at 954.

33. There is no appeal against that finding of fact. I should, however, add that, although there was some argument about the tribunal's reference (in para 25 of the extended reasons) to the faith that the Post Office must have in the employee giving the 'real reason' for a request to be absent from work, it is clear that the tribunal proceeded on the basis that Mr Foley had given the 'real reason' in stating that Mrs Foley had phoned at 7.30pm requiring his attention to her at home and that had led him to seek and obtain permission to go home. There is no suggestion in the facts found by the tribunal that Mr Foley had obtained permission to go home by giving a false reason to obtain permission to leave early.

34. This paragraph is directed not so much to the particular facts surrounding the reason for dismissal in this case as to a more general explanation of the importance of the employer's trust and confidence in his employee and to the future effect on that trust and confidence if an employee does not use his absence from duty for the purpose for which he has obtained it.

35. (2) Reasonableness of dismissal

36. In the circumstances did the Post Office act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing Mr Foley?

37. The argument on this appeal has focused on the tribunal's conclusion that the Post Office acted reasonably in treating that as a sufficient reason for dismissing Mr Foley. I am unable to find any error of law in that conclusion or in the reasoning process by which the tribunal arrived at it.

38. In accordance with s 98(4) the tribunal considered all the relevant circumstances and determined the question whether the dismissal was fair or unfair in accordance with the equity and substantial merits of the case. In particular, in accordance with the approach in *Burchell's* case, the tribunal considered whether the Post Office had established reasonable grounds for its belief that Mr Foley was guilty of misconduct and that it had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

39. Appeal rehearing point

40. Although the tribunal found that the disciplinary hearing by Ms Johnson was not conducted as fairly as it might have been, because she had not followed up lines of inquiry with the minicab company and the licensee of the pub, this deficiency was remedied on the appeal.

41. There is no error of law in that approach. The appeal was a rehearing and not merely a review of the unsatisfactory initial disciplinary hearing by Ms Johnson. The appeal was properly regarded as part of the overall process of terminating Mr Foley's employment: *Whitbread & Co plc v Mills* [1988] ICR 776 at 792–795; *Clark v Civil Aviation Authority* [1991] IRLR 412 at 415–416 (paras 22, 25 and 26). That process constituted an investigation which was reasonable in all the circumstances. The rehearing was conducted thoroughly by Miss Little. She

investigated the documentation with the minicab company and the licensee of the Innisfree Public House and weighed that against the evidence of Mr Kowalski, whom she had no reason to disbelieve.

42. Range of reasonable responses approach

43. The employment tribunal then followed, as it was bound by authority to do, the *Iceland Frozen Foods* approach and held that, although it was of the view that the decision to dismiss was 'harsh', it was not entitled to substitute itself for the employer and impose its 'decision upon that of a reasoned on the spot management decision'. Instead it asked, as required by authority, whether the dismissal was 'within the range of reasonable responses for this employer to have dismissed this employee'. It found that it was.

44. That finding is not erroneous in law, unless it can be characterised by an appellate body as one which no reasonable tribunal could have reached. That is not, however, the basis on which Mr Reade, on behalf of Mr Foley, attacked the decision of the tribunal. His submission, based on *Haddon*'s case, was that the tribunal ought to have started from the position of considering what it would do in the circumstances and then consider on the objective test in s 98(4) whether the decision to dismiss was reasonable or unreasonable. It should not simply have applied what was described in *Haddon*'s case as the 'mantra' (ie the band of reasonable responses and the warning against substituting its own judgment for that of the employer) which drove employment tribunals to subvert the provisions of s 98 and in effect apply a more extreme perversity test.

45. If the tribunal had taken the approach in *Haddon*'s case it would have given effect to its express view that the decision to dismiss was 'harsh' and it would have concluded that the dismissal of Mr Foley, who had a clean record, for an offence which was not gross misconduct, was manifestly unreasonable.

46. I would reject these submissions on the perversity point and on the substitution point as contrary to authority binding on this court.

47. Perversity point

48. It was made clear in *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 at 25 that the provisions of s 57(3) of the 1978 Act (which were re-enacted in s 98(4) of the 1996 Act) did not require 'such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the section'. The tribunals were advised to follow the formulation of the band of reasonable responses approach instead.

49. If an employment tribunal in any particular case misinterprets or misapplies that approach, so as to amount to a requirement of a perverse decision to dismiss, that would be an error of law with which an appellate body could interfere.

50. The range of reasonable responses approach does not, however, become one of perversity nor is it rendered 'unhelpful' by the fact that there may be extremes and that (as observed in *Haddon v Van den Bergh Foods Ltd* [1999] IRLR 672 at 676) 'Dismissal is the ultimate sanction.' Further, that approach is not in practice required in every case. There will be cases in which there is no band or range to consider. If, for example, an employee, without good cause, deliberately sets fire to his employer's factory and it is burnt to the ground, dismissal is the only reasonable response. If an employee is dismissed for politely saying 'Good morning' to his line manager, that would be an unreasonable response. But in between those extreme cases there will be cases where there is room for reasonable disagreement among reasonable employers as to whether dismissal

for the particular misconduct is a reasonable or an unreasonable response. In those cases it is helpful for the tribunal to consider 'the range of reasonable responses'.

51. Substitution point

52. It was also made clear in *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 at 24–25 that the members of the tribunal must not simply consider whether they personally think that the dismissal is fair and they must not substitute their decision as to what was the right course to adopt for that of the employer. Their proper function is to determine whether the decision to dismiss the employee fell within the band of reasonable responses 'which a reasonable employer might have adopted'.

53. In one sense it is true that, if the application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting their judgment for that of the employer. But that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to 'reasonably or unreasonably' and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the tribunal can substitute their *decision* for that of the employer, that decision must not be reached by a process of substituting *themselves* for the employer and forming an opinion of what they would have done had they been the employer, which they were not.

54. (B) THE MADDEN APPEAL

55. Mr John Madden was employed by the Midland Bank (now HSBC Bank plc) from September 1986. He was a lending officer (grade 4) at the date when he was summarily dismissed on 24 October 1997 for a reason relating to his conduct. He presented a complaint of unfair dismissal to the employment tribunal on 21 January 1998. The tribunal unanimously held that he was unfairly dismissed for the reasons set out in the extended reasons sent to the parties on 17 July 1998. The Employment Appeal Tribunal dismissed the appeal on 7 March 2000.

56. The employment tribunal held that a sufficient investigation into the alleged misconduct of Mr Madden was not carried out in all the circumstances before the decision was made to dismiss him, that more inquiries and investigations should have been made and that the decision to dismiss was not taken on reasonable grounds and was therefore unfair.

57. *The facts*

58. The conclusions of the tribunal were based on the following findings of fact.

59. (1) Mr Madden was regarded as a good and trustworthy employee at the Enfield Town branch of the bank. In June 1996 he was transferred from that branch to the Palmers Green branch, but continued to work one Saturday in four at Enfield Town. He had an unblemished record.

60. (2) In June and July 1997 three customers of the bank had their debit cards misappropriated when they were despatched for collection by them at their branches. The cards were used to obtain goods by deception. Two of the customers, Mr Wood and Mr Clark, expected to collect their cards at the Enfield Town branch and the third, Mr Porter, expected to collect his card at the Palmer's Green branch.

61. (3) In July 1997 a bank employee made unauthorised inquiries through the bank's internal Nixdorf computer system about the status of each of the three customers' accounts to which the debit cards related. The inquiries coincided with the fraudulent use of the cards.

62. (4) Mr Madden was in the relevant branches when the cards might have been misappropriated and he was the only member of the staff who was at the respective branches when all three inquiries were made by accessing the internal Nixdorf computer.

63. (5) On 1 September 1997 Mr Madden was arrested. He was later released without charge. He was suspended on full pay pending further investigations.

64. (6) On 7 October an investigation report was made by Mr C J Murphy, an investigating officer with Midland Security. He reported that the evidence indicated that Mr Madden may have had an involvement in the thefts, although he consistently denied taking the cards or making unauthorised computer inquiries on the customers' accounts.

65. (7) On 24 October 1997 a disciplinary hearing was held by the area manager, Mr Brian Fielder. Mr Madden was represented by a BIFU official. At the end of the hearing he was summarily dismissed on the ground that the bank had a reasonable belief that he had been involved in the misappropriation of the cards which had been used fraudulently and that trust had irretrievably broken down.

66. (8) Mr Madden exercised his right of appeal, but did not proceed with it. His appeal was dismissed in his absence.

67. *The legal position*

68. In my judgment there was an error of law in the extended reasons given by the employment tribunal for concluding that Mr Madden was unfairly dismissed. The Employment Appeal Tribunal ought to have allowed the appeal and dismissed Mr Madden's claim.

69. In view of the earlier discussion of the relevant statutory provisions and case law the legal position can be briefly stated as follows:

70. (1) Reason for dismissal

71. Why did the bank dismiss Mr Madden?

72. There was no dispute that the reason for the dismissal of Mr Madden related to his conduct within the meaning of s 98(2)(b) of the 1996 Act, ie the bank's reasonable belief that he had been involved in the misappropriation of the three debit cards which were subsequently used fraudulently and that that led to an irretrievable breakdown in trust between the bank and Mr Madden.

73. (2) Reasonableness of the dismissal

74. In the circumstances did the bank act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing Mr Madden?

75. In holding that the dismissal of Mr Madden for that reason was unreasonable the employment tribunal erred in law. It did not correctly apply the law as laid down in the authorities already discussed in the *Post Office* case.

76. It impermissibly substituted itself as employer in place of the bank in assessing the quality and weight of the evidence before Mr Fielder, principally in the form of the investigating officer's report. Instead it should have asked whether, by the standards of the reasonable employer, the bank had established reasonable grounds for its belief that Mr Madden was guilty of misconduct and

whether the bank's investigation into the matter was reasonable in the circumstances.

77. The extent of the tribunal's substitution of itself as employer in place of the bank, rather than taking a view of the matter from the standpoint of the reasonable employer, is evident from the tenor of the views expressed by the tribunal on the quality and weight of the available evidence against Mr Madden. I refer to the tribunal's cumulative critical comments on the bank's internal investigation by Mr Murphy, on the disciplinary hearing by Mr Fielder and on the probative value of the material on which Mr Fielder based the summary dismissal: that 'there was no clear culprit for the misappropriation of the cards'; that there was 'no firm evidence of the precise dates on which the cards were taken'; that there was 'no direct evidence that Mr Madden had accessed the Nixdorf system'; that there was no investigation of the 'personal or financial affairs' of other members of the staff; that no account was taken of the nature of the goods bought with the stolen cards; that Mr Fielder failed to take account of the fact that a man in Mr Madden's financial and career position would not have jeopardised all for such a 'relatively paltry theft'; that 'the facts of the case should have produced more than reasonable doubt in Mr Fielder's mind'; that the investigators had closed their minds to any possibility other than the guilt of Mr Madden; that Mr Fielder 'came to a hasty conclusion that Mr Madden was probably guilty' and was content to accept the report of the investigators too readily and uncritically; and that Mr Fielder's decision to dismiss Mr Madden, who had a stainless record of 11 years service, would effectively ruin his career and was not taken on reasonable grounds.

78. In my judgment no reasonable tribunal, properly applying the approach in *Burchell*'s case and the *Iceland Frozen Foods* case to the facts, could have concluded either (a) that the bank had failed to conduct such investigation into the matter as was reasonable in all the circumstances or (b) that dismissal for that reason was outside the range of reasonable responses.

79. Instead of determining whether the bank had made reasonable investigations into the matter and whether it had acted within the range of responses of a reasonable employer, the tribunal in effect decided that, had it been the employer, it would not have been satisfied by the evidence that Mr Madden was involved in the misappropriation of the debit cards or their fraudulent use and would not have dismissed him. The tribunal focused on the insufficiency of the evidence to prove to its satisfaction that Mr Madden was guilty of misconduct rather than on whether the bank's investigation into his alleged misconduct was a reasonable investigation.

80. This case illustrates the dangers of encouraging an approach to unfair dismissal cases which leads an employment tribunal to substitute itself for the employer or to act as if it were conducting a rehearing of, or an appeal against, the merits of the employer's decision to dismiss. The employer, not the tribunal, is the proper person to conduct the investigation into the alleged misconduct. The function of the tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the results of that investigation, is a reasonable response.

81. I would accordingly allow both appeals and dismiss the complaints of unfair dismissal.

82. **RIX LJ.** I agree with the judgment of Mummery LJ which I have had the advantage of reading in draft, and only wish to add a few words on what has been called the 'substitution' point.

83. The possibility of an employment tribunal or of the Employment Appeal Tribunal substituting its own view for that of the employer in question could, in theory, arise in at least three different situations:

84, 85. (1) Either tribunal may be tempted to substitute its own views as to the correct conclusion to be arrived at as to the employee's responsibility for the misconduct complained of.

(2) The employment tribunal is charged under s 98(4) of the Employment Rights Act 1996 with the determination of the question whether the dismissal is fair or unfair and, in so doing, has to decide whether the employer acted reasonably or unreasonably in treating the s 98(2) reason as a sufficient reason for dismissing the employee.

(3) The Employment Appeal Tribunal may be tempted to substitute its own views as to the s 98(4) question of reasonableness or unreasonableness.

86. In my judgment only the second of those three alternatives is legitimate. As a matter of authority binding in this court, that determination required by statute is to be answered by the employment tribunal with the assistance of the 'band of reasonable responses' approach set out in the judgment of Browne-Wilkinson J in *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17.

87. The first and third of those three alternatives are illegitimate. The reason why the first alternative is illegitimate was well explained by Arnold J in *British Home Stores Ltd v Burchell* [1980] ICR 303 at 304. The reason why the third alternative is illegitimate is because the Employment Appeal Tribunal is only entitled to differ from the employment tribunal on a question of law. Therefore, it is only in a very exceptional case, where an employment tribunal can be said to have come to a perverse conclusion, that the Employment Appeal Tribunal can interfere in the employment tribunal's determination as to the s 98(4) test, a determination which is essentially a question of fact. That is authoritatively stated in *Gilham v Kent CC (No 2)* [1985] ICR 233 and in *Neale v Hereford and Worcester CC* [1986] ICR 471.

88. **NOURSE LJ.** I have had the advantage of reading in draft the judgment of Mummery LJ. I agree with it and would allow both appeals accordingly.

Appeals allowed.

Kate O'Hanlon Barrister.

B v Chief Constable of the Avon and Somerset Constabulary

QUEEN'S BENCH DIVISION, DIVISIONAL COURT

LORD BINGHAM OF CORNHILL CJ AND ASTILL J

4, 5 APRIL 2000

Magistrates – Order – Sex offender order – Whether conditions for imposition of sex offender order having to be established on criminal standard of proof – Crime and Disorder Act 1998, s 2.

The respondent chief constable applied to the magistrates for the making of a sex offender order against the appellant, B, under s 2[a] of the Crime and Disorder Act 1998. Such an order could be made if the conditions specified in s 2(1) were fulfilled, namely that the person against whom the order was sought was 'a sex offender' (sub-s (1)(a)) and that he had acted, since the relevant date, in such a way as to give reasonable cause to believe that an order under s 2 was necessary to protect the public from serious harm from him (sub-s (1)(b)). By virtue of sub-s (4), the prohibitions placed on a sex offender by such an order were limited to those necessary for the purpose of protecting the public from serious harm from the offender. Breach of such an order, without reasonable excuse, rendered a person liable to imprisonment or a fine. There was no dispute that B was a sex offender within the meaning of s 2(1)(a), and the magistrates concluded that the s 2(1)(b) condition had also been satisfied. In reaching their findings of fact, the magistrates applied a civil standard of proof, but one that was higher than the minimum accepted in a civil case and was instead nearer to the criminal standard. After setting out their findings of fact, the magistrates informed the parties that they proposed to prohibit B from seeking contact or communication with a child under the age of 16, associating with or befriending such a child, residing in any private dwelling where such a child was present and undertaking any activity likely to bring him into contact with such a child. The order was then typed up and brought back into court, but it included an ungrammatical double negative, prohibiting B from not doing the various prohibited actions. When reading out the order, however, the chairman of the magistrates omitted the double negative, and B stated, through his counsel, that he understood the order. A week later, after B had been arrested for breaching the order, the magistrates corrected the written order by removing the double negative. In a subsequent appeal by way of case stated, B contended that applications for sex offender orders were to be treated as criminal proceedings, and that even if that was wrong the criminal standard of proof should apply in determining whether the s 2(1) conditions had been satisfied. He further contended that the order breached both domestic law and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 in that its terms were too vague and imprecise, and imposed a wholly disproportionate fetter on his personal freedom. Finally, B contended that the order of the court was the original written order, that the magistrates had no power to amend or vary the order if the proceedings were

a Section 2 is set out at p 569 *j* to p 570 *f*, post

civil in nature, and that in its original written form the order was nonsensical and a nullity which could not be given effect.

Held – (1) In deciding whether the conditions in s 2(1) of the 1998 Act had been fulfilled, magistrates were not obliged by domestic law or the convention to apply the criminal standard of proof. In terms of domestic law, proceedings under s 2 were civil rather than criminal in character. That provision was directed not to the detection, apprehension, trial and punishment of those who had committed crimes, but to the restraint of those who had a proven record of sex offending and whose conduct founded a reasonable belief that a measure of restraint was necessary to protect members of the public against the risk of serious harm caused by further sex offending. In such proceedings there was no charge, the making of an order did not depend on the proof of any offence and, while a breach of the order could attract a sanction, the order itself imposed no penalty or disability upon the person restrained. Moreover, although the European Court of Human Rights was not bound by the classification of proceedings in domestic law, there appeared to be no case in which it had held proceedings to be criminal even though an adverse outcome for the defendant could not result in a penalty. In any event, even in criminal proceedings the European Court's jurisprudence did not require contracting states to apply what English law called the criminal standard of proof if the standard applied was sufficiently strong in the eyes of the domestic law to establish what had to be established. However, as the magistrates had recognised in the instant case, a bare balance of probability standard of proof was not to be applied in proceedings under s 2. Rather, magistrates should apply a civil standard of proof which would for all practical purposes be indistinguishable from the criminal standard in deciding whether the s 2(1)(a) condition had been satisfied, and a civil standard with the strictness appropriate to the seriousness of the matters to be proved and the implications of proving them in deciding whether the s 2(1)(b) condition had been satisfied. Accordingly, the first ground of challenge failed (see p 571 *d* to p 572 *b*, p 573 *d* to p 574 *a* and p 576 *f*, post); *Percy v DPP* [1995] 3 All ER 124 distinguished.

(2) If a person was the subject of a prohibitory court order for breach of which he would be liable to severe punishment, he was entitled to know, clearly and unambiguously, what conduct he had to avoid to comply with the order. Such an order should be expressed in simple terms, easily understandable even by those who were not very bright. If it was wider than necessary for the purposes of protecting the public from serious harm, it would not meet the requirements of s 2(4) of the 1998 Act and would fall foul of the convention requirement that the means employed, if restrictive of guaranteed rights, should be necessary and proportionate to the legitimate ends to which they were directed. In the instant case, however, the prohibitions were not in any way unclear, vague or unintelligible. They were as specific as the nature of the case permitted if the order's object was to be effectively served, and it would not have been sensible to specify any place in which, or times at which, the prohibitions were to apply. On a reasonable reading, it was clear what B was not to do. Moreover, in convention terms, the prohibitions had the legitimate object of preventing crime, protecting health and morals and protecting the rights and freedoms of others; they were necessary; and they went no further than was strictly necessary to serve their intended end. Accordingly, the second ground of challenge failed (see p 574 *c* to *j* and p 576 *g*, post).

(3) The order of the court in the instant case was that announced orally by the chairman, not the order as first reduced to writing. It took effect from the date and time of its announcement, save in relation to the statutory requirement to notify. The magistrates were therefore entitled to amend the written version of the order so that it expressed the order announced in open court. Accordingly, the third ground of challenge also failed, and the appeal would therefore be dismissed (see p 575 *g h* and p 576 *e h*, post); *R v Lanyon* [1861–73] All ER Rep 165, *Jolliffe v Jolliffe* [1963] 3 All ER 295 and *Walsh v Barlow* [1985] 1 WLR 90 applied.

Note

For sex offender orders, see Supp to 11(1) *Halsbury's Laws* (4th edn reissue) para 505C.

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Bramblevale Ltd, Re [1969] 3 All ER 1062, [1970] Ch 128, [1969] 3 WLR 699, CA.
Carr v Atkins [1987] 3 All ER 684, [1987] QB 963, [1987] 3 WLR 529, CA.
Everett v Ribbands [1952] 1 All ER 823, [1952] 2 QB 198, CA.
Hornal v Neuberger Products Ltd [1956] 3 All ER 970, [1957] 1 QB 247, [1956] 3 WLR 1034, CA.
Jolliffe v Jolliffe [1963] 3 All ER 295, [1965] P 6, [1964] 2 WLR 13, DC.
Percy v DPP [1995] 3 All ER 124, [1995] 1 WLR 1382, DC.
R v Bolton Justices, ex p Graeme (1986) 150 JP 190, CA.
R v Lanyon (1872) 27 LT 355, [1861–73] All ER Rep 165.
R v Marlow Justices, ex p O'Sullivan [1983] 3 All ER 578, [1984] QB 381, [1984] 2 WLR 107, DC.
R v Secretary of State for the Home Dept, ex p Khawaja [1983] 1 All ER 765, [1984] AC 74, [1983] 2 WLR 321, HL.
R v Southampton Justices, ex p Green [1975] 2 All ER 1073, [1976] QB 11, [1975] 3 WLR 227, CA.
Walsh v Barlow [1985] 1 WLR 90, DC.

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A v United Kingdom (1998) 5 BHRC 137, ECt HR.
Adamson v United Kingdom (1999) 28 EHRR CD 209, ECt HR.
Amand v Secretary of State for Home Affairs [1942] 2 All ER 381, HL.
Austria v Italy (1963) 6 YB 740, EComm HR.
Burnett v George [1992] Fam Law 156, [1993] 1 FCR 1012, CA.
Cohen v Cohen [1947] 2 All ER 69, [1947] P 147, CA.
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M (Minors) (Access: Contempt: Committal), Re [1991] FCR 272, CA.
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Murray v United Kingdom (1995) 19 EHRR 193, ECt HR.
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Osman v United Kingdom (2000) 29 EHRR 245, ECt HR.
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Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, HL.
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R v Brighton Magistrates' Court, ex p Budd (1985) 16 Fam Law 134.
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R v DPP, ex p Kebilene [1999] 4 All ER 801, [1999] 3 WLR 972, HL.
R v Hampshire CC, ex p Ellerton [1985] 1 All ER 599, [1985] 1 WLR 749, CA.
Raimondo v Italy (1994) 18 EHRR 237, ECt HR.
Silver v United Kingdom (1983) 5 EHRR 347, ECt HR.
Soering v United Kingdom (1989) 11 EHRR 439, ECt HR.
Solicitor, Re a [1992] 2 All ER 335, [1993] QB 69, DC.
Steel v United Kingdom (1999) 28 EHRR 603, ECt HR.
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Thomas (P A) & Co v Mould [1968] 1 All ER 963, [1968] 2 QB 913.
X v Netherlands (1986) 8 EHRR 235, ECt HR.

Case stated

The appellant, B, appealed by way of case stated against a sex offender order made against him under s 2 of the Crime and Disorder Act 1998, on 21 October 1999 by the Sedgemoor and Mendip justices sitting at Bridgwater, on the application of the respondent, the Chief Constable of the Avon and Somerset Constabulary. The questions for the opinion of the High Court are set out at p 569 *f* to *h*, post. The facts are set out in the judgment of Lord Bingham of Cornhill CJ.

Cherie Booth QC and *Malcolm Galloway* (instructed by *Alletsons*, Bridgwater) for the appellant.

Lord Lester of Herne Hill QC and *Emma Dixon* (instructed by *Susan Dauncey*, Bristol) for the chief constable.

LORD BINGHAM OF CORNHILL CJ.

1. Mr B (the appellant) appeals by case stated against a sex offender order made by the Sedgemoor and Mendip justices sitting at Bridgwater on 21 October 1999 under s 2 of the Crime and Disorder Act 1998. The appeal raises issues concerning the standard of proof which the justices should have applied before making the order, the lawfulness of the order made having regard to its terms and scope, and the correction of the written form of the order on 28 October.

2. The appellant was born on 25 March 1966 and is now aged 34. His record shows that he has committed 13 overtly sexual offences since 1981. On 15 August 1997, at the Crown Court at Reading, he was sentenced to 18 months' imprisonment for attempting to procure an act of gross indecency with another man, contrary to s 13 of the Sexual Offences Act 1956 and the Criminal Attempts Act 1981. He was released from that sentence. He was then convicted at the Crown Court at Exeter on 18 June 1998 of commission of an act outraging public decency, contrary to common law, for which he was again sentenced to 18 months' imprisonment. From that sentence he was released on conditional licence on 28 July 1999. Following his release from that sentence he committed further acts to which later reference will be made.

3. On 3 August 1999 the appellant was recalled to prison for breach of his licence.

4. On 5 October 1999 the Chief Constable of the Avon and Somerset Constabulary made application against the appellant under s 2 of the 1998 Act. The application begins by reciting that the appellant is a sex offender by virtue of his August 1997 conviction at Reading. That assertion has never been challenged. A sex offender is defined in s 3(1)(a) of the 1998 Act to mean someone convicted of a sexual offence to which Pt I of the Sex Offenders Act 1997 applies. The appellant's conviction under s 13 of the 1956 Act was such an offence (see s 1 of and paras 1(1)(a)(vi) and 5(1)(a) and (b) of Sch 1 to the 1997 Act).

5. The chief constable's application alleges that the defendant between 28 July and 3 August 1999, at Exeter and Bridgwater, acted in such a way as to give reasonable cause to believe that an order under s 2 of the 1998 Act was necessary to protect the public from serious harm from him and accordingly application was made for a sex offender order containing six prohibitions. Some of those prohibitions form part of the order as eventually made, subject to modifications. Some of those requested prohibitions were refused by the justices outright. But the justices added one new prohibition to the order which they made.

6. The application gave a brief account of the acts said to have been committed by the appellant numbered 1 to 12 in the application. Some of those allegations the justices found proved as alleged. One the justices found proved in a modified form. Some of the facts alleged were found not proved.

7. The application was heard by the justices on 19, 20 and 21 October 1999. It will be necessary to return in more detail to the procedure adopted when making the order which is relevant to one ground of appeal.

8. The justices recorded the effect of the order in an original written form of which a copy is before us. The justices found that the applicant was a sex offender. They adjudged that he had acted in a manner (particularised in a number of paragraphs) which gave reasonable cause to believe that the order was necessary to protect the public from serious harm from him. They then set out their findings of primary fact in nine numbered paragraphs as follows:

> '1. On 28 July 1999 the defendant approached a young woman at Exeter Railway Station and initiated a conversation of an indecent nature.
>
> 2. On 28 July 1999 in Blake's Park in Bridgwater, the defendant was observed watching two young girls with his hand inside his trouser flies.
>
> 3. On 28 July 1999 in Bridgwater at various times between 1939 hours and 2006 hours, the defendant was observed watching children and young females and loitering and hiding in their vicinity.
>
> 4. On 31 July 1999 in Bridgwater the defendant was observed hiding in the vicinity of the Esso Garage in Taunton Road.
>
> 5. On 1 August 1999 near the Taunton and Bridgwater Canal in Bridgwater, the defendant befriended a ten year old boy, and was in his company for approximately one and a half hours.
>
> 6. On 2 August 1999 the defendant was seen in Bridgwater at various times watching young boys, hiding in bushes and near the canal watching two children with his hand on his groin.
>
> 7. On 2 August 1999 at Blake's Park in Bridgwater, the defendant was seen to masturbate, then lick fluid from his hands.

a 8. On 3 August 1999 in Bridgwater, the defendant was seen to enter private premises, including a residential old people's home, without consent for a short time.

9. On 3 August 1999 at the Angel Place Shopping Centre in Bridgwater, the defendant was observed watching a female and young children.'

b The justices then made an order in these terms (which I read from the original written draft of the order):

'And it is ordered that the defendant is prohibited from

1. Not to seek contact or communication with a child or young person under the age of 16 years.

c 2. Not to associate or befriend a child or young person under the age of 16 years.

3. Not to reside in any private dwelling where a child or young person under the age of 16 years is present.

4. Not to undertake any activity (paid, voluntary or recreational) which by its nature is likely to bring you into contact with a child or young person d under the age of 16 years.'

9. I pause to observe that the order as so drafted involves an obvious grammatical nonsense. The order is expressed to continue until 21 October 2004 and concludes by saying:

e 'And, by virtue of s 2(5) of the Crime and Disorder Act 1998, while this Order has effect, Pt I of the Sex Offenders Act 1997 shall have effect as if: (a) the defendant was subject to the notification requirement of that Part: and (b) in relation to the defendant, the relevant date (within the meaning of that Part) were the date of service of the Order.'

f 10. The signature of the chairman of the bench follows and there is a note which adds:

'If without reasonable excuse the defendant does anything which he is prohibited from doing by this Order, he shall be liable on conviction to a term of imprisonment not exceeding five years or to a fine or both.'

g 11. The written order was served on the appellant at court. On 25 October 1999 he was released from prison. On 26 October, the following day, he was arrested for breach of the order. He appeared before Torbay justices on 27 October 1999 and was remanded in custody. On his behalf his solicitor applied for bail. By this time the solicitor had noticed the obvious error in the wording of the written h order and submitted on the bail application that it was an abuse to proceed on an order which was a nullity. That submission was not accepted. The effect of making the submission, however, was that the defect in the wording of the written order was drawn to the attention of the police, who drew it to the attention of the justices, who corrected the written form of order on 28 October 1999 by deleting j the words 'prohibited from' from the language of the written order. On 29 October the corrected form of order was notified to the appellant's solicitor.

12. A request to the justices for the statement of a case was duly made, and a case was stated on 21 December 1999. In the case the justices summarised the effect of the chief constable's application and reproduce the findings of fact set out in the order in paras 2(a) to (i). These reproduce the findings numbered 1 to 9 in the order.

13. The justices then made an additional finding to the following effect:

'j) On the Rapid Risk Assessment for Sexual Offence Recidivism, an actuarial risk scale for sexual offence recidivism devised by Dr Karl Hanson, Department of the Solicitor General of Canada, the Appellant scored a total of 5 points, which meant that he has a high likelihood of re-offending, some four times in excess of the expected base rate.'

14. In paras 2(k) and (l) the justices summarised the appellant's record, already referred to, and the justices continued to make these findings:

'm) On the basis of the medical evidence of a consultant forensic psychiatrist, the Appellant has a history of drug and alcohol abuse and this, coupled with his impulsive behaviour, exacerbates the risk of reoffending on release back into the community, particularly with no support in terms of statutory supervision. The Appellant has failed to respond to any treatment intervention so far and continues to deny involvement in past offending or minimises his responsibilities for it. The public most at risk from his offending are young children.

n) The risk of reoffending was so high that it gave reasonable cause to believe that an Order was necessary to protect the public from serious harm from him. In this context the serious harm identified was the danger of the Appellant causing serious psychological injury, to one of the most vulnerable sections of the public, namely young school-age children.

o) The Appellant is a sex offender (within the meaning of section 3(1) of the Crime and Disorder Act 1998) by reason of his conviction for attempting to procure gross indecency and it was more probable than not that he has acted since the relevant date in such a way as to give reasonable cause to believe that an Order is necessary to protect the public from serious harm from him.'

15. The justices then summarised the parties' respective contentions, some of which, on the part of the appellant, had been advanced since the conclusion of the hearing. In para 6 the justices expressed their opinion in these terms:

'The Justices were of the opinion that:-

(a) These were civil proceedings, governed by the civil evidence rules, and the Appellant was not in immediate danger of losing his liberty if an Order was made. Most of the acts complained of, within the complaint, were not in themselves criminal in nature. The Justices therefore made the following pronouncement on the standard of proof: "We noted from the beginning that these proceedings are preventative in nature, in order to protect the public. Parliament could have enacted that the criminal procedure should apply in these proceedings and decided against it. We do not accept that a criminal standard of proof has to apply. Having said that, the consequences of a breach of an Order, which in itself would have to be proved to a criminal standard, are severe. Therefore, we accept that the standard of proof should be higher than the minimum accepted in a civil case and nearer the criminal standard". The Justices applied this approach in making their findings of fact.
(b) The prohibitions contained within the Order announced in Open Court on 21 October 1999 were sufficiently specific, understandable and enforceable and did not contain a double negative. In announcing the prohibitions referred to above, extracts from the written Order, signed by the Chairman, were read out to the Appellant. The written Order, but not what was read out,

contained a double negative. The parties were given a written copy of the Order in Court, and the Appellant's counsel was given approximately 20 minutes in the court cells to go through the Order with him. Counsel and the Appellant returned to the court and the Appellant confirmed he understood it. The written Order was subsequently altered on 28 October 1999 to delete the words "prohibited from" to avoid the double negative. This was to give effect to the Order announced in Court and was not amending or varying the Order in any way. The clerical error occurred due to the wording of the Order having been taken from the prescribed form contained within Schedule 3 of The Magistrates' Courts (Sex Offender and Anti-Social Behaviour Orders) Rules 1998, without the words "prohibited from" being taken out before the prohibitions were inserted. c) The Order made was not incompatible with the provisions or articles of the Human Rights Act 1998, notwithstanding that these were not raised by the Appellant during the hearing but have been subsequently referred to in the request to state a case. The reasons for the Justices' opinion are:- i) The provisions of the Human Rights Act 1998 are not yet in force; ii) As the provisions are not in force the Court is not required to give effect to the Act when construing primary legislation; iii) Had the Justices been required to give effect to the Act it is not accepted that article 5 is engaged; iv) The articles which would need to be considered are 8 and 11, both of which are qualified rights, and in applying the structured approach i.e. is the interference prescribed by law, necessary in a democratic society, does it have a legitimate purpose and is it proportional, this Order is not incompatible and therefore does not breach the Appellant's human rights. (d) Accordingly the Justices made the following Order ...'

16. They then reproduced the four prohibitions which they imposed.

17. The justices posed the following questions for the opinion of the High Court:

'a) Whether the Justices, in making findings of fact which will lead to the making of a Sex Offender Order, have to be satisfied so that they are sure [that] those matters which gave reasonable cause for the making of an Order occurred. b) Whether the wording of the Order is satisfactory, meaningful, sufficiently specific, understandable and enforceable and whether the same is too wide as to be incompatible with article 5(1) and 11 of the European Convention of Human Rights. c) Whether the Justices are entitled to amend a written Order in civil proceedings and if so from what date the Order as amended took effect and whether the effect was retrospective to the date of the original Order and whether in the case of a Sex Offender Order the only means of amendment is in accordance with the Magistrates' Courts (Sex Offender and Anti-Social Behaviour Orders) Rules 1998.'

18. It is necessary to refer to the legislative framework. Part I of the 1998 Act is entitled: 'Prevention of Crime and Disorder'. Section 2 provides:

'(1) If it appears to a chief officer of police that the following conditions are fulfilled with respect to any person in his police area, namely—(a) that the person is a sex offender; and (b) that the person has acted, since the relevant date, in such a way as to give reasonable cause to believe that an order under this section is necessary to protect the public from serious harm from him, the chief officer may apply for an order under this section to be made in respect of the person.

(2) Such an application shall be made by complaint to the magistrates' court whose commission area includes any place where it is alleged that the defendant acted in such a way as is mentioned in subsection (1)(b) above.

(3) If, on such an application, it is proved that the conditions mentioned in subsection (1) above are fulfilled, the magistrates' court may make an order under this section (a "sex offender order") which prohibits the defendant from doing anything described in the order.

(4) The prohibitions that may be imposed by a sex offender order are those necessary for the purpose of protecting the public from serious harm from the defendant.

(5) A sex offender order shall have effect for a period (not less than five years) specified in the order or until further order; and while such an order has effect, Part I of the Sex Offenders Act 1997 shall have effect as if—(a) the defendant were subject to the notification requirements of that Part; and (b) in relation to the defendant, the relevant date (within the meaning of that Part) were the date of service of the order.

(6) Subject to subsection (7) below, the applicant or the defendant may apply by complaint to the court which made a sex offender order for it to be varied or discharged by a further order.

(7) Except with the consent of both parties, no sex offender order shall be discharged before the end of the period of five years beginning with the date of service of the order.

(8) If without reasonable excuse a person does anything which he is prohibited from doing by a sex offender order, he shall be liable—(a) on a summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both; or (b) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both.

(9) Where a person is convicted of an offence under subsection (8) above, it shall not be open to the court by or before which he is so convicted to make an order under subsection (1)(b) (conditional discharge) of section 1A of the 1973 Act in respect of the offence.'

19. It is unnecessary to make reference to the terms of s 3. Section 4 provides for appeal to the Crown Court against the making by justices of a sex offender order.

20. The details of the 1997 Act are not immediately relevant, save to observe that it is a criminal offence for a person subject to the notification requirements of that Act to fail to comply. It is also unnecessary to make detailed reference to the Human Rights Act 1998, although it was referred to in argument before us.

21. Rule 2(3) of the Magistrates' Courts (Sex Offender and Anti-social Behaviour Orders) Rules 1998, SI 1998/2682 provides that a sex offender order shall be in the form set out in Sch 3 to the 1998 rules or a form to the like effect. Schedule 3 sets out the form which the justices used when their order was first reduced to writing, including a sentence which begins: 'And it is ordered that the defendant is prohibited from ...'

22. By r 5 it is provided that any copy of an order required to be sent under the 1998 rules to the defendant shall be either given to him in person or sent by first class post to his last known address and, if so given or sent, shall be deemed to have been received by him.

23. With that by way of lengthy preface, I turn to the first issue, which concerns the standard of proof. It is common ground between the parties that Parliament intended an application for a sex offender order in the magistrates' court to be a civil proceeding and intended the civil standard of proof to apply. But Miss Booth QC for the appellant submits: (1) that, whatever its intention, Parliament has failed to express in the statute as enacted any stipulation that the civil standard of proof shall apply; (2) that, as a matter of domestic law, an application for a sex offender order is to be regarded as a criminal proceeding; (3) that if it is not as a matter of domestic law to be regarded as a criminal proceeding, it is a civil proceeding of such a character that the criminal standard of proof should be applied; and (4) that, whatever the position in domestic law, this proceeding would for purposes of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November; TS 71 (1953); Cmd 8969) (the convention) be regarded as a criminal proceeding and so should attract the criminal standard of proof.

24. As to the first point Miss Booth is correct. Parliament has not expressly enacted what standard of proof shall be applied on an application for a sex offender order. In relation to her second point Miss Booth relies on the severe consequences which may follow for the defendant on the making of a sex offender order: the duty to notify under the 1997 Act on pain of criminal penalty; the restriction on a defendant's freedom of movement and activity; and the possible penalty of up to five years' imprisonment on proof that the order has been broken. These are all important and legitimate considerations, but they do not persuade me that, as a matter of English domestic law, this is to be regarded as a criminal proceeding. Under that law a criminal proceeding is one in which a prosecutor accuses a defendant of committing a specific crime, on conviction of which the defendant will be susceptible to punishment. Here the application is made by a chief officer of police, but he is not acting as a prosecutor. The defendant is not accused of committing any specific crime. If the outcome of the application is adverse to the defendant, he does not become susceptible to punishment. It is true that in s 18(1)(a) of the Supreme Court Act 1981 the expression 'criminal cause or matter' has been interpreted more widely, so as to cover matters such as extradition. In my judgment, however, to assess the character of the present proceedings it is necessary to look more closely into the nature of the issue to be decided by the magistrates' court. Part I of the 1998 Act is concerned with the prevention of crime and disorder, not the trial and punishment of those convicted. Magistrates' court proceedings are initiated under the section by complaint, which is the initiating process for civil matters in the magistrates' court (see s 51 of the Magistrates' Courts Act 1980). The condition provided in s 2(1)(b) of the 1998 Act is in my judgment appropriate as a basis for administrative action, not criminal conviction. Furthermore, the problem to which s 2 is directed is not the detection, apprehension, trial and punishment of those who have committed crimes, but the restraint of those who have a proven record of sex offending and whose conduct founds a reasonable belief that a measure of restraint is necessary to protect members of the public against the risk of serious harm caused by further sex offending.

25. There is no room for doubt about the mischief against which this legislation is directed, which is the risk of re-offending by sex offenders who have offended in the past and have shown a continuing propensity to offend. Parliament might have decided to wait until, if at all, the offender did offend again and then appropriate charges could be laid on the basis of that further offending. Before

1998 there was effectively no choice but to act in that way. But the obvious disadvantage was that, by the time the offender had offended again, some victim had suffered. The rationale of s 2 was, by means of an injunctive order, to seek to avoid the contingency of any further suffering by any further victim. It would also of course be to the advantage of a defendant if he were to be saved from further offending. As in the case of a civil injunction, a breach of the court's order may attract a sanction. But, also as in the case of a civil injunction, the order, although restraining the defendant from doing that which is prohibited, imposes no penalty or disability upon him. I am accordingly satisfied that, as a matter of English domestic law, the application is a civil proceeding, as Parliament undoubtedly intended it to be.

26. In support of her point (3) Miss Booth submitted that the English courts had recognised some proceedings as civil but as none the less attracting the criminal standard of proof. She relied in particular on *Percy v DPP* [1995] 3 All ER 124, [1995] 1 WLR 1382, in which justices exercised their power under s 115 of the 1980 Act to require the defendant to enter into a recognisance to keep the peace. The defendant refused to consent to being bound over in this way and was committed to prison. The issue arose on the standard of proof required to establish that the natural consequence of the defendant's conduct was violence. In a reserved judgment of the court Collins J said:

> 'The justices were also addressed on the correct standard of proof. They decided that, as they were hearing a complaint, the civil rather than the criminal standard of proof was appropriate. We were told that there is no direct authority on this point. In our judgment, it is not necessary to categorise the proceedings in order to determine the standard of proof applicable. In *Re Bramblevale Ltd* [1969] 3 All ER 1062, [1970] Ch 128 the Court of Appeal decided that to establish a civil contempt of court proof beyond reasonable doubt was required. This was because imprisonment might result. Winn LJ stated that the proof must be "consistent with such standard as the court ... regards as consistent with the gravity of the charge ..." (see [1969] 3 All ER 1062 at 1064, [1970] Ch 128 at 137). A failure to comply with the order to enter into a recognisance can result in imprisonment. The order is made to uphold the peace and so one is immediately in the realm of law enforcement in the public rather than a private interest. We note, too, that in *R v Bolton Justices, ex p Graeme* (1986) 150 JP 190 the Court of Appeal decided that an application relative to a complaint under s 115 of the 1980 Act was prima facie in a criminal cause or matter and that in *Everett v Ribbands* [1952] 1 All ER 823 at 826, [1952] 2 QB 198 at 206 Denning LJ described the powers as bearing "many of the characteristics of a criminal proceeding". The fact that it is commenced by complaint rather than information is not conclusive (see *Botross v Hammersmith and Fulham London BC* ((1994) 93 LGR 268)). Our attention has been drawn to *R v Marlow Justices, ex p O'Sullivan* [1983] 3 All ER 578, [1984] QB 381, in which the court decided that the appropriate standard in determining whether a recognisance should be forfeited was the civil standard, at least where the only result of such forfeiture was an order to pay money. We must confess that we do not find that decision entirely satisfactory since it does not have regard to s 120(4) of the 1980 Act, which applies the enforcement powers, including imprisonment, relevant to a fine to the estreating of a recognisance and, in so far as it applies *R v Southampton Justices, ex p Green* [1975] 2 All ER 1073, [1976] QB 11, it relies on reasoning which has

subsequently been disapproved (see *Carr v Atkins* [1987] 3 All ER 684, [1987] QB 963). There are pointers either way to whether the proceedings should be labelled criminal or civil. We do not need to decide which is appropriate, although we would incline to criminal, largely for the reasons given in *Ex p Graeme*. In our judgment, the consequences and circumstances of the proceedings require proof to a high standard. Accordingly, whatever the nature of the proceedings, we consider that the proper standard to be applied is the criminal standard, namely proof beyond reasonable doubt.' (See [1995] 3 All ER 124 at 133–134, [1995] 1 WLR 1382 at 1395.)

27. In my judgment that authority does not carry the appellant far enough. In *Percy*'s case the defendant had a choice between agreeing to be bound over and going to prison. Her refusal to agree to be bound over had an immediate and obvious penal consequence without any intervening stage. The threat of imprisonment was no doubt intended to be coercive but it was also punitive. In my judgment that is a crucial distinction between *Percy*'s case and any injunctive procedure such as in play here.

28. In support of her point (4) Miss Booth submitted, rightly, that the European Court of Human Rights does not regard itself as bound by the classification of proceedings in domestic law. In deciding whether there is a criminal charge for purposes of art 6 of the convention the court has regard to the classification of proceedings in domestic law, but also to the nature of the offence itself and the severity of the penalty which may be imposed (see Lester and Pannick *Human Rights Law and Practice* (1999) p 138, para 4.6.13). Here the proceedings are in my judgment classified as civil in domestic law. No offence is charged and the making of an order does not depend on proof of any offence. No penalty may be imposed. I am aware of no case in which the European Court has held a proceeding to be criminal even though an adverse outcome for the defendant cannot result in any penalty.

29. It is noteworthy that the appellant does not complain of any breach of art 6, which would have been the relevant article (assuming it were in force) if the procedure adopted at the trial was unfair. But the European Court jurisprudence does not even in criminal proceedings require member states to apply what we call the criminal standard of proof if the standard of proof is sufficiently strong in the eyes of the domestic law to establish what has to be established. I would not therefore accept Miss Booth's arguments on this point.

30. It should, however, be clearly recognised, as the justices did expressly recognise, that the civil standard of proof does not invariably mean a bare balance of probability, and does not so mean in the present case. The civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters (see *Bater v Bater* [1950] 2 All ER 458, [1951] P 35, *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970, [1957] 1 QB 247, and *R v Secretary of State for the Home Dept, ex p Khawaja* [1983] 1 All ER 765, [1984] AC 74).

31. In a serious case such as the present the difference between the two standards is, in truth, largely illusory. I have no doubt that, in deciding whether the condition in s 2(1)(a) is fulfilled, a magistrates' court should apply a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard. In deciding whether the condition in s 2(1)(b) is fulfilled the magistrates' court should apply the civil standard with the strictness

appropriate to the seriousness of the matters to be proved and the implications of proving them. *a*

32. I turn to the second issue which concerns the lawfulness of the justices' order. Miss Booth accepted that s 2 of the 1998 Act provided adequate legal authority for making a sex offender order, but she submitted that, to satisfy the requirements of domestic law and the convention (assuming that to be fully in force), an order had to be clear and readily intelligible in its terms, specific as to *b* time and place, and no wider than was necessary to restrain the particular harm which it was feared the appellant might cause. This order, it was submitted, failed the tests of both domestic law and the convention because it was too vague, too imprecise, and imposed a wholly disproportionate fetter on the appellant's personal freedom. In argument before us, reliance was not placed on art 5 of the convention, to which the magistrates were referred, but on arts 8 and 11. *c*

33. With much of this submission I agree. If anyone is the subject of a prohibitory court order for breach of which he is liable to severe punishment, that person is entitled to know, clearly and unambiguously, what conduct he must avoid to comply with the order. Such clarity is essential for him. It is scarcely less essential for any authority responsible for policing compliance with the order and *d* for any court called upon to decide whether the terms of the order have been broken. The order should be expressed in simple terms, easily understood even by those who, like the appellant, are not very bright. If the order is wider than is necessary for the purposes of protecting the public from serious harm from the defendant, the order will not meet the requirements of s 2(4) of the 1998 Act and will fall foul of the convention requirement that the means employed, if *e* restrictive of guaranteed rights, should be necessary and proportionate to the legitimate ends towards which they are directed. But I do not accept that the prohibitions in this case were in any way unclear or vague or unintelligible. They were as specific as the nature of the case permitted if the object of the order was to be effectively served. It would not in my view have been sensible to specify any *f* place in which or times at which the prohibitions were to apply. Compliance with the order would be most unlikely to give rise to practical difficulty since it is positive action which is restrained. The analogy with matrimonial injunctions, which are directed to the protection of a specific person or persons, is not apt. When the terms of the prohibitions were communicated to the appellant's counsel, and when he explained their effect to the appellant at the time, no *g* challenge was made or doubt expressed about their scope. On a reasonable reading it was clear what the appellant was not to do. Had he regarded the terms of the order as obscure or unduly restrictive it was open him to apply for a variation, and, if that application was unsuccessful, to appeal.

34. I turn to consider the convention, making the assumption (but not holding) *h* that arts 8 and 11 are in force. The prohibitions plainly infringe the appellant's rights under art 8. It is much more doubtful (and I do not find it necessary to decide) whether they infringe any guaranteed right under art 11. I regard the prohibitions in this order as in accordance with the law or prescribed by law since they are in my judgment authorised by the plain terms of s 2 of the 1998 Act. *j* They have the legitimate object of preventing crime, protecting health and morals and protecting the rights and freedoms of others. They are necessary because without these prohibitions the conduct prohibited cannot be prevented. They go no further than is strictly necessary to serve the end they are intended to serve. In my judgment this ground of challenge must fail. Ground 3 concerns the correction of the order. It is first necessary to rehearse the precise course of

events at the end of the hearing. When the evidence was concluded, submissions were made to the justices. They retired overnight from 20 to 21 October. On the morning of 21 October the justices announced which facts they found proved. The solicitor representing the chief constable then asked the justices to make prohibitory orders in the terms sought in the application. Counsel for the appellant made submissions on the width of the requested prohibitory orders, suggesting that they be curtailed. The justices retired again. In the absence of the appellant and the justices, the clerk, after a period of retirement, informed the legal representatives of the parties of the terms of the prohibitory orders which the justices proposed to make. Neither representative made any comment. The clerk retired and had the order typed up. The justices and the appellant returned into court. The chairman of the justices read out the order which the justices proposed to make. In reading the order she did not read the double negative in the order as typed. She said what the appellant was to be prohibited from doing, omitting (it would seem) the words 'prohibited from' on the printed form and, as one would suppose, inserting the word 'with' after 'associate' in the second prohibition. The chairman asked the appellant's counsel if he would ensure that the appellant was fully aware of the effect of the order. The justices then retired so that the appellant's counsel could explain the effect of the order to the appellant. When counsel returned into court the chairman asked if he had explained the order and if the appellant had understood. There was then a discussion about the signing of the order by the appellant and the giving of notification. The chairman signed a copy of the order and the history thereafter has already been summarised.

35. On this issue the submission of Miss Booth for the appellant is brief and robust: the order of the court was the document which the chairman signed and of which the appellant received a copy. If these proceedings were civil the justices had no power to amend or vary the order (see *Stone's Justices' Manual* (132nd edn, 2000) vol 1, p 68, para 1-583 and the notes thereto). They had no power in civil proceedings as they would have had in criminal proceedings under s 142 of the 1980 Act to rectify any error. The requirement in the 1998 rules that the order shall be in the form set out in Sch 3 or in a form to like effect indicates that it is the written order and not any spoken order which counts. In its original written form the order was nonsensical and therefore a nullity; it could not be given effect. This was accepted to be a very technical argument with no merit to support it, but if, as submitted, the argument was correct, it should prevail.

36. In my judgment the argument is not correct. The order of the court was, as I think, the order announced orally by the chairman, which was to the same effect as the corrected written order and not the order as first reduced to writing. Had there been a period of delay after oral announcement of the order and before it was reduced to writing and signed and sent to the appellant, and had the appellant broken the order during that period, he could not have resisted prosecution on the ground that no order was in force. This approach, which every consideration of common sense appears to support, finds clear support also in the authorities.

37. In *R v Lanyon* (1872) 27 LT 355, [1861–73] All ER Rep 165 the father of a natural child was ordered to pay maintenance at the rate of 2s per week. The order was wrongly recorded as requiring him to pay 2s 6d per week. The matter came back before the justices who ordered that the order be correctly drawn up and signed, which it was, bearing the same date as the original order. In giving judgment it was stated:

'The applicant had a right to have the order made in her favour correctly drawn up. The order first drawn up did not embody correctly the terms of the order made, and in fact no such order as that first drawn up was ever really made by the justices, their signatures having been appended by mistake to a wrong order. It is an error, therefore, to allege that a second order was made. The only order made was the oral order of Jan. 30 and, an incorrect record of that order having been delivered to the applicant, I think that she was entitled to apply to the same justices and to request that a correct record of their order should be delivered to her. This is all that she did, and, as there was in fact no second order made, it follows that no fresh summons and fresh hearing were necessary.' (See [1861–73] All ER Rep 165 at 166).

38. A similar conclusion was reached in *Jolliffe v Jolliffe* [1963] 3 All ER 295, [1965] P 6. A non-cohabitation clause formed no part of the order orally made in that case, although it was included in the written order. It formed no part of the order of the court. In due course the written order was rectified and it was held that the justices were bound to correct the incorrect record of their order.

39. A similar conclusion was reached in *Walsh v Barlow* [1985] 1 WLR 90 where a defendant was alleged to have broken a community service order. It was contended that there was no breach because no written order had been served on the defendant as required by the statute. The ruling was that the order was effective as soon as the court gave judgment and spoke the order.

40. It is not suggested here that the appellant was in any way misled by the error in the written order. Had he been, and had he broken the terms of the order as a result of such misunderstanding, he would no doubt have had a reasonable excuse for his breach. But that is not this case. The order was that which the justices announced and which counsel was at pains to explain to the appellant. I would in summary give the following answers to what I take to be the substantial questions raised by the justices for the opinion of this court:

41. (a) In deciding whether it is proved that the conditions mentioned in s 2(1) of the 1998 Act are fulfilled, the magistrates' court is not obliged to apply the criminal standard of proof. In relation to the condition in s 2(1)(a) it should apply a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard. In relation to the condition in s 2(1)(b) it should apply the civil standard with the strictness appropriate to the seriousness and implications of the matters to be proved. (b) The wording of the order announced orally by the justices and in its amended written form was sufficiently clear, meaningful, specific, intelligible and enforceable to satisfy the requirements of domestic law and the convention and meets the requirements of art 11(2) of the convention (if that article is applicable). Article 5 is accepted to be inapplicable. (c) The justices were entitled to amend the written version of their order so that it expressed the order made and announced in open court on 21 October 1999, which was itself the order of the court and took effect from the date and time of its announcement, save in relation to the requirement to notify, which is governed by s 2(5) of the 1998 Act.

42. I would so answer and dismiss the appeal.

ASTILL J.

43. I agree.

Appeal dismissed.

Dilys Tausz Barrister.

Attorney General's Reference (No 3 of 1999)

HOUSE OF LORDS

LORD STEYN, LORD COOKE OF THORNDON, LORD CLYDE, LORD HUTTON AND LORD HOBHOUSE OF WOODBOROUGH

23, 24 OCTOBER, 14 DECEMBER 2000

Criminal evidence – Sample – Unlawfully-preserved sample – Statutory provision requiring destruction of sample taken from defendant – Sample not being destroyed – Police using DNA profile obtained from sample in new investigation and obtaining further sample linking defendant to offence – Whether evidence obtained in new investigation admissible – Police and Criminal Evidence Act 1984, ss 64(1), (3B), 78 – Human Rights Act 1998, Sch 1, art 8.

In January 1997 a woman was raped by a burglar in her own home. Swabs were taken from her body and a DNA profile was obtained from semen found on those swabs. That profile was then placed on the national DNA database. In January 1998 the defendant was arrested and charged with an unrelated offence of burglary. A saliva sample was lawfully taken from him under the Police and Criminal Evidence Act 1984 and was submitted to the database for profiling. In August 1998 the defendant was acquitted of the burglary, and the sample should therefore have been destroyed, as soon as practicable after the acquittal, in accordance with s 64(1)[a] of the 1984 Act. In fact, it was not destroyed, and the DNA profile derived from it remained on the database. In October 1998 that profile was matched with the swabs taken from the rape victim, and as a result the defendant was arrested in connection with the offences committed against her. A sample of hair was taken from him, and the DNA profile obtained from that sample matched the profile obtained from the swabs taken from the victim. The defendant was subsequently charged with burglary, assault and rape. At trial the prosecution did not adduce evidence relating to the sample taken in January 1998, such evidence being expressly excluded by s 64(3B)(a) of the 1984 Act which provided that information obtained from a sample required to be destroyed under s 64(1) could not be used in evidence against the person entitled to its destruction. Instead, the prosecution relied solely on the match between the DNA profile obtained from the sample taken in October 1998 and that obtained from the swabs taken from the victim. The judge ruled that that evidence was rendered inadmissible by s 64(3B)(b) of the 1984 Act which provided that samples required to be destroyed under s 64(1) 'shall not be used ... for the purposes of any investigation of an offence'. Accordingly, he directed the defendant's acquittal. On a subsequent reference by the Attorney General on a point of law, the Court of Appeal upheld the judge's ruling on admissibility, holding that s 64(3B) was mandatory rather than directory, and that it therefore required the exclusion of all evidence resulting from an investigation which had made use of a sample that should have been destroyed. The point of law was subsequently referred by the Court of Appeal to the House of Lords. On the hearing, the defendant relied on art 8[b] of the European Convention for the Protection of Human

a Section 64, so far as material, is set out at p 580 *h* to p 581 *a*, post

b Article 8 is set out at p 585 *d e*, post

Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) which prohibited interference by a public authority with the exercise of a person's right to respect for his private life, except such as was in accordance with the law and was necessary in a democratic society. He contended in particular that it could never be in accordance with the law to admit in evidence the results of a prohibited investigation.

Held – On its true construction, s 64(3B) of the 1984 Act did not render inadmissible evidence resulting from an investigation which had made use of a sample that should have been destroyed under s 64(1). Such a conclusion derived not from considering whether the relevant provision was mandatory or directory, but from focusing on the consequences of non-compliance. In that respect, s 64(3B)(b) contained no language to the effect that evidence obtained as a result of the prohibited investigation was inadmissible, and was therefore to be contrasted with s 64(3B)(a). Section 64(3B)(b) made no provision for the consequences of a breach of the prohibition on investigation, and it had to be read in conjunction with the judge's discretion, under s 78(1)[c] of the 1984 Act, to refuse to allow prosecution evidence if, having regard to all the circumstances, including the circumstances in which the evidence was obtained, it appeared to him that the admission would have such an adverse effect on the fairness of the proceedings that he ought not to admit it. That conclusion was reinforced by a consideration of the public interest that serious crime should be effectively investigated and prosecuted. In contrast, the Court of Appeal's interpretation was not only in conflict with the plain words of the statute, but also produced results which were contrary to good sense. Moreover, there was plainly no breach of art 8 of the convention. Since admissibility was governed by judicial discretion under s 78, the interference with the right would be in accordance with the law. Such interference, so qualified, was plainly necessary in a democratic society to ensure the investigation and prosecution of serious crime. Accordingly, the Court of Appeal's ruling on the reference had been wrong (see p 583 *d* to *f h* to p 584 *b e* to *j*, p 585 *f*, p 586 *b* to *f*, p 587 *a* to *f*, p 588 *f* to p 589 *b j*, p 590 *a e j* and p 591 *e* to *g*, post).

Dicta of Lord Hailsham of St Marylebone LC in *London and Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876 at 882–884 and Lord Woolf MR in *R v Immigration Appeal Tribunal, ex p Jeyeanthan* [1999] 3 All ER 231 at 236–239 applied.

Decision of the Court of Appeal [2000] 4 All ER 360 reversed.

Notes

For the destruction of samples, see 11(1) *Halsbury's Laws* (4th edn reissue) para 781.

For the Police and Criminal Evidence Act 1984, ss 64, 78, see respectively 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 376 and 17 *Halsbury's Statutes* (4th edn) (1999 reissue) 236.

For the Human Rights Act 1998, Sch 1, art 8, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 524.

Cases referred to in opinions

Bunning v Cross (1978) 141 CLR 54, Aust HC.

Fox v Chief Constable of Gwent [1985] 3 All ER 392, [1986] AC 281, [1985] 1 WLR 1126, HL.

c Section 78(1) is set out at p 584 *a*, post

Howden v Ministry of Transport [1987] 2 NZLR 747, NZ CA.
Kuruma v R [1955] 1 All ER 236, [1955] AC 197, [1955] 2 WLR 223, PC.
London and Clydeside Estates Ltd v Aberdeen DC [1979] 3 All ER 876, [1980] 1 WLR 182, HL.
R v Collins [1987] 1 SCR 265, Can SC.
R v Grayson and Taylor [1997] 1 NZLR 399, NZ CA.
R v Immigration Appeal Tribunal, ex p Jeyeanthan [1999] 3 All ER 231, [2000] 1 WLR 354, CA.
R v Ireland (1970) 126 CLR 321, Aust HC.
R v Khan (Sultan) [1996] 3 All ER 289, [1997] AC 558, [1996] 3 WLR 162, HL.
R v Sang [1979] 2 All ER 1222, [1980] AC 402, [1979] 3 WLR 263, HL.
R v Weir (26 May 2000, unreported), CA.
Ridgeway v R (1995) 184 CLR 19, Aust HC.
Schenk v Switzerland (1988) 13 EHRR 242, ECt HR.

Reference

Following the defendant's acquittal, on the direction of Judge Hitching at the Central Criminal Court on 18 June 1999, on an indictment containing counts of burglary, assault occasioning actual bodily harm and rape, the Attorney General referred to the Court of Appeal, under s 36 of the Criminal Justice Act 1972, a point of law (set out at p 581 g, post) for its consideration. The Court of Appeal (Swinton Thomas LJ, Butterfield and Rafferty JJ) gave its opinion on 26 May 2000 ([2000] 4 All ER 360, [2000] 3 WLR 1164), and on 14 June 2000, following an application from the Attorney General, referred the point to the House of Lords for its consideration. The facts are set out in the opinion of Lord Steyn.

David Perry and *Duncan Penny* (instructed by the *Crown Prosecution Service*) for the Attorney General.

Rebecca Poulet QC and *Roxanne Morrell* (instructed by *Payton & Partners*) for the defendant.

Their Lordships took time for consideration.

14 December 2000. The following opinions were delivered.

LORD STEYN. My Lords, the question of law referred to the House of Lords by the Court of Appeal involves an important point on the proper construction of s 64(3B) of the Police and Criminal Evidence Act 1984.

I. *The narrative*

In the early hours of the morning of 23 January 1997, in London, a man climbed over a garden wall and forced open a ground floor window of a terraced house. The owner of the house was a 66-year-old woman. The burglar went to her bedroom. He threatened her. He punched her several times. He then tied her hands behind her back with flex. He raped her anally. He pushed her into a hallway cupboard and blocked the door to the cupboard with heavy items. After taking money and other items the burglar left. At 7pm that day the Police found the victim in the cupboard. The ordeal of the woman was horrendous and the offence of rape was of the utmost gravity.

The victim was medically examined and swabs were taken from the areas around her vagina and anus. On 17 March 1997 semen was found on both the

swabs. On 20 March 1997 a DNA profile was obtained from the semen. On 15 April 1997 the DNA profile was placed on the national DNA database.

On 4 January 1998 the police arrested and charged the defendant with an unrelated offence of burglary. At the time of his arrest the defendant gave a false name to the police. A saliva sample was lawfully taken from the defendant without his consent. The sample was obtained in connection with the arrest for the burglary alone under s 63(3A) of the 1984 Act. If the defendant had given his real name to the police they would have discovered that his previous convictions included one for affray. That conviction would have permitted the police to obtain a DNA sample which would have justified the retention of the sample whatever the fate of the burglary charge. In any event, on 12 May 1998 the sample taken from the defendant was submitted for DNA profiling.

On 23 August 1998 the defendant was acquitted of the offence of burglary, that is the offence for which he had been arrested on 4 January 1998. It is formally conceded on behalf of the Attorney-General that under s 64(1) of the 1984 Act the sample should have been destroyed as soon as it was practicable after the defendant's acquittal. It was not destroyed and information derived from it, namely the DNA profile, remained on the DNA database. On 6 October 1998 a match was made between the DNA profile obtained from the swabs taken from the victim and the DNA profile obtained from the saliva taken from the defendant.

Relying on the match between the two DNA profiles, the police arrested the defendant on 15 October 1998 in respect of the offences committed against the elderly victim in January 1997. In the course of an interview the defendant denied that he was involved in the offences. He refused to give his consent to the taking of an intimate sample. A police superintendent authorised the taking of a non-intimate sample of plucked head hair. On 18 October 1998 a forensic science laboratory confirmed that a DNA profile obtained from the plucked hair taken from the defendant matched the DNA profile on the swabs taken from the victim. In the opinion of the forensic scientist the frequency of the occurrence of obtaining such a match, if the DNA on the swabs had come from a person unrelated to the defendant, was one in 17 million. The defendant was charged with burglary, assault and rape.

II. *Section 64 of the 1984 Act*

The question was what impact the failure to destroy the sample had on the case against the defendant. The courts below were principally concerned with the interpretation of s 64(1) read with s 64(3A) of the 1984 Act. Subsection (1) of s 64 is to the following effect:

> 'If—(a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and (b) he is cleared of that offence, they must, except as provided in subsection (3A) below, be destroyed as soon as is practicable after the conclusion of the proceedings.'

Subsections (2) and (3) make corresponding provision for cases where it is decided not to prosecute and where the person concerned is not suspected of having committed an offence. Subsection 3(B) provides as follows:

> 'Where samples are required to be destroyed under subsections (1), (2) or (3) above ... information derived from the sample of any person entitled to its destruction under subsection (1), (2) or (3) above shall not be used—(a) in

a evidence against the person so entitled; or (b) for the purposes of any investigation of an offence.'

The reference before the House involves the interpretation of part (b) of this provision.

b III. *The trial*

The prosecution case depended solely on DNA evidence. It is however, necessary to distinguish between the two samples taken from the defendant. Information derived from the sample taken on 4 January 1998 led to the defendant's arrest on 15 October 1994 which in turn led to the taking of a new sample from the defendant. At the trial the prosecution did not adduce evidence c relating to the 4 January 1998 sample. The prosecution relied solely on the match between the DNA profile of the sample taken on 15 October 1998 from the defendant and the DNA profile obtained from the swabs taken from the victim.

It was conceded by the prosecution before the judge that under s 64(1) of the 1984 Act the saliva sample taken on 4 January 1998 should have been destroyed d after his acquittal on the unrelated burglary charge; that such information was used in the investigation of an offence in contravention of s 64(3B)(b); and that this led to the arrest of the defendant on 15 October 1998.

The defence submitted that the evidence based on information derived from the sample of 15 October 1998 was rendered inadmissible by the mandatory terms of s 64(3B). The prosecution submitted that s 64(3B)(b) was merely of e directory effect. The judge ruled that the provision was mandatory and that the evidence tendered by the prosecution was inadmissible. But the judge also concluded that, if, s 64(3B) was merely of directory effect, he would have had to exercise his discretion under s 78 of the 1984 Act to exclude the DNA evidence. Given these conclusions the prosecution case collapsed and despite what the Court f of Appeal subsequently described as 'compelling evidence', the judge directed a verdict of not guilty.

IV. *The Court of Appeal*

The Attorney General referred the matter to the Court of Appeal. He acted under s 36 of the Criminal Justice Act 1972. The question referred was as follows:

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> 'Where a sample of DNA is lawfully taken from an accused in respect of offence A (of which offence the accused is subsequently acquitted), and information derived from the sample suggests that the accused is guilty of offence B, does a judge have a discretion to permit a prosecution to proceed h against the accused for offence B, notwithstanding the terms of s 64(3B) of the Police and Criminal Evidence Act 1984?'

The question raised an issue of the admissibility of evidence which depended on the proper construction in its contextual setting of s 64(3B)(b) of the 1984 Act. The Court of Appeal answered this question in the negative.

j The judgment of the Court of Appeal is reported ([2000] 4 All ER 360, [2000] 3 WLR 1164). The court attached considerable importance to paras 34, 35 and 36 in the *Report of the Royal Commission on Criminal Justice* (Cm 2263) (1993), pp 16–17 (see [2000] 4 All ER 360 at 367–368, [2000] 3 WLR 1164 at 1179–1180). In evaluating this material the court had the advantage that one of its members (Rafferty J) had been a member of the Royal Commission. Giving the judgment of the court Swinton Thomas LJ observed:

'The words of the section are clear. In our judgment the provisions contained in s 64(3B)(a) and (b) stand together. We do not accept Mr Perry's submission [for the Attorney General] that if Parliament had intended to exclude the exercise of a judge's discretion, it would have said so. In our judgment, on the contrary, if Parliament had intended that a judge should have a discretion in the circumstances envisaged in s 64(3B)(a) or in (3B)(b), Parliament would have said so. It would have been perfectly possible for Parliament to conclude that the fight against crime was so important that there should be no restriction on the use of DNA samples, so that where such samples were lawfully obtained by the police the information derived from them could be retained on a database for all purposes. It would have been equally possible for Parliament to enact that whilst information derived from samples taken from persons cleared of involvement in offences should not normally be used for the investigation of other offences, the investigating authorities should have a discretion to use that information for the purposes of a further investigation in exceptional circumstances only. Parliament could have enacted that the information should not be used for the purpose of an investigation of an offence subject to the discretion of the court to permit such use if in the circumstances the court thought it right to do so. Parliament did not choose to take any of those courses. Indeed a discretionary power such as envisaged above would have rendered virtually nugatory the plain intention of Parliament that samples should be destroyed and information obtained from them not used after one or other of the events set out in s 64(1)–(3). The section expressly and without qualification forbids the use of the sample which is required to be destroyed either in evidence or for the purposes of any investigation. It is plainly mandatory and not directory. If the sample, which includes the profile, is used for the purposes of an investigation, then all evidence resulting from that investigation must be excluded. Accordingly, in our judgment, Judge Hitching was right to rule as he did on admissibility, and it is not necessary for the court to consider his ruling under s 78.' (See [2000] 4 All ER 360 at 369–370, [2000] 3 WLR 1164 at 1182.)

Towards the end of this judgment Swinton Thomas LJ referred to the case of *R v Weir* (unreported, 26 May 2000) which was heard by the Court of Appeal together with the reference in the instant case. In *R v Weir* the appellant was convicted of a particularly brutal murder on what Swinton Thomas LJ also described as compelling DNA evidence. Applying the reasoning in the judgment on reference to the House, the Court of Appeal felt compelled to quash the conviction. In giving judgment in the case of *R v Weir* the Court of Appeal observed:

'... the Royal Commission plainly intended that a balance should be struck between the interests of the state and the interests of the citizen and, following those recommendations, Parliament struck the balance as they did, and enacted that information derived from the sample of the person entitled to its destruction shall not be used in evidence against the person so entitled or for the purposes of any investigation of an offence. It is, in our judgment, impossible, either in relation to the section itself or in endeavouring to ascertain the intention of Parliament to draw a distinction between para (a) and para (b) so as to exclude the exercise of the judge's discretion in (a) but to say that such a discretion exists in relation to (b). In our judgment the court has no discretion in respect of either.'

Turning back to the judgment in the case directly under consideration, the Court of Appeal did not deal with the alternative basis of the judge's decision, namely the judge's view that, in any event, he would have had to exclude the DNA evidence under s 78 of the 1984 Act.

V. *The question before the House*

The Court of Appeal referred the very question upon which it had been called to rule to the House. Whatever the opinion of the House on this question the acquittal of the defendant stands. It is necessary therefore to consider the point about the correct interpretation of s 64(3B) not only in the light of the facts of the present case but also in the context of other cases which may arise. It was agreed between counsel that the House was not called upon to travel beyond this point, notably we are not asked to consider the correct approach of a judge in dealing with such an issue under s 78. For the avoidance of doubt, and with due respect to the judge, I would emphasise that nothing I say must be regarded as an endorsement of his reasoning on this aspect.

VI. *The interpretation of s 64(3B)*

My Lords, I acknowledge at once that reasonable minds may differ as to the correct interpretation of a subsection which has no parallel in the 1984 Act or any other statute. Nevertheless, there do seem to be secure footholds which may lead to a tolerably clear answer. It is not along the route adopted by the prosecution of asking whether the relevant provision is mandatory or directory. In *London and Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876 at 882–884, [1980] 1 WLR 182 at 188–190, Lord Hailsham of St Marylebone LC considered this dichotomy and warned against the approach 'of fitting a particular case into one or other of mutually exclusive and starkly contrasted compartments'. In *R v Immigration Appeal Tribunal, ex p Jeyeanthan* [1999] 3 All ER 231 at 237, [2000] 1 WLR 354 at 360, Lord Woolf MR, now Lord Chief Justice, echoed this warning and held that it is 'Much more important ... to focus on the consequences of non-compliance'. This is how I will approach the matter.

It is, of course, clear that after the acquittal of the defendant the sample should have been destroyed. In imperative terms s 64(1) provides that it 'must' be destroyed. The existence of the duty to destroy the sample and its breach is merely the starting point. It does not provide the answer to the precise point before the House. The question before us relates to the consequences of the breach of the duty to destroy a sample which should have been destroyed by reason of the provisions of s 64(1). Subsection (3B) is in two parts. Subsection (3B)(a) unambiguously spells out of the legal consequences of a breach of the obligation to destroy a sample: it may not be used in evidence against the person entitled to its destruction. So far the provision is perfectly clear.

The problem arises in regard to the second part of sub-s (3B), which provides that samples which are required to be destroyed 'shall not be used ... (b) for the purposes of any investigation'. The difference between s 64(3B)(a) and s 64(3B)(b) is striking. Section 64(3B)(a) legislates for the inadmissibility in evidence against the person concerned of the sample that should have been destroyed. By contrast s 64(3B)(b) contains no language to the effect that evidence obtained as a result of the prohibited investigation shall be inadmissible. It does not make provision for the consequences of a breach of the prohibition on investigation. This does not mean that this particular prohibition is toothless. On the contrary, it must be read with s 78(1) of the 1984 Act. It provides as follows:

> 'In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, *having regard to all the circumstances, including the circumstances in which the evidence was obtained,* the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.' (My emphasis.)

In other words, there is in the very same statute a discretionary power in the trial judge, in the face of a breach of s 64(3B)(b), to exclude the evidence if it would be unfair to admit it.

Counsel for the defendant submitted that s 64(3B)(a) and (b) must stand together. In other words, because (a) provides for the inadmissibility of evidence, (b) must have a like meaning. That is how the Court of Appeal also reasoned. But, with due respect, this is too simplistic. It does not address the critical difference that s 64(3B)(a) expressly provides for the consequences of a breach but that s 64(3B)(b) does not. It also does not meet the point that no verbal manipulation of (b) is required if it is simply read together with s 78.

Counsel for the defendant, like the Court of Appeal, thought that certain paragraphs of the report of the Royal Commission supported the construction that sub-s (3B)(b) creates an absolute bar to the admissibility of the fruits of a prohibited investigation. If it had done so, it could not have prevailed over the plain language of the statute. But the report yields no such support. It does record in emphatic language the recommendation that after an acquittal a sample must be destroyed. But the report does not address the precise point of statutory construction before the House.

Counsel for the defendant was further compelled to concede that the construction adopted by the Court of Appeal leads to absurd consequences. Counsel for the Attorney General gave the following illustration. The police receive information from a forensic laboratory that X appears to have been responsible for a number of serial murders. The source of the information is derived from a sample which ought to have been destroyed pursuant to s 64(1) of the 1984 Act. The police can do nothing until a further crime is committed. Even a consequential confession by X or discovery of the murder weapon in the house of X could not be used. But one does not have to resort to hypothetical examples: on the interpretation of the judge and the Court of Appeal a case involving evidence of a very serious rape could never reach the jury and in *R v Weir* a conviction for a brutal murder was quashed on the ground that the DNA evidence should not have been placed before the jury. It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public. In my view the austere interpretation which the Court of Appeal adopted is not only in conflict with the plain words of the statute but also produces results which are contrary to good sense. A consideration of the public interest reinforces the interpretation which I have adopted.

VII. *Implication*

Somewhat reluctantly counsel for the defendant sought in the alternative to support the conclusion of the Court of Appeal on the basis of implying words in

sub-s (3B). The suggested implication involves, as my noble and learned friend Lord Cooke of Thorndon elicited, the addition at the end of s 64(3B)(b) of the words 'nor shall evidence of the results of any prohibited investigation be admissible'. The difficulty in this approach is obvious. If one reads s 64(3B)(b) together with s 78 the statute is entirely workable without any implication. Moreover, the implication would result in a meaning which would be productive of absurd results which are contrary to the public interest. The suggested implication is unnecessary and unwarranted.

VIII. *The Human Rights Act 1998*

On the supposition that on ordinary principles of construction s 64(3B)(b) does not provide that the evidence obtained as a result prohibited investigation is always inadmissible, counsel for the defendant argued that the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) by the Human Rights Act 1998 now compels the interpretation for which she contends. Counsel relied in the first place on art 8 of the convention. Article 8 reads as follows:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Counsel submitted that, because a sample must be destroyed after an acquittal, it cannot ever be 'in accordance with the law' to admit in evidence the results of a prohibited investigation. The question whether it meets this requirement is the very issue of interpretation which the House has to decide. If the construction I have adopted is correct 'the interference' is 'in accordance with law', the critical point being that admissibility is governed by judicial discretion under s 78. And 'the interference', so qualified, is plainly necessary in a democratic society to ensure the investigation and prosecution of serious crime. There is plainly no breach of art 8.

In the alternative, counsel in her printed case relied on art 6. In oral argument she expressly abandoned this argument. That was not surprising. Article 6 provides inter alia that in the determination of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Under the general law the trial judge has adequate powers to ensure fairness: (1) he has jurisdiction to stay the proceedings as an abuse of the process; and (2) he has a discretion to exclude evidence under s 78 if it would be unfair to admit the evidence 'having regard to all the circumstances, including the circumstances in which the evidence was obtained'. If trial is allowed to proceed, and the evidence is not excluded, the accused will have a full opportunity to contest the reliability and accuracy of the DNA evidence. In any event, the question of admissibility is a matter for regulation under national law. There is no principle of convention law that unlawfully obtained evidence is not admissible: *Schenk v Switzerland* (1988) 13 EHRR 242 at 265–266 (para 46); *R v Khan (Sultan)* [1996] 3 All ER 289, [1997] AC 558. I would therefore reject the argument under this heading.

It follows that the law as I have stated it is fully compatible with the relevant convention rights. The interpretative obligation under s 3 of the 1998 Act is not in play.

Conclusion

I would therefore rule that the Court of Appeal's rulings in the reference, as well as in the appeal of *R v Weir,* were wrong and accede in substance to the argument presented on behalf of the Attorney General. On the other hand, the question formulated by the Attorney General is too compressed and contains no reference to s 78. It is, however, unnecessary to redraft it since the correct position is clearly stated in the opinions of the House.

LORD COOKE OF THORNDON. My Lords, having had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn, I am in complete agreement with it. In particular I wish to be associated with his invocation of the approach of Lord Hailsham of St Marylebone LC in *London and Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876 at 882–884, [1980] 1 WLR 182 at 188–190, which had the agreement of Lord Wilberforce in that case and has been echoed by Lord Woolf MR in *R v Immigration Appeal Tribunal, ex p Jeyeanthan* [1999] 3 All ER 231 at 236–239, [2000] 1 WLR 354 at 359–362.

In the present case I think that the Court of Appeal fell into the trap (and they were in good company in doing so) of treating the issues to be resolved according to whether s 64(3B)(b) of the Police and Criminal Evidence Act 1984 should be classified as mandatory or directory. That it is in ordinary language mandatory there can be no doubt. In clear terms it provides that certain categories of samples required to be destroyed shall not be used for the purposes of any investigation of an offence. Use in breach of this prohibition is plainly unlawful. But s 64(3B)(b), in contrast with s 64(3B)(a), does not go on to provide that, in the event of such unlawful use, the results of the investigation shall not be admissible in evidence against the person who was entitled to the destruction of the sample. Nor does it provide that an unlawful investigation shall be null and void or deemed never to have occurred—provisions which would indeed read rather oddly in relation to an investigation. So far as the law of evidence is concerned, any remedy for the unlawfulness is to be found in s 78(1) of the same Act. It is to be noted that the terms of s 78(1) show that the fairness of the proceedings is a wide concept and extends to the circumstances in which the evidence was obtained.

It may be worth adding that just as in European Convention law, as Lord Steyn has pointed out, there is no principle that unlawfully obtained evidence is not admissible, so there is no such general principle in Commonwealth countries. Approaches differ somewhat among the jurisdictions. Thus in Canada evidence obtained in breach of the Charter will be excluded if its admission is likely to bring the administration of justice into disrepute (*R v Collins* [1987] 1 SCR 265); in Australia the leading cases recognise a judicial discretion in which the competing demands of the public interest in the prevention and punishment of crime, on the one hand, and fairness to the accused, on the other, have to be weighed (*Bunning v Cross* (1978) 141 CLR 54; *Ridgeway v R* (1995) 184 CLR 19); and in New Zealand, while it has long been held that the judicial discretion to exclude unfairly obtained evidence is wider than that recognised in England at common law in *R v Sang* [1979] 2 All ER 1222, [1980] AC 402 and *Kuruma v R* [1955] 1 All ER 236, [1955] AC 197, a line of cases has treated evidence obtained in breach of the semi-constitutional provisions of the Bill of Rights as prima facie inadmissible but subject to exceptions

created by the overriding demands of justice (*Howden v Ministry of Transport* [1987] 2 NZLR 747; *R v Grayson and Taylor* [1997] 1 NZLR 399). The cases in the various jurisdictions on this pervasive and perennial problem are legion. I have cited only a handful. The point of present significance is simply that, apart from express statutory provisions, nowhere in the Commonwealth does there appear to be any remorseless principle of the exclusion of evidence unlawfully obtained. In the instant case there is in s 64(3B)(b) no such express statutory provision; and in my view, it would be astonishing if Parliament had intended the evidence eventually tendered to have been ruled out.

Accordingly I agree that the reference should be disposed of as proposed by Lord Steyn.

LORD CLYDE. My Lords, I have had the opportunity of reading in draft the speech which has been prepared by my noble and learned friend Lord Steyn and I agree with the conclusion which he has reached for the reasons which he has given.

I agree in particular that this is not a case in which it is useful to adopt any technical distinction between mandatory and directory constructions. Indeed the present is a case where such an approach can be misleading and dangerous. The critical subsection, s 64(3B) of the Police and Evidence Act 1984, specifies two situations in which information derived from the sample 'shall not be used'. The same words govern the two situations set out as (a) and (b) respectively. It is then temptingly attractive to concentrate upon the word 'shall' and by giving it a single classification, either mandatory or directory, determine the effect of the two provisions which follow, so far as the admission of evidence is concerned, in a way which must be the same in respect of each of the two situations. But if that approach is rejected one is free to ask in respect of each separately what the effect of the particular obligation is to be. This is not to hold that the word 'shall' has at the same time two different meanings. It has the constant meaning of imposing obligations. But the effect of each particular obligation, particularly where the possibility of a failure in compliance arises, may be different. I agree that while s 64(3B)(a) is complete in itself so far as a possible breach is concerned, a breach of s 64(3B)(b) is to be regulated by reference to s 78.

LORD HUTTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn and I gratefully adopt his account of the statutory background and the events and proceedings which have given rise to the present reference to this House.

Section 64(3B) of the Police and Criminal Evidence Act 1984 provides:

> 'Where samples are required to be destroyed under subsections (1), (2) or (3) above, and subsection (3A) above does not apply, information derived from the sample of any person entitled to its destruction under subsection (1), (2) or (3) above shall not be used—(a) in evidence against the person so entitled; or (b) for the purposes of any investigation of an offence.'

The Crown did not seek to adduce in evidence the sample taken from the defendant on 4 January 1998 when he was charged with burglary and which should have been destroyed as soon as was practicable after his acquittal on that charge pursuant to s 64(1) of the 1984 Act which provides:

> 'If—(a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and (b) he is cleared of that offence, they must, except as provided in subsection (3A) below, be destroyed as soon as is practicable after the conclusion of the proceedings.'

But the sample taken on 4 January 1998 was used to make a match on 6 October 1998 between the DNA profile obtained from that sample and the DNA profile obtained from the swabs taken from the victim of the offences of rape, burglary and assault committed on 23 January 1997. This investigation led to the arrest of the defendant on 15 October 1998 in respect of those offences and on 15 October 1998 a sample of plucked head hair was taken from him, which was the sample which the Crown wished to use in evidence against him. Therefore the sample taken on 4 January 1998 was used, in breach of the prohibition contained in s 64(3B)(b), for the purposes of an investigation into the offences of rape, burglary and assault committed on 23 January 1997.

The principal submission advanced by Mrs Poulet QC on behalf of the defendant before the Crown Court judge and the Court of Appeal was that s 64(3B)(b) by its express words prohibited the Crown using in evidence against the defendant the sample taken on 15 October 1998, and in support of that submission Mrs Poulet further submitted that para (b) of sub-s (3B) cannot be detached from para (a) of that subsection but must be read together with it, so that as para (a) prohibited the use of evidence derived from the sample which should have been destroyed, para (b) must be read as prohibiting the use of evidence resulting from an investigation arising from that sample. This submission was accepted by the Court of Appeal, Swinton Thomas LJ stating:

> 'The section expressly and without qualification forbids the use of the sample which is required to be destroyed either in evidence or for the purposes of any investigation. It is plainly mandatory and not directory. If the sample, which includes the profile, is used for the purposes of an investigation, then all evidence resulting from that investigation must be excluded.' (See [2000] 4 All ER 360 at 370, [2000] 3 WLR 1164 at 1182.)

My Lords I consider, with respect, that the Court of Appeal erred in accepting this submission. In my opinion s 64(3B)(b) prohibits the sample liable to destruction from being used for the purposes of any investigation of the offences committed on 23 January 1997, but it does not prohibit evidence resulting from such an investigation from being used in criminal proceedings in respect of those offences.

The wording of s 64(3B)(a) by its express words does prohibit the use in evidence of information derived from a sample which should have been destroyed but, in contrast, s 64(3B)(b) is silent as to the admissibility of evidence resulting from an investigation which it prohibits. Therefore, in my opinion, the issue which arises in a case such as the present one is whether evidence which has been unlawfully obtained, in that it arises from a line of investigation which has been prohibited, is inadmissible as a matter of law (as opposed to being subject to exclusion in exercise of the trial judge's discretion conferred on him by s 78 of the 1984 Act). On that issue the law is clear.

In *Kuruma v R* [1955] 1 All ER 236 at 239, [1955] AC 197 at 203 Lord Goddard CJ stated:

> 'In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was

obtained. While this proposition may not have been stated in so many words in any English case, there are decisions which support it and, in their Lordships' opinion, it is plainly right in principle.'

And in *Fox v Chief Constable of Gwent* [1985] 3 All ER 392 at 396, [1986] AC 281 at 292 Lord Fraser of Tullybelton stated:

'It is a well-established rule of English law, which was recognised in *R v Sang*, that (apart from confessions as to which special considerations apply) any evidence which is relevant is admissible even if it has been obtained illegally.'

Counsel for the defendant in advancing her submission based on the express words of s 64(3B)(b) relied on passages in the *Report of the Royal Commission on Criminal Justice* (Cm 2263) presented to Parliament in July 1993, but she also relied on those passages in support of the alternative submission which she advanced to this House that the words of s 64(3B)(b) by necessary implication prohibited the admission of the evidence relating to the sample taken on 15 October 1998. It is clear that the Royal Commission intended to extend the scope of DNA testing but counsel submitted that the Royal Commission also intended that where a person had been acquitted, no evidence should be adduced against him resulting from an investigation arising from a sample taken from him in the course of investigating an offence of which he was subsequently acquitted, and counsel relied on the following passages in paras 34, 35 and 36 of ch 2 of the report:

'34. ... The relevant data of those who are subsequently convicted would be retained so that, in any subsequent investigation where the identity of the offender is unknown but DNA evidence comes to light, that evidence can be checked against the samples in a data base ...

35. ... The relevant DNA data or samples would be retained for subsequent use if the person concerned is convicted, but not otherwise unless retained under the conditions recommended in the next paragraph for the purposes of a frequency data base.

36. ... Where, however, a defendant is acquitted or a person is not proceeded against, it should only be possible to keep the sample on the data base for statistical purposes, as opposed to the purpose of assisting in further investigations, and there should be strong safeguards to ensure that such samples can no longer be linked by the police or prosecution to the persons from whom they were taken.'

It was submitted that the amendments to the 1984 Act, including sub-s (3B) of s 64, followed closely the recommendations of the Royal Commission and that therefore, if the express words of sub-s (3B) did not do so, it was a necessary implication that Parliament intended that evidence resulting from the prohibited investigation should not be admitted in evidence. My Lords, I am unable to accept that submission, because the Royal Commission did not consider the issue whether evidence resulting from a prohibited investigation should be automatically rendered inadmissible. Bearing in mind that the principle stated in *Kuruma*'s case is a well established one, I would be slow to hold that in enacting the provisions of s 64(3B) Parliament intended to exclude automatically evidence resulting from a prohibited investigation, irrespective of the circumstances in which the evidence was obtained, and irrespective of its weight and cogency and the gravity of the crime to which it related. Accordingly I am of the opinion that the words of s 64(3B) do not prohibit the admissibility of the evidence which the Crown

wished to adduce in this case, and therefore the issue whether the prohibition contained in para (b) is mandatory or directory does not arise. *a*

I am in respectful agreement, for the reasons which he gives, with the opinion of my noble and learned friend Lord Steyn that the defendant derives no support for his case from art 6 or art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). *b*

In conclusion I would observe that before the Crown Court judge two questions arose. The first question was whether the evidence relating to the sample taken from the defendant on 15 October 1998 was admissible in law. If it was, the second question was whether the judge should exercise his discretion under s 78 of the 1984 Act to exclude that evidence. The Crown Court judge ruled that the evidence was inadmissible but, if he should be wrong in his view that the evidence was inadmissible, he further ruled that he would exclude the evidence in the exercise of his discretion under s 78. The question formulated by the Attorney General does not distinguish between these two issues. The judgments of the House are related to the first issue and make it clear that the evidence was admissible. *c* *d*

Counsel did not ask the House to consider the correctness of the approach taken by the Crown Court judge to the exercise of his discretion under s 78. I therefore wish to make it clear that in not expressing an opinion on the judge's ruling on the exercise of his discretion I am not to be taken as endorsing his reasoning on that point. In considering the interpretation of s 64(3B) my noble and learned friend Lord Steyn has stated in his speech that respect for the privacy of defendants is not the only value at stake, that the purpose of the criminal law is to protect citizens from harm and that there must be fairness to all, to the victim and to the public as well as to the defendant. I wish to express my concurrence with these observations, but in a case of this nature where very grave crimes were committed against an elderly woman in her own home, I consider that the observations of my noble and learned friend are also relevant to the exercise of the discretion under s 78. In the exercise of that discretion I consider that the interests of the victim and the public must be considered as well as the interests of the defendant. As Barwick CJ stated in his judgment in the High Court of Australia in *R v Ireland* (1970) 126 CLR 321 at 335, with which all the members of the court agreed: *e* *f* *g*

> 'Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.' *h*

LORD HOBHOUSE OF WOODBOROUGH. My Lords, I agree that this appeal should be allowed. *j*

Upon the question of the construction of s 64(3B), I have little to add to what all your Lordships have already said and with which I agree. The unfortunate drafting of the various amendments which have been made to ss 61 to 65 have produced a maze of provisions with complex numbering which can only have the

effect of making it more likely that differences of understanding will arise. The draftsmen have appreciated that different provisions are required in relation to the use and disposal of fingerprints and samples. In the case of samples it is the information derived from the scientific testing and analysis of the samples which is significant rather than the production of the sample itself. Indeed it may often be the case that the sample itself will have been destroyed by the scientific processes. Two consequences follow from this. Legislative provisions which depend upon a right to have the sample destroyed may not be fully coherent (s 64(1), (2) and (3)). The sample may already have been destroyed. Secondly, the information which has been derived from testing or analysing the sample may be partly contained in records and partly in peoples' minds. A police officer may have read a report which states that a certain match has been made. Is the statute requiring him artificially to 'forget' what he knows? Maybe he will remember it for the purpose of not wasting time on what he knows will be a fruitless line of investigation. Maybe he will remember it for the purpose of excluding from a criminal trial or conviction a person whom he thereby knows is not guilty.

Subsection (3B), and the other similarly drafted provisions require that there shall be two consequences of the requirement to destroy a sample. The first, (a), is a requirement that the information shall not be used in evidence against the person who was entitled to have the sample destroyed. This is a requirement which makes the information inadmissible in evidence but only as against that person. It is thus limited in its scope but does not, within its scope, admit of exceptions: the evidence is inadmissible and there is no discretion to admit it as against that person. (If there is more than one defendant at the criminal trial, the familiar problems associated with evidence that is admissible against one defendant but not against another would have to be addressed.)

The second, (b), is different. It prohibits the use of the information in any investigation of an offence. It is not concerned with the admissibility of evidence at a trial. The judge and the Court of Appeal were in error in treating it as an implication of (a) that any evidence obtained in the course of an investigation which had involved some breach of the requirement of (b) *must*, as a matter of the statutory construction of s 64, be inadmissible. Like your Lordships, I consider that the implication is the reverse. But, in any event, when one takes into account that the statute also contains a provision covering the discretionary exclusion of evidence—s 78—the right construction of s 64 becomes clear. If any question of the exclusion of evidence on the ground that the circumstances in which it has been obtained would make it unfair to admit it, then the trial judge should exercise his discretion under s 78 to exclude it. This is the approach which has most recently been endorsed by your Lordships' House in *R v Khan (Sultan)* [1996] 3 All ER 289, [1997] AC 558.

As your Lordships have pointed out, this appeal has been concerned only with the construction of s 64 and whether the relevant later evidence was made inadmissible by that section. The appeal has not concerned, and your Lordships have not heard argument about, the alternative decision of the judge to exclude the evidence under s 78. It is obvious that that decision was based upon reasoning which derived from his mistaken construction of s 64. In relation to s 78, it is the duty of the judge to have regard to all the circumstances including the circumstances in which the evidence was obtained and then apply the statutory criterion 'whether the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'. The criterion is the effect which the admission of the evidence would have on the

fairness *of the proceedings*. Each case must depend upon its own facts and circumstances. The two cases which came before the Court of Appeal dramatically illustrate the public importance of making the correct assessment under s 78. Subject to this, I, like your Lordships express no opinion about the ruling of the judge at the trial. a

Opinion accordingly.

Kate O'Hanlon Barrister.

R v Secretary of State for the Home Department, ex parte Adan

R v Secretary of State for the Home Department, ex parte Aitseguer

HOUSE OF LORDS

LORD SLYNN OF HADLEY, LORD STEYN, LORD HUTTON, LORD HOBHOUSE OF WOODBOROUGH AND LORD SCOTT OF FOSCOTE

1, 2 NOVEMBER, 19 DECEMBER 2000

Immigration – Refugee – Asylum – Deportation back to third country – Provision of international convention protecting those with well-founded fear of persecution – Asylum seekers fearing persecution from non-state agents and arriving in United Kingdom via third countries – Third countries interpreting convention provision as applying only to persecution by state – Secretary of State certifying return of asylum seekers to third countries – Whether convention provision open to range of permissible interpretations – Asylum and Immigration Act 1996, s 2(2)(c) – Geneva Convention relating to the Status of Refugees 1951, art 1A(2).

The respondents, a Somali and an Algerian, were asylum seekers. The Somali, who had arrived in the United Kingdom via Germany, claimed that she was a member of a minority clan who had been persecuted by majority clans. The Algerian, who had passed through France before arriving in the United Kingdom, claimed that he was at risk from a political faction in Algeria and that the Algerian authorities were unable to protect him. Under s 2(2)(c)[a] of the Asylum and Immigration Act 1996, the Secretary of State was allowed to send an asylum seeker to a country of which he was not a national or citizen, provided that he certified, inter alia, that in his opinion the government of that country would not send him to another country 'otherwise than in accordance with' the Geneva Convention relating to the Status of Refugees 1951. The convention itself prohibited contracting states from returning a 'refugee' to territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Under art 1A(2)[b] of the convention, a refugee was defined as a person who, owing to a well-founded fear of being persecuted for those reasons, was outside the country of his nationality and was unable or, owing to such fear, unwilling to avail himself of the protection of that country. Unlike the government of the United Kingdom, which accepted that art 1A(2) extended to persecution by non-state agents, both the German and French authorities interpreted that provision as applying only to persecution by the state. The Secretary of State accepted that, if the Somali asylum seeker were returned to Germany, the authorities would probably send her back to Somalia on the basis that governmental authority in that country had collapsed and that there was therefore no state to which persecution could be attributed. Similarly, he accepted that the French authorities would probably return the Algerian asylum seeker to his country on the ground that the Algerian

a Section 2, so far as material, is set out at p 601 *d* to *f*, post

b Article 1A, so far as material, is set out at p 600 *c d*, post

state neither tolerated nor encouraged the feared persecution. Nevertheless, he issued certificates under s 2(2)(c) of the 1996 Act, providing for the return of the asylum seekers to Germany and France respectively. They challenged those certificates in separate proceedings for judicial review. The Somali's application was dismissed, but the Algerian's was allowed. On the subsequent appeals, which the Court of Appeal heard together, the Secretary of State contended that he had sufficiently complied with s 2(2)(c) if he considered that the approach of the third country was an interpretation of the convention reasonably open to that country. That contention was rejected by the Court of Appeal which held that the Secretary of State had to be satisfied that the practice in the third country was consistent with the one true and international interpretation of the convention, namely that art 1A(2) extended to persons who feared persecution by non-state agents. Accordingly, it allowed the Somali's appeal and dismissed the Secretary of State's appeal in the other case. The Secretary of State appealed to the House of Lords, contending that s 2(2)(c) was to be interpreted as if it referred to the convention 'as legitimately interpreted by the third country concerned', and challenging the Court of Appeal's conclusion that art 1A(2) had only one true meaning.

Held – On the true construction of s 2(2)(c) of the 1996 Act, the words 'otherwise than in accordance with' the convention referred to the meaning of the convention as properly interpreted, not 'as legitimately interpreted by the third country concerned'. A conclusion to the contrary would involve interpolation, not interpretation, and there was no warrant for implying such words. It followed that the inquiry had to be into the meaning of the convention, approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It was therefore necessary to determine the one true autonomous and international meaning of art 1A(2). That meaning was that the protection of the convention extended to those who were subject to persecution by factions within the state if the state in question was unable to afford protection against such factions. In that respect, there was no material distinction between a country where there was no government and one in which the government was unable to afford the necessary protection to citizens. In the instant cases, the Secretary of State had wrongly proceeded on the twin assumptions that there was a band of permissible meanings of art 1A(2) and that the practice hitherto adopted in Germany and France fell within the permissible range. He had materially misdirected himself, and accordingly the appeals would be dismissed (see p 597 *f* to p 598 *g*, p 603 *f* to *j*, p 605 *a* to *f*, p 606 *e* to p 607 *f*, p 608 *b c e*, p 615 *a b*, p 617 *d*, p 618 *a b j to* p 619 *c*, post).

Adan v Secretary of State for the Home Dept [1998] 2 All ER 453 applied.

Dicta of Lord Woolf MR in *Kerrouche v Secretary of State for the Home Dept* [1997] Imm AR 610 at 615 and *Iyadurai v Secretary of State for the Home Dept* [1998] Imm AR 470 at 476 disapproved.

Decision of the Court of Appeal [1999] 4 All ER 774 affirmed.

Notes

For conventions relating to refugees, see 18 *Halsbury's Laws* (4th edn) para 1718.

For the Asylum and Immigration Act 1996, s 2, see 31 *Halsbury's Statutes* (4th edn) (2000 reissue) 258. Section 2 has been repealed, with effect from 2 October 2000, by the Immigration and Asylum Act 1999, s 169(3), Sch 16.

Cases referred to in opinions

Adan v Secretary of State for the Home Dept [1998] 2 All ER 453, [1999] 1 AC 293, [1998] 2 WLR 702, HL.

Arcado SPRL v Haviland SA Case 9/87 [1988] ECR 1539.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Buchanan (James) & Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1977] 3 All ER 1048, [1978] AC 141, [1977] 3 WLR 907, HL.

Bugdaycay v Secretary of State for the Home Dept [1987] 1 All ER 940, [1987] AC 514, [1987] 2 WLR 606, HL.

Chassagnou v France (1999) 7 BHRC 151, ECt HR.

Fothergill v Monarch Airlines Ltd [1980] 2 All ER 696, [1981] AC 251, [1980] 3 WLR 209, HL.

H (minors) (abduction: acquiescence), Re [1997] 2 All ER 225, [1998] AC 72, [1997] 2 WLR 563, HL.

Horvath v Secretary of State for the Home Dept [2000] 3 All ER 577, [2000] 3 WLR 379, HL.

Iyadurai v Secretary of State for the Home Dept [1998] Imm AR 470, CA.

Jakob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA (TMCS) Case C-26/92 [1992] ECR I-3967.

Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst & Co Case 189/87 [1988] ECR 5565.

Kerrouche v Secretary of State for the Home Dept [1997] Imm AR 610, CA.

Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereneging Case 34/82 [1983] ECR 987.

R v Secretary of State for the Home Dept, ex p Salem [1999] 2 All ER 42, [1999] 1 AC 450, [1999] 2 WLR 483, HL.

R v Secretary of State for the Home Dept, ex p Simms [1999] 3 All ER 400, [2000] AC 115, [1999] 3 WLR 328, HL.

Appeals

R v Secretary of State for the Home Dept, ex p Adan

The Secretary of State for the Home Department appealed with permission of the Appeal Committee of the House of Lords given on 11 April 2000 from the decision of the Court of Appeal (Lord Woolf MR, Laws and Mance LJJ) on 23 July 1999 ([1999] 4 All ER 774, [1999] 3 WLR 1274) allowing an appeal by the respondent asylum seeker, Lul Omar Adan, from the decision of the Divisional Court (Rose LJ and Mitchell J) on 24 November 1998 ([1999] Imm AR 114) dismissing her application for judicial review of the Secretary of State's decision dated 19 February 1998 refusing her claim for asylum and certifying that claim under s 2 of the Asylum and Immigration Act 1996. The facts are set out in the opinion of Lord Steyn.

R v Secretary of State for the Home Dept, ex p Aitseguer

The Secretary of State for the Home Department appealed with permission of the Appeal Committee of the House of Lords given on 11 April 2000 from the decision of the Court of Appeal (Lord Woolf MR, Laws and Mance LJJ) on 23 July 1999 ([1999] 4 All ER 774, [1999] 3 WLR 1274) dismissing his appeal from the decision of Sullivan J on 18 December 1998 ([1999] INLR 176) allowing an application by the respondent asylum seeker, Hamid Aitseguer, for judicial

review of the Secretary of State's decision dated 21 April 1998 certifying his claim to asylum under s 2 of the Asylum and Immigration Act 1996. The facts are set out in the opinion of Lord Steyn.

David Pannick QC and *Steven Kovats* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Nicholas Blake QC and *Stephanie Harrison* (instructed by *Wilson & Co*) for Adan.

Andrew Nicol QC and *Mark Henderson* (instructed by *Howe & Co*) for Aitseguer.

Their Lordships took time for consideration.

19 December 2000. The following opinions were delivered.

LORD SLYNN OF HADLEY. My Lords, I have had the advantage of reading drafts of the speeches of my noble and learned friends Lord Steyn and Lord Hobhouse of Woodborough. I gratefully adopt Lord Steyn's summary of the relevant facts and of the statutory and convention provisions involved. In the light of their opinions my own view can be stated more shortly.

It is common ground that if each of the respondents were sent back to the countries from which immediately they came to the United Kingdom, Germany would probably send back Adan to Somalia and France would probably send back Aitseguer to Algeria. Germany would do so because it considered that there was no state or government in Somalia which could carry out the persecution. France because it considered that the 'persecution' which he feared was not tolerated or encouraged or threatened by the state itself. Thus in each case it was not conduct for which the state was accountable. It is also common ground that the United Kingdom would not send them back directly to Somalia and Algeria respectively if it was accepted that each was outside the country of his nationality owing to 'a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion (see art 1A of the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmd 9171) (the Geneva Convention) (as amended by the 1967 Protocol relating to the Status of Refugees (New York, 31 January 1967; TS 15 (1969); Cmnd 3906)). Thus even though the persecution was not threatened by the state or by an agency for which the state was responsible, Adan would not be sent back if the threat was from a rival clan to that to which Adan belonged and if the threat to Aitseguer was from the Groupe Islamique Armé in Algeria.

It appears that the Secretary of State accepts that under art 33 of the Geneva Convention which provides that the United Kingdom shall not—

> 'expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion',

such threats may come from agencies other than the state. In other words that what is sometimes called the 'protection' theory rather than the 'accountability' theory is adopted. On the basis of the decision of the House (*Adan v Secretary of State for the Home Dept* [1998] 2 All ER 453, [1999] 1 AC 293) the Secretary of State's view is not only legitimate but right. He also accepts that for him to send back a person to a state which would itself send the applicant to the country where he

feared persecution would itself be a breach of his obligations. (See *Bugdaycay v Secretary of State for the Home Dept* [1987] 1 All ER 940, [1987] AC 514.)

The present case however turns on s 2(2)(c) of the Asylum and Immigration Act 1996 which allows a person who has made a claim for asylum to be removed from the United Kingdom if, inter alia, the Secretary of State certifies that in his opinion 'the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention'.

The sole or core question is therefore whether as a matter of law it is open to the Secretary of State to certify that in his opinion that condition has been fulfilled. Can he as a matter of law say that the government of Germany and France would not send Adan or Aitseguer back respectively to Somalia and Algeria 'otherwise than in accordance with the Convention'? Unfortunately there is a lack of uniformity in the interpretation of this provision between states.

As is apparent from the brief facts I have stated Germany and France take a very different view from the United Kingdom as to who as a matter of interpretation can be the perpetrators of the persecution, a fear of which is relied on by the applicant, though the German and French positions may themselves have differences. It seems thus that if there is no recognised state in the territory (Germany) or no government which tolerates or encourages the persecution (France) the respective government will send the claimants back even if acts are threatened by others which, if done by the state, would amount to persecution within the meaning of the Geneva Convention. The reason is that in such cases they do not see that there is any persecution for which the state is accountable. The United Kingdom on the other hand will regard a threat of persecution in the territory on one of the specified grounds by a body other than the state and which is not tolerated or encouraged by the state as constituting a sufficient threat within the Geneva Convention.

The question thus narrows—may the Secretary of State say that he is satisfied that the other state will not send the applicant to another country 'otherwise than in accordance with the Convention' if the other state adopts an interpretation of the Geneva Convention which the Secretary of State rejects but which the Secretary of State accepts is a reasonably possible or legitimate or permissible or perhaps even arguable interpretation?

It is understandable that comity between nations, parties to the Geneva Convention, might be seen to encourage that view but in my opinion that view is wrong. The question is not whether the Secretary of State thinks that the alternative view is reasonable or permissible or legitimate or arguable but whether the Secretary of State is satisfied that the application of the other state's interpretation of the Geneva Convention would mean that the individual will still not be sent back otherwise than in accordance with the Geneva Convention. The Secretary of State must form his view as to what the Geneva Convention requires (interpreted if his view is challenged by the courts). His is the relevant view and the relevant obligation is that of the United Kingdom. It seems to me that the Secretary of State may not send back an applicant if the Secretary of State considers that the other state's interpretation would lead to an individual being sent back by that state to a state where he has established a fear of persecution which the Secretary of State finds to be covered by the Geneva Convention.

Just as the courts must seek to give a 'Community' meaning to words in the EC Treaty ('worker') so the Secretary of State and the courts must in the absence of a ruling by the International Court of Justice or uniform state practice arrive at their interpretation on the basis of the Geneva Convention as a whole read in the

light of any relevant rules of international law, including the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964). The Secretary of State and the courts of the United Kingdom have to decide what this phrase in this treaty means. They cannot simply adopt a list of permissible or legitimate or possible or reasonable meanings and accept that any one of those when applied would be in compliance with the Geneva Convention.

In my view it is impossible for the Secretary of State to certify that the condition in s 2(2)(c) of the Act is satisfied, that the other state would not send the applicant back 'in contravention of the Convention', if the interpretation of the other state and its application to particular facts would result in the Geneva Convention being applied in a way which the Secretary of State himself was satisfied was not in accordance with the Geneva Convention.

The phrase 'otherwise than in accordance with the Convention' does not mean 'otherwise than in accordance with the relevant state's possible reasonable, permissible or legitimate view of what the Convention means'.

That persecution may be by bodies other than the state, for the purposes of the Geneva Convention, was accepted in *Adan*'s case. Nothing has been said in the present case which suggests that that might be wrong and in my view it was plainly correct. If art 33 of the Geneva Convention had intended his obligation to be limited to cases where a state carried out or tolerated the persecution, art 33 would have said so. The Secretary of State must apply that interpretation to the application of s 2(2)(c) of the Act as he must to his own obligation under art 33 of the Geneva Convention.

In s 2(2)(c) of the Act it is his obligation not to send back the applicant which is in issue. If some other states interpret the Geneva Convention differently in a way which he considers not to be in compliance with the Geneva Convention he must carry out his obligation in the way in which he is advised or is told by the courts is right. To do so is not in any way contrary to the comity of nations or offensive to other states who interpret it differently and it does not begin to suggest malafides on their part.

There may be cases in which an interpretation adopted by the Secretary of State can be carried out in different ways and in such a case it may well be that the Secretary of State could accept that such other ways were in compliance with the Geneva Convention. But the Secretary of State is neither bound nor entitled to follow an interpretation which he does not accept as being the proper interpretation of the Geneva Convention.

I have no doubt that the Court of Appeal reached the right conclusion and I therefore agree with Lord Steyn and Lord Hobhouse that these appeals should be dismissed.

LORD STEYN. My Lords, there are two appeals before the House from decisions on separate applications for judicial review, which were heard together and determined in a single judgment in the Court of Appeal ([1999] 4 All ER 774, [1999] 3 WLR 1274). The central question is whether under s 2(2)(c) of the Asylum and Immigration Act 1996, read with the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmd 9171) (the Geneva Convention), and its protocol (1967 Protocol relating to the Status of Refugees (New York, 31 January 1967; TS 15 (1969); Cmnd 3906) (the protocol), the Secretary of State was entitled to authorise the removal of two asylum seekers to safe third countries on the basis that there is a permissible range of interpretations of protections of the Geneva Convention rather than one autonomous

interpretation. The answer to this question turns on the construction of s 2(2)(c) of the 1996 Act which has been repealed by the Immigration and Asylum Act 1999.

Adan's asylum application

Stripped of unnecessary detail, the sequence of events was as follows. Adan is a citizen of Somalia. She is now 28 years of age. She claimed asylum in Germany. She told the German authorities that she was a member of a minority clan and that she had been persecuted by majority clans dominant near Mogadishu. On 25 August 1997 the German Federal Office for the Recognition of Refugees rejected her asylum claim and refused her any other form of protection in Germany. She was ordered to leave Germany on pain of deportation to Somalia. She did not exercise her right of appeal against this decision. On 4 October 1997 she arrived in the United Kingdom and claimed asylum. On 3 February 1998 the Secretary of State asked the German authorities to accept responsibility under the Dublin Convention for determining Adan's asylum claim. (The full title of this convention is the Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities (Dublin, 15 June 1990; TS 72 (1997); Cm 3806) (the Dublin Convention).) On 19 February 1998 the German authorities accepted responsibility for determining her asylum claim. On the same day the Secretary of State refused her asylum claim without consideration of its merits and certified under s 2 of the 1996 Act that Adan could be returned to Germany.

On 29 April 1998 a judge granted leave to Adan to move for judicial review of the Secretary of State's certificate. On 24 November 1998 the Divisional Court (Rose LJ and Mitchell J) dismissed the application ([1999] Imm AR 114). On 22 January 1999 the Court of Appeal granted leave to appeal. By letter dated 23 June 1999, the Secretary of State informed Adan that he would not seek to return her to Germany, regardless of the outcome of the appeal, but that he would himself determine her claim for asylum. This was because the Secretary of State wished to adduce before the Court of Appeal fresh evidence about alternative forms of protection available in Germany. He accepted that he could have obtained such evidence in time to produce it to the Divisional Court. The Secretary of State accepted that it would not be right to seek to return Adan to Germany in reliance on new evidence. But, in the light of over 200 pending cases which raised similar issues, the Secretary of State wanted the Court of Appeal to hear the appeal and admit the further evidence. The Court of Appeal (Lord Woolf MR, Laws and Mance LJJ) admitted further evidence and heard the appeal. On 23 July 1999 the Court of Appeal allowed Adan's appeal.

Aitseguer's asylum application

Aitseguer is a citizen of Algeria. He is now 33 years of age. On or about 26 January 1998 he arrived in France. He did not claim asylum in France. On 9 February 1998 he arrived in the United Kingdom and claimed asylum. He claimed to be at risk from the Groupe Islamique Armé and said that the Algerian authorities are unable to protect him. On 12 February 1998 the Secretary of State asked the French authorities to accept responsibility under the Dublin Convention for determining Aitseguer's claim for asylum. On 20 April 1998 the French authorities agreed to do so. On 21 April 1998 the Secretary of State certified under s 2 of the 1996 Act that Aitseguer could be returned to France.

On 15 July 1998 a judge granted leave to apply for judicial review of the Secretary of State's certificate. On 18 December 1998 Sullivan J ([1999] INLR 176)

quashed the Secretary of State's certificate. Sullivan J granted leave to appeal. On 23 June 1999 the Secretary of State wrote to Aitseguer in the same terms as contained in his letter to Adan, namely that he wished to adduce further evidence before the Court of Appeal and that he would not send Aitseguer to France but would himself determine his substantive asylum claim, regardless of the outcome of the appeal. The appeal was heard with that of Adan. The Court of Appeal dismissed the Secretary of State's appeal against the order of Sullivan J.

Different interpretations of the Geneva Convention

Article 1A of the Geneva Convention provides, so far as material:

> 'For the purposes of the present Convention, the term "refugee" shall apply to any person who ...
>
> (2) [As a result of events occurring before 1, January 1951, and] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence [as a result of such events], is unable or, owing to such fear, is unwilling to return to it.'

The words in brackets were deleted by the protocol. Article 33(1) of the Geneva Convention provides:

> 'No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

There is a divergence in state practice concerning the interpretation of the word 'persecuted' in art 1A(2). The majority of contracting states, including the United Kingdom, do not limit persecution to conduct which can be attributed to a state. A minority of contracting states, including Germany and France, do so limit it. The two different approaches have been referred to as the persecution theory and the accountability theory. The consequences of adopting one or other of these theories on the fate of refugees are vividly illustrated by the cases before the House.

In the case of Adan the German authorities have taken the view that governmental authority in Somalia has collapsed, so that there is no state to which persecution can be attributed. Adan claims to belong to a persecuted minority clan. She claims to be unaffected by the general exclusion from the Geneva Convention of victims of civil war simpliciter, as she would be able to demonstrate a differential impact (*Adan v Secretary of State for the Home Dept* [1998] 2 All ER 453 at 463, [1999] 1 AC 293 at 311). Aitseguer claims to be a target of the Groupe Islamique Armé in Algeria. The Secretary of State accepts that there is a substantial risk that the French authorities would refuse his asylum claim on the ground that there was no state toleration or encouragement of the threats of this faction against Aitseguer, and therefore no persecution attributable to the Algerian state. The Secretary of State accepts that if Adan and Aitseguer were to be returned to Germany and France respectively, the restrictive view of art 1A(2) of the Geneva Convention encapsulated in the accountability theory, which prevails in Germany and France, will probably cause them to be returned to Somalia and

Algeria where they may face torture and death. This acceptance was, however, subject to a possible argument that there are alternative forms of protection in Germany and France which ought to protect Adan and Aitseguer.

The Asylum and Immigration Appeals Act 1993 and the Asylum and Immigration Act 1996

In the United Kingdom applications for asylum are determined by the Secretary of State. Section 6 of the Asylum and Immigration Appeals Act 1993 provides as follows:

> 'During the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the United Kingdom.'

Section 2 of the 1996 Act creates an exception to s 6 of the 1993 Act. It deals with removal of asylum seekers to 'safe third countries' certified as such by the Secretary of State when he is of the opinion that the statutory conditions are satisfied. Section 2 of the 1996 Act provides, so far as material:

> '(1) Nothing in section 6 of the 1993 Act ... shall prevent a person who has made a claim for asylum being removed from the United Kingdom if—(a) the Secretary of State has certified that, in his opinion, the conditions mentioned in subsection (2) below are fulfilled ...
>
> (2) The conditions are—(a) that the person is not a national or citizen of the country or territory to which he is to be sent; (b) that his life and liberty would not be threatened in that country or territory by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and (c) that the government of that country or territory would not send him to another country or territory *otherwise than in accordance with the Convention*.
>
> (3) This subsection applies to any country or territory which is or forms part of a member State ...' (My emphasis.)

There is a right of appeal against a s 2 certificate (ss 2(1)(b), 3(1) of the 1996 Act). But, where the certified country is a member state of the European Union, the appeal cannot be brought until after the asylum seeker has left the United Kingdom (ss 2(3), 3(2)of that Act).

The Immigration and Asylum Act 1999

Section 169(3) of and Sch 16 to the Immigration and Asylum Act 1999 repealed ss 2 and 3 of the 1996 Act. By s 11 of the 1999 Act, a member state of the European Union with which there are standing arrangements, such as the Dublin Convention, for determining which state is responsible for considering applications for asylum, is to be regarded as a place from which a person will not be sent to another country otherwise than in accordance with the Geneva Convention. The asylum seeker has a right of appeal on the ground that removal to the member state will contravene s 6 of the Human Rights Act 1998 (ss 11(2), 65 of the 1999 Act). The Secretary of State can carry out the removal before the right of appeal is exercised if he certifies that the allegation that the removal would breach the asylum seeker's human rights is manifestly unfounded (ss 11(3), 72(2)(a) of that Act). These provisions of the 1999 Act came into force on 2 October 2000. The issue raised in the present case may still arise in cases where the proposed

removal is not to a member state under standing arrangements (s 12 of the 1999 Act).

The decision in the Court of Appeal

The Secretary of State's principal submission before the Court of Appeal was that under s 2(2)(c) of the 1996 Act it was a sufficient compliance with the statute if he considered that the approach of the third country was a reasonable interpretation of the Geneva Convention open to that country. In a detailed and careful judgment of the court Laws LJ rejected this submission ([1999] 4 All ER 774, [1999] 3 WLR 1274). He held that the Secretary of State had to be satisfied that the practice in the third country was consistent with the true and international interpretation of the Geneva Convention. Article 1A(2) of the Geneva Convention extended to persons who feared persecution by non-state agents. Accordingly, the Secretary of State had not been entitled to issue certificates authorising the return of the asylum seekers to Germany and France.

The status of the appeals before the House

The outcome of the two appeals before the House will not affect the cases of Adan and Aitsegeur. But the appeals raise important issues which may require consideration in other cases, including cases of removal to countries outside the European Union. In accordance with the approach set out in *R v Secretary of State for the Home Dept, ex p Salem* [1999] 2 All ER 42, [1999] 1 AC 450 the House gave leave to appeal in the cases of Adan and Aitseguer. Leave was granted in both cases so that the House could consider whether there is a material difference between a state where governmental authority has collapsed completely (as is the case in Somalia) and a state where governmental authority exists but is too weak to provide effective protection against persecution by non-state actors (as is the case in Algeria). It was on this basis that Sullivan J distinguished the ruling of the Divisional Court in Aitseguer's case from that of Adan. The Court of Appeal held that the two cases were indistinguishable ([1999] 4 All ER 774 at 798, [1999] 3 WLR 1274 at 1299).

On the other hand, a third case before the Court of Appeal, named Subaskaran, added nothing to the issues and leave was not sought to bring it before the House.

The issues

In the context of a certificate issued under s 2(2)(c) of the 1996 Act the following issues arise.

(A) Does art 1A(2) of the Geneva Convention have a proper international meaning, the interpretation of which is decided by the court as a question of law, in relation to the consideration of claims of persecution by non-state agents?

(B) If so, what is that international meaning in so far as it is relevant in the present case?

(C) Was the Secretary of State entitled to conclude that: (i) Germany was a safe third country in respect of asylum claims made by a person from a country where there was no state to protect her from persecution by non-state agents? (ii) France was a safe third country in respect of asylum claims made by a person from a country where there is a state but it is unable to provide protection from persecution by non-state agents?

(D) Was the Secretary of State entitled to rely on forms of protection other than the grant of asylum which are available in the state to which he is proposing to send the asylum seeker and, if so, by reference to what criteria?

In the circumstances of the two cases before the House issue (A) is the critical issue.

Issue A: is there an autonomous meaning of art 1A(2)?

The starting point is s 2(2)(c) of the 1996 Act. It provides that one of the indispensable conditions to the granting of a certificate by the Secretary of State authorising the removal of an asylum seeker is that the government of the country to which he is to be sent (the third country) 'would not send him to another country or territory otherwise than *in accordance with the Convention*'. And that requires one in the present context to turn back to art 33(1) of the Geneva Convention, which provides that no state—

> 'shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

It is accepted, and rightly accepted, by the Secretary of State that it is a long standing principle of English law that if it would be unlawful to return the asylum seeker directly to his country of origin where he is subject to persecution in the relevant sense, it would equally be unlawful to return him to a third country which it is known will return him to his country of origin (*Bugdaycay v Secretary of State for the Home Dept* [1987] 1 All ER 940 at 952, [1987] AC 514 at 532). But counsel for the Secretary of State submits that this principle tells us nothing about the particular problem before the House, namely whether there is a true and international meaning of art 1A(2) of the Geneva Convention or simply a range of interpretations some of which the Secretary of State may be entitled to regard as legitimate and others not.

Section 2(2)(c) of the 1996 Act is drafted in plain words. It requires certification by the Secretary of State that the third country would not send the asylum seeker to his country of origin 'otherwise than in accordance with the Convention'. The section does not express the condition in terms that refer to 'the Convention as legitimately interpreted by the (third) country concerned'. But that is exactly the meaning which counsel for the Secretary of State invites the House to give to s 2(2)(c) of that Act. It would involve interpolation not interpretation. And there is no warrant for implying such words. It is noteworthy that such a legislative technique, expressly accommodating a range of acceptable interpretations, is nowhere to be found in respect of multilateral treaties or conventions incorporated or authorised by United Kingdom legislation. Such a remarkable result would have required clear wording. The obvious and natural meaning of s 2(2)(c) is that 'otherwise than in accordance with the Convention' refers to the meaning of the Geneva Convention as properly interpreted.

It follows that the inquiry must be into the meaning of the Geneva Convention approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It is necessary to determine the autonomous meaning of the relevant treaty provision. This principle is part of the very alphabet of customary international law. Thus the Court of Justice of the European Communities has explained how concepts in the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (as set out in Sch 1 to the Civil Jurisdiction and Judgments Act 1982) must be given an autonomous or independent meaning in accordance with the objectives and system of the

convention (see *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereneging* Case 34/82 [1983] ECR 987 at 1002 (paras 9–10), *Arcado SPRL v Haviland SA* Case 9/87 [1988] ECR 1539 at 1549 (the opinion of Advocate General Slynn), *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst & Co* Case 189/87 [1988] ECR 5565 at 5585 (para 16), *Jakob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA (TMCS)* Case C-26/92 [1992] ECR I-3967 at 3993 (para 10)). Closer to the context of the Geneva Convention are human rights conventions where the principle requiring an autonomous interpretation of convention concepts ensures that its guarantees are not undermined by unilateral state actions. Thus the European Court of Human Rights has on a number of occasions explained that concepts of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) must be given an autonomous meaning, eg concepts such as 'civil right' and 'criminal charge'. The decisions articulating this idea are too numerous to cite but I would mention one recent example, namely *Chassagnou v France* (1999) 7 BHRC 151 as well as the clear analysis in Grosz, Beatson and Duffy, *Human Rights: The 1998 Act and the European Convention* (2000) pp 165–166 (C0-07).

In *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] 3 All ER 1048 at 1052, [1978] AC 141 at 152, Lord Wilberforce observed that a treaty should be interpreted 'unconstrained by technical rules of English law, or by English legal precedent but on broad principles of general acceptation' (see also *Re H (minors) (abduction: acquiescence)* [1997] 2 All ER 225 at 234–235, [1998] AC 72 at 87). The rules governing the interpretation of treaties are art 31 ('General rule of interpretation') and art 32 ('Supplementary means of interpretation') of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) (the Vienna Convention), which codify already existing public international law (*Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 at 706–707, [1981] AC 251 at 282). It is common ground that there are no relevant supplementary means of interpretation to be considered in regard to the Geneva Convention and I will therefore not set out art 32 of the Vienna Convention. But art 31 of the Vienna Convention is important in the present context. It reads as follows:

> '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context of the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (*a*) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument relating to the treaty.
>
> 3. There shall be taken into account, together with the context: (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (*c*) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.'

a It follows that, as in the case of other multilateral treaties, the Geneva Convention must be given an independent meaning derivable from the sources mentioned in arts 31 and 32 of the Vienna Convention and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty. If there is disagreement on the meaning of the Geneva Convention, it can be b resolved by the International Court of Justice (art 38 of the Geneva Convention). It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court of Justice is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the c treaty. And there can only be one true meaning.

There were contrary arguments presented by counsel for the Secretary of State. The most important were the following. First, that the objective of the legislative changes effected by the 1996 Act show that it is inherently unlikely that Parliament intended that the Secretary of State, when considering whether to d issue a certificate under s 2 of the 1996 Act, should be required to proceed on the basis that there is only one true interpretation of the Geneva Convention. I would reject this contention. The subject of the Geneva Convention is fundamental rights. It is fair to assume that if Parliament had intended to introduce in 1996 the relativist and imprecise notion of 'the Convention as legitimately interpreted by the third country concerned', which tends to undermine the protections guaranteed by the e Geneva Convention, it would have made such legislative intent clear by express words. Secondly, counsel was able to rely on observations in the Court of Appeal in *Kerrouche v Secretary of State for the Home Dept* [1997] Imm AR 610 at 615 and *Iyadurai v Secretary of State for the Home Dept* [1998] Imm AR 470 at 476, which tend to support the idea of a range of permissible meanings of the Geneva Convention. f For the reasons I have given I do not accept that in this respect the law was correctly stated in these cases. Thirdly, counsel for the Secretary of State placed great reliance on the fact that on 4 March 1996 the member states of the European Union agreed a joint position (OJ 1996 L63 p 2) on the harmonised application of the definition of the term 'refugee' in art 1 of the Geneva Convention. Paragraph 5.2 of the joint position states:

g

> *'Persecution by third parties*
>
> Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A of that Convention, is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution h should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The persons concerned may be eligible in any event for appropriate forms of protection under national law.'

j Counsel put too much weight on this document. Laws LJ convincingly explained in his judgment that the argument treats what is necessary as if it were sufficient for the purpose of ascertaining the true interpretation of s 2(2)(c) of the 1996 Act read with art 1A(2) of the Geneva Convention. I agree. Fourthly, counsel for the Secretary of State painted a picture that if his argument was rejected, the Secretary of State was charged with an impossible task. He said:

> 'For the Secretary of State to be required to assess the details of the judgments of the appellate courts of other EU States, and form a judgment on whether they are consistent with the 1951 Convention, with that judgment subject to reassessment by the courts of this country by way of judicial review, would impose a complex and time-consuming task that is inconsistent with, and would substantially frustrate, the objective of the 1996 Act to implement the principles in the Dublin Convention and speedily return asylum seekers to other EU States for the merits of their claims to be considered.'

The sky will not fall in. If there is one autonomous meaning of the Geneva Convention, the task of the Secretary of State will in some ways be simplified. He need only consider and apply the true interpretation of the Geneva Convention rather than a multiplicity of potential issues about the legitimacy of particular interpretations by other countries. Fifthly, counsel for the Secretary of State raised a matter which did cause me concern at one stage, namely whether the view I have adopted contains an implicit criticism of the judicial departments of Germany and France. I certainly intend no criticism of the interpretations adopted in good faith in Germany and France. Unanimity on all perplexing problems created by multilateral treaties is unachievable. National courts can only do their best to minimise the disagreements. But ultimately they have no choice but to apply what they consider to be the autonomous meaning. Here the difference is fundamental and cannot be overcome by a form of words. The House is bound to take into account the obligations of the United Kingdom government and to apply the terms of s 2(2)(c) of the 1996 Act.

In my view the contention of the Secretary of State is in conflict with the logic of treaty law, and in particular the logic of the Geneva Convention, and finds no support in the language of the 1996 Act. The Court of Appeal correctly concluded that there is only one true interpretation of art 1A(2) of the Geneva Convention. It is as I have explained an autonomous interpretation as befits a basic concept in the Geneva Convention.

Issue B: what is the relevant autonomous meaning of the Geneva Convention?

In *Adan v Secretary of State for the Home Dept* [1998] 2 All ER 453, [1999] 1 AC 293 the House of Lords authoritatively rejected the accountability theory and adopted the persecution theory. Lord Lloyd of Berwick held that the protection of the Geneva Convention extends to:

> '... the important class of those who are sometimes called "third party refugees," i e those who are subject to persecution by factions within the state. If the state in question can make protection available to such persons, there is no reason why they should qualify for refugee status. They would have satisfied the fear test, but not the protection test. Why should another country offer asylum to such persons when they can avail themselves of the protection of their own country? But if, for whatever reason, the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete. Both tests would be satisfied.' (See [1998] 2 All ER 453 at 458–459, [1999] 1 AC 293 at 306.)

Although not relevant to the cases before the House, I draw attention to the fact that Lord Lloyd qualified his ruling as follows:

> 'I conclude from these authorities, and from my understanding of what the framers of the convention had in mind, that where a state of civil war exists, it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show what Mr Pannick calls a differential impact. In other words, he must be able to show fear of persecution for convention reasons over and above the ordinary risks of clan warfare.' (See [1998] 2 All ER 453 at 463, [1999] 1 AC 293 at 311.)

Three Law Lords (Lord Goff of Chieveley, Lord Nolan and Lord Hope of Craighead) agreed with the opinion of Lord Lloyd and Lord Slynn of Hadley gave a separate judgment which on the material point is to the same effect (see [1998] 2 All ER 453 at 455, [1999] 1 AC 293 at 302).

It is important to recognise that in *Adan*'s case Lord Lloyd made clear that the inquiry related to the autonomous meaning of the Geneva Convention. He said:

> 'I return to the argument on construction. Mr Pannick points out that we are here concerned with the meaning of an international convention. Inevitably the final text will have been the product of a long period of negotiation and compromise. One cannot expect to find the same precision of language as one does in an Act of Parliament drafted by parliamentary counsel. I agree. It follows that one is more likely to arrive at the true construction of art 1A(2) by seeking a meaning which makes sense in the light of the convention as a whole, and the purposes which the framers of the convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach.' (See [1998] 2 All ER 453 at 458, [1999] 1 AC 293 at 305.)

And Lord Slynn approached the matter in the same way. The conclusions in *Adan*'s case were endorsed by the House in *Horvath v Secretary of State for the Home Dept* [2000] 3 All ER 577, [2000] 3 WLR 379.

On the supposition that art 1A(2) of the Geneva Convention must be given one autonomous interpretation counsel for the Secretary of State accepted that the holding in *Adan*'s case represents that interpretation. It is unnecessary therefore to travel over the same ground again. Two points in amplification of the judgments in *Adan*'s case must, however, be mentioned. First, it is accepted that the United Kingdom view is shared by the majority of states. It also appears to be gaining ground. Secondly, the *UN Handbook on Procedures and Criteria for Determining Refugee Status* (1979) published by the United Nations High Commission for Refugees (UNHCR), states in para 65:

> 'Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, *or if the authorities refuse, or prove unable, to offer effective protection.*' (My emphasis.)

Under arts 35 and 36 of the Geneva Convention, and under art II of the protocol, the UNHCR plays a critical role in the application of the Geneva Convention: compare the Statute of the Office of the United Nations High Commissioner for

Refugees (UN GA Resolution 428(V) (1950), Doc A/1775) (para 8). Contracting states are obliged to co-operate with the UNHCR. It is not surprising therefore that the *UNHCR Handbook*, although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals (see Aust, *Modern Treaty Law and Practice* (2000) p 191).

The relevant autonomous meaning of art 1A(2) of the Geneva Convention is therefore as explained in *Adan*'s case. Like the Court of Appeal I would hold that there is no material distinction between a country where there is no government (like Somalia) and a country when the government is unable to afford the necessary protection to citizens (such as Algeria). Both are covered by art 1A(2).

Issue C: was the Secretary of State's certification lawful?

On the stark and clear cut facts on which the House has been asked to consider the two appeals I conclude that the Secretary of State wrongly proceeded on the twin assumption that there is a band of permissible meanings of art 1A(2) of the Geneva Convention and that the practice hitherto adopted in Germany and France falls within the permissible range. The Secretary of State materially misdirected himself. His decisions must be quashed. It is only necessary to add that cases under the Geneva Convention are always particularly fact-sensitive. Where the position is less straight forward different considerations may arise.

Issue D: alternative protection in France and Germany

It was sensibly agreed between counsel that the House is not in a position to express any opinion on alternative procedures for the protection of asylum seekers in Germany and France. I do not therefore propose to say anything about this aspect.

Disposal

For these reasons I would dismiss both appeals.

LORD HUTTON. My Lords, art 1A(2) of the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmd 9171) (the Geneva Convention) (as amended by the 1967 Protocol relating to the Status of Refugees (New York, 31 January 1967; TS 15 (1969); Cmnd 3906)) defines a 'refugee' as any person who—

> 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ... is unable or, owing to such fear, is unwilling to return to it.'

Article 33 of the Geneva Convention provides:

> '1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

The United Kingdom has accepted this obligation under the Geneva Convention and Parliament recognised the primacy of the Geneva Convention

when a person claims asylum in the United Kingdom in enacting the Asylum and Immigration Appeals Act 1993. Section 1 of that Act provides:

> '"the 1971 Act" means the Immigration Act 1971; "claim for asylum" means a claim made by a person (whether before or after the coming into force of this section) that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from, or required to leave, the United Kingdom; and "the Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and the Protocol to that Convention.'

Section 2 provides: '*Primacy of Convention*—Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention.'

Section 6 gave protection to persons making a claim for asylum and provided:

> 'During the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the United Kingdom.'

Where a refugee claimed asylum in more than one member state of the European Communities difficulties arose as to which state was responsible for examining the claim in order to determine whether the claimant should be granted asylum in discharge of the obligations imposed by the Geneva Convention. A particular problem arose of 'forum-shopping' by asylum seekers. The Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities (Dublin, 15 June 1990; TS 72 (1997); Cm 3806) (the Dublin Convention) entered into by the member states was intended to make provisions for these difficulties and one of the recitals in the preamble states:

> 'Aware of the need, in pursuit of this objective, to take measures to avoid any situations arising, with the result that applicants for asylum are left in doubt for too long as regards the likely outcome of their applications and concerned to provide all applicants for asylum with a guarantee that their applications will be examined by one of the Member States and to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum ...'

The articles of the Dublin Convention give effect to the intent stated in the preamble and art 3 provides:

> '1. Member States undertake to examine the application of any alien who applies at the border or in their territory to any one of them for asylum. 2. That application shall be examined by a single Member State, which shall be determined in accordance with the criteria defined in this Convention. The criteria set out in Articles 4 to 8 shall apply in the order in which they appear. 3. That application shall be examined by that State in accordance with its national laws and its international obligations.'

Sections 2 and 3 of the Asylum and Immigration Act 1996 were enacted in the light of the Dublin Convention. Section 2 provides:

'(1) Nothing in section 6 of the 1993 Act (protection of claimants from deportation etc.) shall prevent a person who has made a claim for asylum being removed from the United Kingdom if—(a) the Secretary of State has certified that, in his opinion, the conditions mentioned in subsection (2) below are fulfilled; (b) the certificate has not been set aside on an appeal under section 3 below; and (c) except in the case of a person who is to be sent to a country or territory to which subsection (3) below applies, the time for giving notice of such an appeal has expired and no such appeal is pending.

(2) The conditions are—(a) that the person is not a national or citizen of the country or territory to which he is to be sent; (b) that his life and liberty would not be threatened in that country or territory by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and (c) that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention.

(3) This subsection applies to any country or territory which is or forms part of a member State, or is designated for the purposes of this subsection in an order made by the Secretary of State by statutory instrument ...

(7) In this section "claim for asylum" and "the Convention" have the same meanings as in the 1993 Act.'

Section 3 of the 1996 Act gives a right of appeal against a certificate issued under s 2(1), but s 3(2) provides:

'A person who has been, or is to be, sent to a country or territory to which section 2(3) above applies shall not be entitled to bring or pursue an appeal under this section so long as he is in the United Kingdom.'

My Lords, the context in which the cases of the two applicants, Ms Adan and Mr Aitseguer, come before the courts of this country is that there are two different approaches to the meaning of 'persecution' under the Geneva Convention. One view ('the accountability theory') is that conduct can only amount to persecution within the meaning of art 1A(2) of the Geneva Convention if a state can be regarded as accountable for it. On this view the Geneva Convention does not apply where, in the country in which persecution is feared, the state is too weak to provide effective protection, or the state has collapsed. The other view ('the persecution theory') is that persons are entitled to protection as refugees if not given protection against persecution in their own country, irrespective of whether this is due to a lack of power in the state or due to encouragement or toleration of the persecution by the state. It is clear from the speech of Lord Lloyd of Berwick, with which Lord Goff of Chieveley, Lord Nolan and Lord Hope of Craighead concurred, in *Adan v Secretary of State for the Home Dept* [1998] 2 All ER 453 at 458–459, [1999] 1 AC 293 at 306, that in the United Kingdom the proper construction of the Geneva Convention requires the acceptance of the persecution theory.

The Secretary of State accepts, however, that the courts of Germany and of France adopt the accountability theory and interpret the Geneva Convention as being concerned with the relation between an individual and his or her state, so that international protection under the Geneva Convention only applies if the claimant's country is responsible for, or complicit in, the persecution of its own citizens.

In relation to Ms Adan, the German authorities have taken the view that government authority in Somalia has collapsed, so that there is no state to which persecution can be attributed. In relation to Mr Aitseguer, the Secretary of State accepts that there is a real risk that the French authorities will take the view that there is no state toleration or encouragement of the violent activities of the Groupe Islamique Armé which Mr Aitseguer fears, and therefore no persecution attributable to the Algerian State. Accordingly the Secretary of State accepts that there is a real risk that if Ms Adan were sent to Germany the German authorities (including the German court), applying the accountability theory, would reject her claim for asylum and send her back to Somalia. He also accepts that there is a real risk that if Mr Aitseguer were sent to France, the French authorities (including the French court) applying the accountability theory, would reject his claim for asylum and send him back to Algeria.

The essence of the reasoning of the Court of Appeal ([1999] 4 All ER 774 at 794–795, [1999] 3 WLR 1274 at 1295–1296), is:

> 'Because the scope of the definition of "refugee" in art 1A(2) is a matter of law, it is in our judgment not appropriate to investigate the reasons of history or culture why some states—here, Germany and France—adopt one construction and the courts of the United Kingdom (and other signatory states) adopt another. This involves no disrespect to the French and German jurisdictions. In *Iyadurai*'s case (*Iyadurai v Secretary of State for the Home Dept* [1998] Imm AR 470 at 473) Lord Woolf MR (in a passage we have already set out), citing *Kerrouche*'s case (*Kerrouche v Secretary of State for the Home Dept* [1997] Imm AR 610), referred to "the absence of some supranational court which is capable of giving authoritative interpretations to the provisions of the Convention and Protocol which are binding on the signatory countries". That being the position, if the Secretary of State gives a certificate in any case where the scope of art 1A(2) is in question, the courts of this country have no choice but to arrive at an authoritative interpretation themselves. If they did not do so, they would abrogate their elementary responsibility to supervise the Secretary of State's decisions for error of law: their duty here is the same as where the Secretary of State's appreciation of purely municipal provisions is in question. It is true that art 38 of the convention provides for references to be made to the International Court of Justice at the Hague. We understand that no such reference has ever been made. In any event it seems clear that (in contrast to the position under art 234, formerly 177, of the EC Treaty in relation to the law of the European Union) the court has no power itself to refer, whether at the request of a party or of its own motion. In these circumstances our courts are bound to find the true interpretation of art 1A(2) for themselves, and to apply it in the exercise of their supervisory jurisdiction of decisions arrived at by the Secretary of State touching s 2(2)(c) of the 1996 Act. From all these considerations it follows that the issue we must decide is whether or not, as a matter of law, the scope of art 1A(2) extends to persons who fear persecution by non-state agents in circumstances where the state is not complicit in the persecution, whether because it is unwilling or unable (including instances where no effective state authority exists) to afford protection. We entertain no doubt but that such persons, whose case is established on the facts, are entitled to the convention's protection. This seems to us to follow naturally from the words of art 1A(2): "... is unable or, owing to such fear, is unwilling to avail himself of the

protection of that country"; and this involves no technical or over-legalistic reading of the provision. This interpretation is supported by the approach taken in para 65 of the UNHCR Handbook. We have described the Handbook's genesis, to which we attach some importance. While the Handbook is not by any means itself a source of law, many signatory states have accepted the guidance which on their behalf the UNHCR was asked to provide, and in those circumstances it constitutes, in our judgment, good evidence of what has come to be international practice within art 31(3)(b) of the Vienna Convention.'

After referring to the protocol to the Geneva Convention, the court states:

'It is clear that the signatory states intended that the convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the European Convention on Human Rights is so regarded. Looked at in this light, the Geneva Convention is apt unequivocally to offer protection against non-state agent persecution, where for whatever cause the state is unwilling or unable to offer protection itself.' (See [1999] 4 All ER 774 at 795, [1999] 3 WLR 1274 at 1296.)

Mr Pannick QC, on behalf of the Secretary of State, submitted that notwithstanding that the courts of the United Kingdom apply the persecution theory and the courts of Germany and France apply the accountability theory, the Secretary of State was entitled to be of the opinion that Germany would not send Ms Adan to Somalia 'otherwise and in accordance with the Convention', and that France would not send Mr Aitseguer to Algeria 'otherwise than in accordance with the Convention'.

Mr Pannick advanced four main submissions which I summarise as follows.

(1) Section 2(1)(a) of the 1996 Act requires the Secretary of State to form an opinion whether, in relation to a particular asylum seeker, the government of another state would act in accordance with the Geneva Convention. The subsection should not be construed as requiring the Secretary of State to reach a conclusion on what is a difficult and disputed issue of international law. Parliament could not have intended the Secretary of State to decide whether or not the decision of a German court or a French court on an application for asylum in that country was correct in law.

(2) Moreover, having regard to the principle of comity under which the courts of one country are very slow to adjudicate upon the actions or decisions of another country or its courts acting within the territory of that country, Parliament could not have intended that the Secretary of State or the courts of this country might, in effect, have to make a decision that an action by the German or French governments or a ruling by a German or French court was wrong in law.

(3) The purpose of s 2 of the 1996 Act was to give effect to the arrangements made in the Dublin Convention, and those arrangements were intended to ensure that where a refugee sought asylum in more than one member state, his or her application for asylum would be considered only by one state, and under those arrangements the applications of Ms Adan and Mr Aitseguer were to be heard and determined respectively by Germany and France.

(4) Mr Pannick also placed reliance on para 5.2 of the joint position of 4 March 1996 (OJ 1996 L63 p 2) of the member states on the harmonised application of the definition of the term 'refugee' in art 1 of the Geneva Convention:

> *'Persecution by third parties*
>
> Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A of that Convention, is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The person concerned may be eligible in any event for appropriate forms of protection under national law.'

He submitted that the wording of the statement shows that it was accepted that the Geneva Convention did not give protection to asylum seekers unless there was complicity by the state in the persecution which they feared.

My Lords, I consider that Mr Pannick's second submission relating to comity is of limited weight as the purpose of an English court in determining applications such as the present ones is not to pass judgment on the validity of a decision of a French or German court but to decide if the English Secretary of State has acted lawfully in deciding to remove a claimant for asylum from England.

The preamble to the joint position states: 'Having established that the Handbook of the United Nations High Commissioner for Refugees (UNHCR) is a valuable aid to Member States in determining refugee status'; and I think that the weight of Mr Pannick's fourth submission is reduced by the observations in the *UNHCR Handbook*. Paragraph 65 states:

> 'Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.'

And para 98 states:

> 'Being *unable* to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution.' (My emphasis.)

However, I consider that the first and third arguments advanced on behalf of the Secretary of State are of considerable weight. Where it is agreed between states that a particular legal issue under an international convention, which could arise for determination in a number of the states, be determined by one of them, it can

be strongly argued that the issue should be resolved in accordance with the legal doctrines of that state and that a government minister of another state would not be required to form and express an opinion whether or not the decision of a court of that other state was correct in its interpretation of the convention.

There is a further consideration, however, which has to be taken into account. On the Secretary of State's case, s 2 of the 1996 Act constitutes a diminution in a human right given to an asylum-seeker by an international convention incorporated into the law of the United Kingdom by a United Kingdom statute. Under the law of the United Kingdom, as decided by this House in *Adan v Secretary of State for the Home Dept* [1998] 2 All ER 453, [1999] 1 AC 293, an asylum seeker is entitled to the protection of art 33 of the Geneva Convention notwithstanding that the state in whose territory he fears persecution is not complicit in that persecution. This is an important human right and, because the courts of Germany and France will rule that art 33 does not give this right, the effect of s 2 of the 1996 Act, if the construction contended for by the Secretary of State were held to be correct, would be to take away that right from Ms Adan and Mr Aitseguer. This was recognised by Lord Bridge of Harwich in his speech in *Bugdaycay v Secretary of State for the Home Dept* [1987] 1 All ER 940 at 952, [1987] AC 514 at 532 where, giving a different illustration, he stated:

> 'Suppose it is well known that country A, although a signatory to the convention, regularly sends back to its totalitarian and oppressive neighbour, country B, those opponents of the regime in country B who are apprehended in country A following their escape across the border. Against that background, if a person arriving in the United Kingdom from country A sought asylum as a refugee from country B, assuming he could establish his well-founded fear of persecution there, it would, it seems to me, be as much a breach of art 33 of the convention to return him to country A as to country B. The one course would effect indirectly, the other directly, the prohibited result, i e his return "to the frontiers of territories where his life or freedom would be threatened".'

My Lords, Parliament can enact a provision which takes away a right given by the Geneva Convention and incorporated into the law of the United Kingdom by the 1993 Act. But in deciding whether s 2 of the 1996 Act has this effect I consider that the House should apply the principle stated by Lord Hoffmann in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 412, [2000] AC 115 at 131:

> 'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.'

In the present case I think that the words 'otherwise than in accordance with the Convention' in s 2(2)(c) of the 1996 Act are ambiguous in the context in which they appear; they could mean 'otherwise than in accordance with the

Convention as interpreted by the United Kingdom', or they could mean 'otherwise than in accordance with the Convention as interpreted by the country to which he is to be sent'. Therefore in my opinion the important human right given by art 33 of the Geneva Convention cannot be taken away by those words. Accordingly I would dismiss the two appeals.

LORD HOBHOUSE OF WOODBOROUGH. My Lords, I agree that these appeals by the Secretary of State should be dismissed as proposed by my noble and learned friend Lord Steyn. I agree with his conclusions and the substance of what he has said.

These appeals by the Secretary of State arise from the judicial review of two certificates which he issued purportedly pursuant to s 2 of the Asylum and Immigration Act 1996. This section, since repealed, permitted the Secretary of State to order the removal of an asylum seeker from the United Kingdom to a third country if the Secretary of State was prepared to certify that in his opinion three conditions have been fulfilled. These conditions are that: (a) the person is not a national or citizen of the country to which he is to be sent, (b) his life and liberty would not be threatened in that country for a convention reason, and (c) the government of that country would not send him to another country or territory otherwise than in accordance with the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmd 9171) (the Geneva Convention) (as amended by the 1967 Protocol relating to the Status of Refugees (New York, 31 January 1967; TS 15 (1969); Cmnd 3906)) (s 2(2) of the 1996 Act).

The issue raised by these applicants relates to the proper interpretation of the third of these conditions, s 2(2)(c) of the 1996 Act.

It is accepted that condition (c), like condition (b), relates to art 33(1) of the Geneva Convention which provides that no contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened for a convention reason. It is also accepted that art 33 can be breached indirectly as well as directly. Thus for a country to return a refugee to a state from which he will then be returned by the government of that state to a territory where his life or freedom will be threatened will be as much a breach of art 33 as if the first country had itself returned him there direct. This is the effect of art 33 and has been further established as a matter of English law by your Lordships' House in *Bugdaycay v Secretary of State for the Home Dept* [1987] 1 All ER 940 at 952, [1987] AC 514 at 532, per Lord Bridge of Harwich: 'The one course would effect indirectly, the other directly, the prohibited result ...'

Thus, s 2 of the 1996 Act was designed to provide a scheme whereby the Secretary of State could return an asylum seeker to the country from which he had entered the United Kingdom without breaching the Geneva Convention and without having first to determine whether or not he was a 'refugee' as defined by the Geneva Convention. The section provides an authority under English law for the Secretary of State to do something which otherwise English law would preclude him from doing. At the material time the prohibition was contained in s 6 of the Asylum and Immigration Appeals Act 1993, to which s 2 of the 1996 Act cross-refers and creates an exception. But the exception is conditional and the Secretary of State must be able to certify that the conditions are in his opinion fulfilled. If the Secretary of State misconstrues the 1996 Act and as a result certifies that the conditions are fulfilled when as a matter of law they cannot be,

his purported exercise of his power is ultra vires under the statute and on an application for judicial review can be quashed. The applicants say that that is the position here.

The practical problem that has arisen is that different countries within the European Union have interpreted the Geneva Convention differently. The difference relevant to the present applications is in the interpretation of the definition of 'refugee' in art 1 of the Geneva Convention. As my noble and learned friend has already explained, there is a difference of opinion between one group of countries, among which are Germany and France, and another group, which includes the United Kingdom. The two groups adopt different interpretations of what persecution entitles an asylum seeker to say that he is unable, or fears, to avail himself of the protection of his own country. It is fair to say that, internationally, the view adopted by the group which includes the United Kingdom is generally preferred and is supported by the United Nations High Commission for Refugees. But it is likewise accepted by the United Kingdom government that the view of the former group of countries is one which is held in good faith. The scheme of the Geneva Convention is that any such differences should be referred to and resolved by the International Court of Justice under art 38 of that convention. However there is no prospect that the presently relevant difference (which has existed now for many years) will be resolved in that way.

So long as such differences continue to exist, the intention of the Geneva Convention to provide a uniformity of approach to the refugee problem will be frustrated and the scheme of the international response will remain grossly distorted. It is both contrary to the intention of the Geneva Convention and productive of the most severe abuses that there should be such a premium on making a claim for asylum on the north side of the English Channel as opposed to on the south side. The evidence in the present case discloses that only 5% of would-be refugees from Algeria are granted asylum if they make their application in France, whereas 80% of such applicants are successful if applying in the United Kingdom. It is in no way a criticism of the government of the United Kingdom that it should try to find a solution to this problem. However Parliament in 1996 passed legislation which did not leave the Secretary of State with a free hand. His freedom to act was subject to the statutory conditions.

Section 2 of the 1996 Act is as I have stated a provision of English law binding upon the Secretary of State. He is likewise bound by the law of England as to what is and is not 'in accordance with the Convention'. In *Adan v Secretary of State for the Home Dept* [1998] 2 All ER 453 at 459, [1999] 1 AC 293 at 306, Lord Lloyd of Berwick with the agreement of your Lordships' House unequivocally upheld the United Kingdom's interpretation of art 1 of the Geneva Convention, saying: '... if, for whatever reason, the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete'. So, to return a would-be refugee to a state where the state was unable to protect his life or freedom is in English law not in accordance with the Geneva Convention. It has been suggested that this was a specifically English interpretation and not in accord with what was described as the 'international' meaning of art 1. This is not correct. As is demonstrated by authorities such as *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 at 706–707, [1981] AC 251 at 281–283, particularly per Lord Diplock, when an English court construes an international convention it adopts the same techniques of construction and interpretation as would an international tribunal. It is true that there has not been any decision of the

International Court of Justice which would be authoritative under art 38 of the Geneva Convention but, in the absence of a decision of that court, the decision of your Lordships' House in *Adan*'s case remains, for the purposes of English law and the construction and application of s 2 of the 1996 Act, the determinative decision.

The facts of the present cases are not in dispute. Because of the interpretation which their governments and judiciary place upon art 1 of the Geneva Convention, the expectation is that neither Germany nor France would recognise either of the applicants as refugees. They would therefore not come within the protection of art 33 in those countries. The result of this is that there is a strong probability that, if returned to Germany or France, these two individuals will be returned respectively to Somalia and Algeria where their lives and freedom will be threatened for convention reasons. The Secretary of State issued his certificates being aware of and accepting these facts. His reason for certifying that condition (c) was satisfied was that he felt at liberty, notwithstanding the decision of the House of Lords in the first *Adan* case, to treat the German and French interpretation of art 1 as being 'in accordance with' the Geneva Convention.

My Lords, the Secretary of State was not at liberty to do this. The 1996 Act is a provision of English law. It must be construed in accordance with English law, that is to say, as determined by the *Adan* decision. The Secretary of State was in error.

The argument of behalf of the Secretary of State on these appeals contended for a different view based upon the submission that there were a range of interpretations which could be legitimately adopted of art 1 and the Geneva Convention and that the adoption of any of these in good faith would satisfy the requirement that the relevant person should not be sent to another country otherwise than in accordance with the Geneva Convention. In support of this submission counsel relied upon *Kerrouche v Secretary of State for the Home Dept* [1997] Imm AR 610 and *Iyadurai v Secretary of State for the Home Dept* [1998] Imm AR 470. These authorities certainly favour the submission made. In *Kerrouche*'s case, Lord Woolf MR said (at 615):

> 'The difference in an approach to the interpretation of the Convention and Protocol has to be of such significance that it can be said that in making a decision affecting the position of a particular applicant for asylum, the third country would not be applying the principles of the Convention. For this to be the position, the third country's approach, would have to be outside the range of tolerance which one signatory country, as a matter of comity, is expected to extend to another ... Unless the interpretation adopted by the "safe country" was sufficiently different from that in English law to be outside the range of possible interpretations the difference need not concern the authorities in this country.'

In *Iyadurai*'s case, Lord Woolf MR expressed similar views, again with the agreement of the other members of the Court of Appeal, and, having characterised the question as being 'whether the language used by the courts of another jurisdiction means that although they are purporting to apply the Convention they are not in fact doing so', said:

> 'It is only if the meaning placed on the convention by the other municipal court is clearly inconsistent with its international meaning, that the courts in this country are entitled to conclude that the approach of the other

municipal court involves a contravention of the convention.' (See [1998] Imm AR 470 at 476.) a

My Lords, it will be apparent from what I have already said that I do not agree with the analysis which is implicit in these statements. The question is not one of comity but is one of satisfying the conditions laid down by the 1996 Act, as a matter of English law, before the Secretary of State is at liberty, under English b law, to order the removal of the asylum seeker without having first determined whether or not he is a refugee. In convention terms, it is a question of the United Kingdom performing *its* obligation under art 33 of the Geneva Convention (see *Bugdaycay*'s case). It is this on which the Secretary of State has to satisfy himself so that he can issue the statutory certificate. If he cannot properly be so satisfied, he is not, as a matter of English law, entitled to issue the certificate. c

There are two further points which arise from what was said by Lord Woolf MR and Buxton LJ in *Iyadurai*'s case. First, the Court of Appeal rejected a submission that a decision of the United Kingdom courts could be determinative of the interpretation of the Geneva Convention for the purposes of s 2 of the 1996 Act: indeed the Court of Appeal rejected the proposition that the Geneva Convention d could have any autonomous meaning. Whilst it is correct that any such decision would always need to be evaluated in order to see whether it was a decision which involved construing the Geneva Convention as an international instrument and not a collateral decision on some question of domestic law (even though occasioned by some question arising from the Geneva Convention), if it is a decision coming into the former category it must be respected and applied unless it can be shown e to have been wrong. In the present case, the Secretary of State has not argued that *Adan*'s case was wrongly decided.

Secondly, there are cases where, unlike in the present case, the position is not clear cut. The facts may not have been established; they may be disputed. This is exactly the type of situation to which the drafting of s 2 of the 1996 Act using f the words 'in his opinion' and 'would' is directed. But it may similarly involve an exercise of judgment to predict what will be the decision of the courts of the country to which it is proposed to return the relevant person. Will those courts decide that he may be returned to the country from which he originally fled? If so will such a decision be capable of being described as in accordance with the Geneva Convention. Under the 1996 Act it is the Secretary of State who has to g make this assessment and express his opinion. It is for the applicant for judicial review to establish that the certificate issued by the Secretary of State cannot have been properly given applying the statutory criteria. The language of Lord Woolf MR draws upon the test for *Wednesbury* unreasonableness (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB h 223). If the certificate expresses opinions which the Secretary of State could reasonably hold and does not disclose that he has, or must have, made an error of law, the applicant for judicial review will fail. He will not have established that there has been an illegality or that the statutory power has been exceeded. It is not to be assumed that a country which has agreed to and adopted the Geneva j Convention will then act otherwise than in accordance with its obligations under the Geneva Convention. It is certainly not to be assumed that this will occur from the existence of differences of emphasis or from differences which can only be discovered by a meticulous comparative examination.

Thus, my Lords, much of what has been said on this topic in previous decisions of the Court of Appeal I would agree with but it does not justify refusing to

recognise that the wording of the Geneva Convention must at the end of the day have a meaning ascribed to it and it may be the task of a court to give its decision upon what that meaning is or, if the meaning has already been decided by an earlier authoritative decision, to give effect to that meaning. It is not right to say that there can only be a range of meanings.

The Court of Appeal in the present case ([1999] 4 All ER 774, [1999] 3 WLR 1274) was constrained by what had been said in the earlier Court of Appeal judgments by which they were bound. The cases of *Kerrouche* and *Iyadurai* should not be treated as authoritative save to the limited extent I have recognised. I agree with the decision of the Court of Appeal in the present case and the substance of its reasoning. The question raised by these appeals is whether the Secretary of State's certificates disclose an error of law. On the agreed facts they do and the applicants were entitled to the remedy of judicial review.

LORD SCOTT OF FOSCOTE. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Steyn and Lord Hobhouse of Woodborough. I agree with them and for the reasons they give I would dismiss these appeals.

Appeals dismissed.

Kate O'Hanlon Barrister.

MacDonald v Ministry of Defence

EMPLOYMENT APPEAL TRIBUNAL

LORD JOHNSTON, DR A H BRIDGE AND DR W M SPIERS

19, 25 SEPTEMBER 2000

Employment – Discrimination against a man – Act of discrimination – Discrimination based on sexual orientation – Whether discrimination on grounds of sex including discrimination on grounds of sexual orientation – Sex Discrimination Act 1975, s 6 – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 14.

M, an officer in the Royal Air Force, was required to resign after declaring his homosexuality to an officer conducting a vetting interview. Those declarations led to his compulsory resignation. He subsequently brought proceedings under the Sex Discrimination Act 1975 for unlawful discrimination on grounds of sex in respect of his dismissal (the termination claim) and intrusive questioning by the vetting officer (the sexual harassment claim). The employment tribunal dismissed those proceedings, holding, on the basis of decisions by the English courts, that the word 'sex' in the 1975 Act was concerned with gender rather than sexual orientation, that accordingly the reason for the termination of M's employment fell outside the discrimination envisaged by the 1975 Act, that a female homosexual was the correct comparator in a claim for sexual harassment brought by a male homosexual and that the vetting officer would have treated a female homosexual no differently than M. On his appeal to the Employment Appeal Tribunal (which was heard before the implementation of the Human Rights Act 1998), M relied on art 14[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 which protected the enjoyment of convention rights and freedoms from discrimination on various grounds including 'sex'. The European Court of Human Rights had construed that word as applying, in art 14, to sexual orientation as well as gender.

Held – For the purposes of the 1975 Act, the word 'sex' included sexual orientation, and accordingly discrimination on the grounds of such orientation fell within the scope of the Act. The word 'sex' could mean 'gender' or could refer to homosexuality in both men and women. There was therefore an ambiguity on the face of the record, and that ambiguity would be resolved, on established common law principles, by construing the 1975 Act in conformity with the wider definition given to the word 'sex' under art 14 of the convention. Moreover, if comparators were relevant in respect of the termination claim, the issue was not as between a male and female simpliciter. Rather, the true comparator was between a male or female homosexual and a female or male heterosexual in order to determine not whether one homosexual was being treated less favourably than another, but whether homosexuals of either gender were being treated, in the context, less favourably than heterosexuals of the opposite gender. Similarly, in a sexual harassment claim, comparisons with other homosexuals were irrelevant. The distinction was between how the employer treated a homosexual, be it male

a Article 14, so far as material, provides: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex ... or other status.'

or female, on the one hand, and a heterosexual, be it female or male, on the other. Accordingly, in the case of a male, it was necessary to look for a female heterosexual comparator. It followed that in the instant case the tribunal had misdirected itself, and the appeal would be allowed (see p 630 *a* to *h* and p 632 *a b*, post).

Salgueiro da Silva Mouta v Portugal (29 December 1999, unreported) followed.

Smith v Gardner Merchant Ltd [1998] 3 All ER 852, *Grant v South-West Trains Ltd* Case C-249/96 [1998] All ER (EC) 193 and *Pearce v Governing Body of Mayfield Secondary School* [2000] ICR 920 not followed.

Notes

For discrimination on the grounds of sex, see 13 *Halsbury's Laws* (4th edn reissue) para 312.

For the Sex Discrimination Act 1975, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 36.

For the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 14 (as set out in Sch 1 to the Human Rights Act 1998), see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 525.

Cases referred to in judgment

Anderson v HM Advocate 1996 JC 138, HC of Justiciary.
Baehr v Miike (9 December 1999, unreported), Hawaii SC.
Baker v State of Vermont (20 December 1999, unreported), Vermont SC.
Brown v Stott 2000 JC 328, HC of Justiciary.
Derbyshire CC v Times Newspapers Ltd [1993] 1 All ER 1011, [1993] AC 534, [1993] 2 WLR 449, HL.
Dzodzi v Belgium Joined cases C-297/88 and C-197/89 [1990] ECR I-3763.
Grant v South-West Trains Ltd Case C-249/96 [1998] All ER (EC) 193, [1998] ECR I-621, [1998] ICR 449, ECJ.
Kaur v Lord Advocate 1981 SLT 322, Ct of Sess.
Lustig-Prean and Beckett v UK (1999) Times, 11 October, ECt HR.
Murray v HM Advocate 2000 JC 102, HC of Justiciary.
O'Neill v HM Advocate 1999 JC 1, HC of Justiciary.
Opinion 2/94 [1996] ECR I-1759.
Orkem v EC Commission Case 374/87 [1989] ECR 3283.
Pearce v Governing Body of Mayfield Secondary School [2000] ICR 920, EAT.
R v DPP, ex p Kebeline, R v DPP, ex p Rechachi [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.
R v Ministry of Defence, ex p Smith [1996] 1 All ER 257, [1996] QB 517, [1996] 2 WLR 305, CA.
R v Secretary of State for Defence, ex p Perkins [1997] IRLR 297.
R v Secretary of State for Defence, ex p Perkins (No 2) [1999] 1 FLR 491, [1998] IRLR 508.
R v Secretary of State for the Home Dept, ex p Brind [1991] 1 All ER 720, [1991] 1 AC 696, [1991] 2 WLR 588, HL.
Reed and Bull Information Systems Ltd v Stedman [1999] IRLR 299, EAT.
Salgueiro da Silva Mouta v Portugal (29 December 1999, unreported), ECt HR.
Salomon v Customs and Excise Comrs [1966] 3 All ER 871, [1967] 2 QB 116, [1966] 3 WLR 1223, CA.
Smith and Grady v UK (1999) 29 EHRR 493, [1999] IRLR 734, ECt HR.
Smith v Gardner Merchant Ltd [1998] 3 All ER 852, [1999] ICR 134, CA.

Strathclyde Regional Council v Porcelli 1986 SC 137, [1986] ICR 564, Ct of Sess.
T, Petitioner 1997 SLT 724, Ct of Sess.
Toonen v Australia Communication [1994] 1-3 IHRR 97, HR Committee.
Vriend v Alberta [1998] 1 SCR 493, Canada SC.
Waddington v Miah [1974] 2 All ER 377, [1974] 1 WLR 683, HL.
Webb v EMO Air Cargo (UK) Ltd [1992] 4 All ER 929, [1993] 1 WLR 49, [1993] ICR 175, HL.

Appeal

The appellant, Roderick Kenneth W MacDonald, appealed from the decision of an employment tribunal sitting at Edinburgh on 9 September 1999 dismissing his proceedings under the Sex Discrimination Act 1975 against the respondent, the Ministry of Defence. The facts are set out in the judgment of the Employment Appeal Tribunal.

Aidan O'Neill QC (instructed by *Anderson Strathern*, Edinburgh) for the appellant.
Ian D Truscott QC (instructed by *Robson MacLean WS*, Edinburgh) for the respondent.

Cur adv vult

25 September 2000. The following judgment was delivered.

LORD JOHNSTON.

1. This is an appeal at the instance of the applicant appellant against a decision of the employment tribunal in respect of his claim that he had been discriminated against unlawfully on grounds of sex, contrary to Council Directive (EEC) 76/207 (OJ 1976 L39 p 40) (the equal treatment directive) and s 6 of the Sex Discrimination Act 1975 (SDA). He also had a consequent claim for sexual harassment which raises similar but separate issues. Both claims were dismissed.

2. The appellant is homosexual. He is 35 years of age and was commissioned initially in the Intelligence Corps (Territorial Army) in May 1986. He subsequently enlisted as an officer cadet in the Royal Air Force and was commissioned and subsequently promoted to various posts culminating in a period of service at RAF Aldergrove. He then arranged for a transfer to the Scottish Air Traffic Control Centre (Military) at Prestwick, largely for compassionate reasons to be closer to a relative who was ill. He realised this would involve certain vetting procedures, in the course of which he was asked to declare whether he was a homosexual, to which he agreed. He subsequently also made that declaration to his commanding officer. These declarations led eventually to his compulsory resignation under Queen's Regulation 2905. His last paid day of service being 27 March 1997.

3. He subsequently made a timeous application to the then industrial tribunal claiming discrimination on the grounds stated and sexual harassment and compensation, which came to a hearing in July and September 1999.

4. The tribunal made a number of findings of detailed fact, not least in relation to the interview conducted in the vetting process by a Wing Commander Leeds which was the basis of the claim for sexual harassment. In that latter respect there were some factual discrepancies disputed before us, the tribunal not being satisfied that the vigorous questioning by the officer in relation to the appellant's sexuality and its content was sexually motivated as far as the wing commander was concerned. It considered it was more part of what he perceived to be a strenuous vetting process. Nevertheless, there was little doubt and it was so

found that the interview was distressing and distasteful to the appellant. We put that matter aside for the time being and turn to the real issue in the case.

5. It was not disputed that the appellant's employment in the Royal Air Force was terminated by reason of his admitted homosexuality but the substance of the decision against him is that the SDA, in so far as it refers to the word 'sex', is concerned with gender and not sexual orientation. The admitted reason therefore for the termination of the appellant's employment does not fall, in the view of the employment tribunal, within the scope of discrimination envisaged by the SDA.

6. It has to be noted that the principal argument before the tribunal concerned whether or not, there being uncertainty in the law as to the proper definition or construction to put upon the word 'sex' in the SDA, the tribunal should make a reference to the Court of Justice of the European Communities. It also has to be noted that subsequent to the hearing but prior to the issue of the judgment, the European Court of Human Rights in Strasbourg issued a judgment best found as *Smith and Grady v UK* (1999) 29 EHRR 493 in which it held that investigations by the Ministry of Defence into the homosexual orientation of the two appellants violated their human rights in terms of art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmnd 9885 (the convention). The basic facts of this case and its sister case, *Lustig-Prean and Beckett v UK* (1999) Times, 11 October, are indistinguishable from the present case inasmuch that all four applicants in the Strasbourg court were maintaining violation of their human rights in terms of the convention by reason of being dismissed from the services as a consequence of being homosexual, in terms of the policy then adopted by the Ministry of Defence which was to the effect that homosexuality is incompatible with service in the Armed Forces and that persons who were known to be homosexual and to engage in homosexual activity are administratively discharged from the Armed Forces. The European Court of Human Rights upheld their contention with the result that subsequent to the hearing in this case before the tribunal below, for the first time the European Court of Human Rights has interpreted the convention so as to protect the rights of homosexuals, albeit under the right to privacy.

7. The operative part of the tribunal's judgment in relation to this general question is to be found on p 22 of their decision as follows:

> 'The tribunal recognises that the decision of the European Court of Human Rights in *Smith and Grady v UK* (and indeed the related case of *Lustig-Prean and Beckett v UK*) represent a significant landmark in the campaign of those seeking the elimination of the services' policy on homosexuality. The tribunal understands that in the light of the rulings by the European Court of Human Rights the United Kingdom government has suspended all action against homosexuals facing dismissal from the forces. Apart from any other consideration the rulings will have particular significance in the United Kingdom when the Human Rights Act 1998 comes into force in October 2000. In the context of this case the rulings do no more than establish that the treatment of the applicants breached rights embodied in the convention. Those rights existed prior to the rulings. They existed at the time of the European Court of Justice decision in *Grant v South-West Trains Ltd* Case C-249/96 [1998] All ER (EC) 193, [1998] ECR I-621. While therefore the tribunal recognises that the rulings of the European Court of Human Rights represent a significant

advance in the overall cause of persons such as the applicant in the present case it does not find that they advance in any way the argument that the tribunal should make a reference of the kind which it is being asked to make. In any event the European Court of Justice did have in consideration "human rights issues" when it made the decision in *Grant's* case. As noted above Mr O'Neill QC quoted at length from the judgment of the European Court of Justice in *Grant's* case in an effort to illustrate the extent to which the court drew from the case law of the European Court of Human Rights. In *Grant v South-West Trains Ltd* Case C-249/96 [1998] All ER (EC) 193 at 207, [1998] ECR I-621 at 645, para 24 having summarised the case before it the court observed: "In the light of all the material in the case, the first question to answer is whether a condition in the regulations of an undertaking such as that in issue in the main proceedings constitutes discrimination based directly on the sex of the worker. If it does not, the next point to examine will be whether Community law requires that stable relationships between two persons of the same sex should be regarded by all employers as equivalent to marriages or stable relationships outside marriage between two persons of opposite sex. Finally, it will have to be considered whether discrimination based on sexual orientation constitutes discrimination based on the sex of the worker." The passages ([1998] All ER (EC) 193 at 207–208, [1998] ECR I-621 at 646–648, paras 29 to 35) quoted by Mr O'Neill in his supplementary submissions represent the court's observations on the second of the three questions identified by it in para 24 of its judgment. It is the third of the three questions set out there which principally concerns this tribunal. The tribunal notes that when it came to deal with this question the European Court of Justice recorded a submission made by Miss Grant that the Community provisions on equal treatment of men and women should be interpreted as covering discrimination based on sexual orientation. She referred the court in particular to the International Covenant on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977); Cmnd 6702) (the covenant) in which, in the view of the Human Rights Committee established under art 28 of the covenant, the term "sex" is to be taken as including sexual orientation. Having noted that submission the European Court of Justice made these observations: "44. The covenant is one of the international instruments relating to the protection of human rights of which the court takes account in applying the fundamental principles of Community law (see eg the judgments in *Orkem v EC Commission* Case 374/87 [1989] ECR 3283 (para 31), and *Dzodzi v Belgium* Joined cases C-297/88 and C-197/89 [1990] ECR I-3763 (para 68)). 45. However, although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competence of the Community (see, inter alia, on the scope of art 235 of the EC Treaty as regards respect for human rights, *Opinion 2/94* [1996] ECR I-1759 (para 34 and 35))." (See [1998] All ER (EC) 193 at 209, [1998] ECR I-621 at 650–651, paras 44 and 45.) It appears to the tribunal that what the court said about fundamental rights being incapable in themselves of having the effect of extending the scope of the Treaty provisions beyond the competences of the Community effectively answers Mr O'Neill's argument on the "human rights issues". This ties in with what the European Court of Justice said later in *Grant's* case about the provision in the Treaty of

Amsterdam (Amsterdam, 2 October 1997) (OJ 1997 C340 p 1) for the insertion into the EC Treaty of an article which will allow the Council to take appropriate action to eliminate, among other forms of discrimination, discrimination based on sexual orientation. As Lightman J said in *R v Secretary of State for Defence, ex p Perkins (No 2)* [1999] 1 FLR 491 at 495, para 10: "It is a matter for the Council to make this extension in Community rights, not the ECJ." In short the tribunal finds itself in no different a position than Lightman J in *Ex p Perkins (No 2)* in dealing with the request that it should make a reference to the European Court of Justice. Having reviewed the authorities and the detailed and careful arguments advanced by Mr O'Neill the tribunal finds that the answer to the question of construction which the proposed reference raises is so obvious as to leave no scope for reasonable doubt. The tribunal does not know whether, as suggested by Mr Truscott QC, a reference would be met by a letter from the Administrator of the European Court of Justice inviting the tribunal to consider withdrawing the reference. The important point is that the tribunal has no reason to doubt what answer the court would give to the questions formulated in Mr O'Neill's supplementary submissions were it to address them. For that reason the tribunal has decided not to make the reference. Further it has decided that in the light of the authorities on the interpretation of both the equal treatment directive and the SDA the applicant's complaint of sex discrimination in respect of his enforced discharge from the Royal Air Force falls to be dismissed.'

8. That part of the judgment has to be looked at against the background of other decisions of the English court and of the European court as follows: *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257, [1996] QB 517; *R v Secretary of State for Defence, ex p Perkins* [1997] IRLR 297; *R v Secretary of State for Defence, ex p Perkins (No 2)* [1999] FLR 491; *Smith v Gardner Merchant Ltd* [1998] 3 All ER 852, [1999] ICR 134 and *Grant's* case.

9. With the exception of the latter case, these cases were all decisions of the English courts determining, irrespective of issues under the convention, that the relevant discrimination as to sex in relation to EEC legislation was that between male and female ie an issue of gender. Thus, it can be seen that the substance of the decision of the tribunal below in refusing a reference was that the matter had been clearly interpreted and an answer to a reference was obvious and that any claim for discrimination under the SDA or indeed the equal treatment directive, was restricted to, or related to, discrimination as between a male and a female and not based on sexual orientation of persons of the same sex or because of their sexual orientation.

10. Although the tribunal below had knowledge of the existence of *Smith and Grady v UK* before issuing its decision, it seems it did not appear to consider that such bore upon the content of it (see p 22 of the decision).

11. There are two other important issues. At the beginning of October 2000, the 1998 Act comes into effect within the United Kingdom general law which requires, essentially, that courts should interpret United Kingdom legislation against the background of, and to be compatible with, the convention and it is against that background that the Ministry of Defence changed their policy and abandoned their prohibition on homosexuality within the services, notwithstanding the Act has yet to come into force. This tribunal, however, is faced with the fact that very shortly after the issue of our judgment, the convention will be incorporated into United Kingdom law generally, although it has been within the

Scottish jurisdiction for over a year. This, it was submitted by Mr O'Neill on behalf of the appellant, was an important factor with regard to the future, inasmuch that he maintained that his client could not in the long term lose, albeit he was losing at the moment. Whatever may be the position under the 1998 Act, however, we consider we must apply the law at the date of this hearing which means that we cannot have regard to the possible effect on this case in due course of the 1998 Act. There was an issue between the parties in this respect that the arrival of this Act will not in any event have any retrospective effect which means that this particular application will never be subject to it by reason of the fact that the alleged discriminatory act occurred before the 1998 Act came into force. As will be seen we offer no view upon this matter since it need not be focussed for our determination of the issues before us.

12. However, there is one other matter of some importance. We were informed that in *Salgueiro da Silva Mouta v Portugal*, an unreported case of the European Court of Human Rights dated 29 December 1999, that court has ruled that sexual orientation is contrary to its own discriminatory provision, namely, art 14 of the convention, which uses amongst others the word 'sex' in relation to discriminatory acts that can be successfully complained against.

13. The current state of the law before us is, therefore, within the United Kingdom, that it has been established by the English courts that the word 'sex' has been clearly interpreted as being restricted to a gender interpretation and not a sexual orientation interpretation while the opposite interpretation has been put upon the word both indirectly in *Smith and Grady v UK* and directly in *Salgueiro*'s case by the European Court of Human Rights. It has to be said that Mr O'Neill made something of a plea *ad misericordiam* on behalf of his appellant, that if he was sooner or later to win in Strasbourg, it was unreasonable to require him to exhaust his remedies in this country before so doing but again we are unable to accept this as being relevant to the issue before us which must be determined upon its merits at the present time and upon the law that applies at the present time.

14. The substance of Mr O'Neill's submission was that it has been accepted prior to the coming into force of the Act in Scots law, there is a presumption in the common law that the Westminster Parliament intends to legislate in conformity with international commitments including the convention. Accordingly, when a statutory provision is susceptible of more than one interpretation, the court should give it the construction which complies more closely with these commitments. He referred to Lord President Hope in *T, Petitioner* 1997 SLT 724 at 733–734. A similar approach had been adopted in *O'Neill v HM Advocate* 1999 JC 1 and now to some extent modified by *Murray v HM Advocate* 2000 JC 102 given that the convention is part of Scots law in the criminal context. However, Mr O'Neill submitted that, as a matter of common law, statutory interpretation was required to adopt a position compatible with the convention even prior to the arrival in the national law of the convention as a matter of law and he pointed to certain dicta from Lord Hope of Craighead in *R v DPP, ex p Kebeline, R v DPP, ex p Rechachi* [1999] 4 All ER 801 at 838–839, [2000] 2 AC 326 at 374–375 to the extent of statutory interpretation being generally found to reflect declared fundamental rights and freedoms. Putting aside for the moment any question of ambiguity, he submitted that so long as a national United Kingdom statute was capable in any way of being construed to be compatible with the convention, that was the line down which the court should go. It was necessary to identify the relevant convention right and only if it was impossible to make it compatible with the

relevant United Kingdom legislation, was the convention to be ignored. He then made a number of submissions under reference to certain foreign cases to support the view that this tribunal should interpret the word 'sex' as being compatible with the convention at least if it included sexual orientation, given the recent decisions to which we have referred of the European Court of Human Rights. He referred to *Toonen v Australia Communication* [1994] 1-3 IHRR 97, *Vriend v Alberta* [1998] 1 SCR 493, *Baehr v Miike,* an unreported decision of the Supreme Court of the State of Hawaii dated 9 December 1999, and *Baker v State of Vermont,* another unreported decision of that state's Supreme Court dated 20 December 1999. The high point of his submission was that only if it was impossible to interpret a relevant piece of a legislation in terms of compatibility with the convention should that not happen. He did, however, return to the issue of ambiguity as focussed by Lord Hope in *T, Petitioner.*

15. Mr Truscott, responding on behalf of the respondents, accepted the general factual background, albeit disputing some aspects in relation to the sexual harassment issue but he maintained that the law of the United Kingdom in conjunction with the European Court of Justice, has clearly stated in a number of authoritative cases both in relation to equal treatment and equal pay and thus sex discrimination, that it applied only to gender circumstances and not to sexual orientation as between the same sex or in relation to the same sex. There was no room, he said, for an ambiguity argument nor should the convention be applied at all, at least so long as the 1998 Act was not in force. This was particularly clear from *Ex p Perkins (No 2)* and a recent decision of the Employment Appeal Tribunal in England, *Pearce v Governing Body of Mayfield Secondary School* [2000] ICR 920, where the Employment Appeal Tribunal confirmed a decision of the employment tribunal that, when the acts complained of were homophobic thus having the result that all homosexuals being treated the same, there was no discrimination on grounds of sex, the issue not being one of gender, there being no suggestion that male and female homosexuals were being treated in a different way. Thus, said Mr Truscott, the current state of the law clearly and without equivocation excludes sexual orientation from an interpretation to be put on the word 'sex' in the SDA and thus the present application effectively is incompetent. The tribunal thus came to the correct decision. There was, he said, no ambiguity and certainly no scope so long as the 1998 Act was not in force for the high position adopted by Mr O'Neill on the issue of 'impossibility' and 'compatibility'.

16. There is no doubt that in seeking to resolve the matter before us, the issue is initially complicated by the imminent arrival of the 1998 Act into the United Kingdom law in the particular context of employment. It is not necessarily clear to us that after the operative date it applies only to discriminatory acts committed after that date and not also to proceedings pending in relation to discriminatory acts before that date, which was Mr O'Neill's contention. It derives some support from the fact that in the relevant provision, which is s 7, reference is made to 'any legal proceedings', in s 7(1)(b). It is also somewhat ironic that if we delayed issuing this judgment until after 2 October 2000, since s 6 applies to a court or tribunal, it would be unlawful for us after that date to act in a way incompatible with the convention but that seems to us to beg the question before us.

17. There is also a real issue to be determined in due course as to what interpretation should be put on the provisions of s 3(1) which states:

> 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.'

18. It can be seen at once that this may well be approaching the position adopted by Mr O'Neill before us, against the background of compatibility, thus requiring the courts to take a view of convention rights against United Kingdom legislation similar to that to which they are already enjoined to do in relation to Community legislation by the House of Lords in *Webb v EMO Air Cargo (UK) Ltd* [1992] 4 All ER 929 at 940, [1993] 1 WLR 49 at 59, per Lord Keith of Kinkel (see Lord Hope in *Ex p Kebeline*). However, that question only arises when the Act has come into force.

19. However, these observations are not to be treated as our views, relevant to the resolution of this matter, having regard to the fact that we consider we can resolve this matter against the current common law as focussed by Lord President Hope in *T, Petitioner*, where he disassociates himself from the passages quoted by him, as observations of both Lord Ross and Lord Diplock, that the convention is currently irrelevant even in a context of ambiguity. The opinion of his Lordship is to the effect that if ambiguity is established inasmuch that one of the possible interpretations is consistent with the convention and the other not, the former interpretation should be favoured. Furthermore he goes on in the next passage to confirm the legislative presumption applying to United Kingdom law in relation to the convention to which we note subsequent reference. Support for this could be found also from the Lord Justice-General (Rodger) in *Brown v Stott* 2000 JC 328, albeit that his Lordship was there dealing with a situation where the convention was already incorporated into the domestic law and, therefore, that case should not necessarily be read as providing much support for the ambiguity position.

20. In *T, Petitioner*, Lord President Hope failed to find any ambiguity but quite clearly states that if he had done so in the relevant context he would have given effect to the provision favouring the convention right.

21. He states (at 733–744) as follows:

> 'The amicus curiae suggested that, if we were unclear as to whether the provisions of the [Adoption (Scotland) Act 1978] were intended to allow applications such as that made by the petitioner, we should consider whether regard should be had to the European Convention on Human Rights as an aid to the construction of the Act. As he pointed out, Lord Ross in *Kaur v Lord Advocate*, (1981 SLT 322 at 330) said that, as the Convention was not part of the municipal law of the United Kingdom, the court was not, so far as Scotland was concerned, entitled to have regard to the Convention either as an aid to construction or otherwise. That opinion was expressed after a careful review of the English authorities. These consisted largely of various dicta in the Court of Appeal, where the judges stated that, if there was any ambiguity in the United Kingdom statute, the court may look at and have regard to the Convention as an aid to construction. But Lord Ross said that he shared the view of Diplock LJ, as he then was, that the Convention was irrelevant in legal proceedings unless and until its provisions had been incorporated or given effect to in legislation. For my part, I think that, read as a whole and in context, Diplock LJ's remarks in *Salomon v Commissioners of Customs and Excise* ([1966] 3 All ER 871 at 875, [1967] 2 QB 116 at 143), were not intended to indicate that the Convention could not be looked at in order to resolve an ambiguity. What he was saying was that the terms of the statute could not be departed from if they were clear and unambiguous. However that may be, Lord Ross's opinion, although widely quoted in the

textbooks as still representing the law of Scotland on this matter, has been looking increasingly outdated in the light of subsequent developments, and in my opinion, with respect, it is time that it was expressly departed from. It is now clearly established as part of the law of England and Wales, as a result of decisions in the House of Lords, that in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it: see *R v Secretary of State for the Home Dept, ex p Brind* per Lord Bridge of Harwich ([1991] 1 All ER 720 at 722–723, [1991] 1 AC 696 at 747–748). Similar views with regard to the relevance of the Convention were expressed by Lord Reid in *Waddington v Miah* ([1974] 2 All ER 377 at 379, [1974] 1 WLR 683 at 694), and by Lord Keith of Kinkel in *Derbyshire County Council v Times Newspapers Ltd* ([1993] 1 All ER 1011 at 1020–1021, [1993] AC 534 at 550–551). In *Anderson v HM Advocate* the opportunity was taken (1996 SLT 155 at 158), to refer to the Convention and to Lord Bridge's observations. But an opinion was reserved as to whether these observations were part of the law of Scotland also, as the court was not concerned with a matter of statutory interpretation in that case. It is however now an integral part of the general principles of European Community law that fundamental human rights must be protected, and that one of the sources to which regard may be made for an expression of these rights is international treaties for the protection of human rights on which member states have collaborated or of which they are signatories: see *Stair Memorial Encyclopaedia*, Vol 10, "European Community Law", para 95. I consider that the drawing of a distinction between the law of Scotland and that of the rest of the United Kingdom on this matter can no longer be justified. In my opinion the courts in Scotland should apply the same presumption as that described by Lord Bridge, namely that, when legislation is found to be ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, Parliament is to be presumed to have legislated in conformity with the Convention, not in conflict with it.'

22. This seems to us to accord with common sense against a background of the general presumption that United Kingdom domestic law has been presumed to conform to the convention ever since the United Kingdom government became a signatory to the convention and obviously before such time as the 1998 Act enacted the convention into the United Kingdom domestic law (see *T, Petitioner*). The position seems to us to be compatible with the now accepted doctrine of ambiguity in relation to the construction of Parliamentary statutes where reference can be made to Parliamentary debates, background papers and the like to resolve the ambiguity by ascertaining the intention of Parliament. We consider the authorities entitle us to conclude at this point in time that if United Kingdom domestic legislation is ambiguous in the context of a potential convention right, the convention may rule as between the two or more interpretations.

23. At the end of the day, Mr Truscott did not appear seriously to dispute this basic proposition, taking his stance on a determined position that there was no ambiguity in the interpretation of the word 'sex' both naturally and as focussed by the courts in the relevant decisions that he had referred to, not least *Smith v Gardner Merchant Ltd* and the recent decision of *Pearce v Governing Body of Mayfield Secondary School* [2000] ICR 920.

24. We do not consider that the two recent decisions of the European Court of Human Rights and, in particular, the Portuguese case of *Salgueiro,* have created an ambiguity but rather that they have focussed one in the relevant word 'sex' found both in the SDA and art 14 of the convention. Intrinsically, the *Oxford University Dictionary* (1989 edn) inter alia includes a definition under the word 'sex' of 'a third sex' which undoubtedly refers to homosexuality in both men and women. Since the word also can obviously mean 'gender' as interpreted by the English courts an obvious ambiguity arises on the face of the record. Extrinsically, the European Court of Human Rights has now expressly included sexual orientation in the definition of the word 'sex', as found in their convention, we consider there is the classic example of a statutory ambiguity before us from two competent authorities and we therefore consider we have a choice of interpretation.

25. If this analysis is correct we have thereafter no hesitation in favouring the wider interpretation. The only case presented to us since the obvious change of circumstances created by the two recent European Court of Human Rights cases, is that of *Pearce* which seems to have concentrated upon the existing state of the English law and certainly there is no indication that the convention cases were laid before the tribunal. In any event the substance of that case was dealing with comparators and applied *Smith v Gardner Merchant Ltd* which in its terms is very clear.

26. In reaching our conclusion we have not been greatly influenced by the case of *Grant v South-West Trains Ltd,* since the European Court of Justice was then considering the issue of equal pay and not concerned directly with the definition of the word 'sex'.

27. In our opinion, accordingly, on the present state of the law, stated at the date of the dissemination of this judgment, the word 'sex' in the SDA should be interpreted to include 'on grounds of sexual orientation'. In reaching this conclusion, we admit no criticism of the tribunal below who were directed to the essential issue of the reference against what appeared to be settled law. It is simply, that in our opinion, by the time the matter has reached us, matters have moved on.

28. Mr O'Neill had a supplementary position, that in any event, if the issue involved a comparator, the comparator should not be on a gender basis but on a sexual orientation basis. This position arose precisely in the same way as the main argument has done, inasmuch that it depended upon whether sexual orientation could be contemplated within the scope of the SDA. Since we have determined this point, we would also agree with Mr O'Neill's position that if comparators are relevant, the issue is not as between a male and a female simpliciter but between a male or female homosexual and a female or male heterosexual in order to determine not whether one homosexual is being treated less favourably than another but whether homosexuals of either gender in the context are being treated less favourably than heterosexuals of the opposite gender which is the true comparator in the context of sexual orientation as a consequence of our definition of the word 'sex'.

29. That leaves us to deal with the issue of sexual harassment. This can be dealt with comparatively shortly since although there are some factual disagreements, the essential complaint as set out by the tribunal was the way in which the interview was conducted with Wing Commander Leeds. The tribunal's essential decision is as follows:

> 'The applicant's complaint goes beyond the suggestion that wing commander Leeds gained his own sexual gratification from the interview.

a He complains of the intrusive nature of the questioning. He complains about being asked about those with whom he has had homosexual relations. He complains about being asked about his heterosexual activities. He complains about being asked about the history of his sexuality including questions about his schooldays. He complains about the way in which he was asked for details of his sexual activities. He complains about being asked repeatedly b to name other service people with whom he has had sexual relations. He complains about being asked about the extent of his family's knowledge of his sexuality. All of this the applicant maintains amounted to sexual harassment. Whether or not wing commander Leeds' conduct in these respects should properly be classified as sexual harassment there were elements of his conduct which in *Smith and Grady v UK* were found by the c European Court of Human Rights to be violations of rights under art 8 of the convention. If there were violations of the applicant's convention rights that is not something with which this tribunal has jurisdiction to deal. Since for the reasons given above discrimination on the ground of sexual orientation does not constitute sexual discrimination for the purposes of either the SDA d or the equal treatment directive the applicant's complaint of sexual harassment can only succeed if he satisfies the tribunal in terms of s 1(1)(a) of the SDA that on the ground of his sex he has been treated less favourably than a woman would have been treated. Section 5(3) of the SDA provides that a comparison of the cases of persons of different sex under s 1(1) has to be such that "the relevant circumstances" in both cases are the same or not e materially different. Mr O'Neill contends that the appropriate comparator in a case like the present is a heterosexual woman. It is not appropriate to consider how a lesbian might be treated in comparison to a gay man because this involves changing the gender not only of the subject under consideration but also the gender of the object of his or her affection. That argument was f considered by the Court of Appeal in *Smith v Gardner Merchant Ltd* which held that the appropriate comparator in such a case must be a female homosexual. In that case homosexuality was held to be "the relevant circumstance" which had to be the same for the purpose of the comparative analysis required by s 5(3) of the SDA. The tribunal is bound by that decision. The tribunal also considered that in looking at "the relevant circumstances" g in this case for the purposes of s 5(3) it would be necessary to have regard to the context of the interview which wing commander Leeds conducted. It was a security vetting interview. It was a second interview specifically held for the purpose, rightly or wrongly, of confirming the applicant's sexual orientation and seeking to ascertain the extent to which this had involved h other service personnel. The tribunal had no doubt that if he had been faced with a homosexual female officer who had undergone a similar interview to that which the applicant had with Mr Warner wing commander Leeds would have conducted the interview on very much the same lines. To do so was what he perceived to be his responsibility as a vetting officer. On the j basis of that conclusion the applicant's complaint of sexual harassment also falls to be dismissed.'

30. It will be immediately apparent that the tribunal approached the matter quite understandably in regard to the position it had already reached on the main issue, that what was required was harassment as between a male and female comparison on a gender basis, in the sense that if there had to be both that

distinction and orientation, the proper comparator was therefore a female homosexual. a

31. Generally for the reasons we already discussed, we do not consider that this is correct once it is appropriate to interpret the word 'sex' in the SDA as capable of including sexual orientation. As soon as that is established, comparisons with other homosexuals, which in the male context has to be female, are immaterial. The distinction must be between how the employer treated a b homosexual, be it male or female on the one hand and a heterosexual, be it female or male on the other. Thus in the case of a male, one is looking for a female heterosexual comparator. This issue did not even factually arise in the present case. Nor in our opinion, is it anything to the point that the interviewer would have treated a lesbian female in exactly the same way as a homosexual male. c

32. We are left with the slightly disturbing point as to the extent to which the tribunal have concerns about the applicant's credibility when it comes to his recollection of the nature of the interview but given the case of *Reed and Bull Information Systems Ltd v Stedman* [1999] IRLR 299, referred to by the tribunal, we do not consider any further investigation is relevant on this point, not least d because given the tribunal's findings in fact as to the nature of the interview, the test laid down in *Strathclyde Regional Council v Porcelli* 1986 SC 137 must apply which confirms that if the nature of the conduct is both sexually related and blatantly unacceptable there is no need for a comparator. *Res ipsa loquitur.* On the facts generally found proved by the tribunal, this is at least a possible interpretation. e

33. All this confirms to our mind that the tribunal misdirected itself by not applying the wider definition which would have admitted the claim for sexual harassment on grounds of sexual orientation. Again we emphasise no criticism of the tribunal below for the reasons we have already given.

34. In these circumstances this appeal is allowed. Since the issues raised are f questions of law we feel able to quash the decision simpliciter, find that by reason of his dismissal from the Armed Forces on grounds of his sexual orientation, the appellant was discriminated against in terms of the SDA and that he is entitled to compensation in respect of that legislation. We also find on the facts generally found proved by the tribunal, that he was subjected to sexual harassment and is also entitled to compensation in that respect. g

35. In these circumstances the case is remitted back to the employment tribunal to proceed as accords in relation to the issues of compensation.

Appeal allowed.

Dilys Tausz Barrister.

Official Receiver v Stern and another

CHANCERY DIVISION (COMPANIES COURT)
SIR RICHARD SCOTT V-C
29, 30 NOVEMBER, 20 DECEMBER 1999

COURT OF APPEAL, CIVIL DIVISION
HENRY, ROBERT WALKER LJJ AND SCOTT BAKER J
26 JANUARY, 2 FEBRUARY 2000

Company – Director – Disqualification – Evidence – Directors giving interviews to Insolvency Service under compulsion – Official Receiver wishing to rely on interviews in disqualification proceedings against directors – Whether use of such evidence in disqualification proceedings necessarily infringing right to fair hearing – Company Directors Disqualification Act 1986 – Insolvency Act 1986, s 235 – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 6(1).

The Official Receiver sought disqualification orders against two directors under the Company Directors Disqualification Act 1986. In those proceedings, he wished to rely on interviews given by the directors to the insolvency service under s 235[a] of the Insolvency Act 1986, a provision which required them to attend and answer questions. On the determination of a preliminary issue, the directors contended that the use of such statements in disqualification proceedings necessarily breached the right to a fair hearing under art 6(1)[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. That contention was rejected by the Vice-Chancellor, and the directors applied to the Court of Appeal for permission to appeal.

Held – The use in disqualification proceedings of statements obtained under s 235 of the Insolvency Act 1986 did not necessarily involve a breach of art 6(1) of the convention. The issue of fair trial was one which had to be considered in the round, having regard to all relevant factors. Those factors included, but were not limited to, the fact that disqualification proceedings, though they were not criminal proceedings and were primarily for the protection of the public, often involved serious allegations and almost always carried a degree of stigma for anyone who was disqualified; that there were degrees of coercion involved in different investigative procedures available in corporate insolvency, and those differences might be reflected in different degrees of prejudice involved in the admission in disqualification proceedings of statements obtained by such procedures; and that, in directors' disqualification proceedings, as in most other

a Section 235, so far as material, provides: ' ... (2) Each of the persons mentioned in the next subsection shall—(a) give to the office-holder such information concerning the company and its promotion, formation, business, dealings, affairs or property as the officer-holder may at any time after the effective date reasonably require, and (b) attend on the office holder at such times as the latter may reasonably require.

(3) The persons referred to above are—(a) those who are or have at any time been officers of the company ...

(5) If a person without reasonable excuse fails to comply with any obligation imposed by this section, he is liable to a fine and, for continued contravention, to a daily default fine.'

b Article 6, so far as material, is set out at p 639 b c, post

fields, it was generally best for issues of fairness or unfairness to be decided by the trial judge, either at a pre-trial review or in the course of the trial. Accordingly, although permission to appeal would be granted, the appeal itself would be dismissed (see p 659 *a* to *c e*, post).

Orkem v EC Commission Case 374/87 [1989] ECR 3283 and *Otto BV v Postbank NV* Case C-60/92 [1993] ECR I-5683 considered.

Notes

For disqualification proceedings generally and the right to a fair hearing, see respectively 7(2) *Halsbury's Laws* (4th edn reissue) paras 1425–1426 and 8(2) *Halsbury's Laws* (4th edn reissue) para 134.

For the Company Directors Disqualification Act 1986, see 8 *Halsbury's Statutes* (4th edn) (1999 reissue) 837.

For the Insolvency Act 1986, s 235, see 4 *Halsbury's Statutes* (4th edn) (1998 reissue) 903.

For the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 6 (as set out in the Human Rights Act 1998, Sch 1, art 6), see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 523.

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Barbera v Spain (1988) 11 EHRR 360, ECt HR.

Bishopsgate Investment Management Ltd (in prov liq) v Maxwell, Cooper v Maxwell, Mirror Group Newspapers plc v Maxwell [1992] 2 All ER 856, [1993] Ch 1, [1992] 2 WLR 991, CA.

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Cremieux v France (1993) 16 EHRR 357, ECt HR.

DC, HS and AD v UK [2000] BCC 710, ECt HR.

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Orkem v EC Commission Case 374/87 [1989] ECR 3283.

Otto BV v Postbank NV Case C-60/92 [1993] ECR I-5683.

R v Secretary of State for Trade and Industry, ex p McCormick [1998] BCC 379, QBD and CA.

Rank Film Distributors Ltd v Video Information Centre [1981] 2 All ER 76, [1982] AC 380, [1981] 2 WLR 668, HL.

Rutili v Minister for the Interior Case 36/75 [1975] ECR 1219.
Saunders v UK (1996) 23 EHRR 313, ECt HR.
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Wilson v UK (1998) 26 EHRR CD 195, E Com HR.

Preliminary issue

By order of Neuberger J made on 19 May 1998, the court was required to determine a preliminary issue (set out at p 637 *a b*, post) in proceedings brought by the Official Receiver against William George Stern and Mark Stephen Lawrence Stern (the directors) for disqualification orders under s 6 of the Company Directors Disqualification Act 1986. The facts are set out in the judgment.

Helen Davies (instructed by *Isadore Goldman*) for the directors.
David Pannick QC, Jonathan Crow and *Richard Hill* (instructed by the *Treasury Solicitor*) for the Official Receiver.

Cur adv vult

20 December 1999. The following judgment was delivered.

SIR RICHARD SCOTT V-C.

1. On 23 October 1996 the Official Receiver commenced proceedings against Mr William George Stern and his son, Mr Mark Stephen Lawrence Stern (the directors), for an order under s 6 of the Company Directors Disqualification Act 1986 (the CDDA). The evidence filed by the Official Receiver in support of his application included a report (with appendices) dated 23 October 1986 by Mr Pickthall, the Deputy Official Receiver with conduct of the case. In the first paragraph of his report Mr Pickthall said:

> 'This application is concerned with the conduct of the [directors] whilst acting as directors of Westminster [Property Management Ltd] and I have been directed by the Secretary of State to make this application for a Disqualification Order. The information in this Report has come to my knowledge in the course of my investigation of Westminster's affairs, the day to day administration of the case having been conducted under my supervision by insolvency examiners.'

2. On 21 November 1996 both the directors filed notice that they intended to contest the application and, in July 1997, filed substantial evidence in answer to that relied on by the Official Receiver.

3. On 19 May 1998, however, in response to an application by the directors, Neuberger J made an order for an issue of European Community law to be determined as a preliminary issue. The issue was formulated as follows:

> 'Whether, in the particular circumstances of this case, European Community law, and in particular any fundamental rights deriving from the European Convention on Human Rights, preclude: (a) the making of an order pursuant to section 6 of [the CDDA] against the [directors] or either of them, or (b) the use in these proceedings by the [Official Receiver] of any evidence provided to him under legal compulsion.'

4. The order of 19 May 1998 recited an important admission by the Official Receiver. The recital was as follows:

> 'And upon the [Official Receiver] stating by its counsel that it admits, for the purposes of the hearing of the [directors' application] only, that in the particular circumstances of this case the making of an order herein pursuant to section 6 of the [CDDA] would affect the rights of the [directors] under Articles 52 and/or 59 of the EC Treaty.'

5. Articles 52 and 59, referred to in the recital, are now arts 43 EC and 49 EC. I shall refer to them by their current numbers.

6. Article 43 EC requires restrictions on the 'freedom of establishment' of nationals of a member state in the territory of another member state to be abolished, and provides that:

> 'Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected ...'

7. Article 49 EC requires restrictions on 'freedom to provide services within the Community' to be abolished. Both arts 43 EC and 49 EC are of direct effect and thus give rights which national courts are bound to protect.

8. Mr William Stern is a citizen of Austria and of the United States. He is living in England. Mr Mark Stern is a United Kingdom citizen. He, too, lives in England. It is accepted for the purposes of this preliminary issue that if a disqualification order were to be made against Mr William Stern, it would have the consequence of hampering him in the exercise of his freedom of establishment.

9. It is accepted, also, that a disqualification order would restrict the freedom both of Mr William Stern and of Mr Mark Stern to provide services within the Community.

10. However, neither art 43 EC nor art 49 EC imposes an absolute prohibition. Restrictions apt to interfere with the freedom of establishment or with the freedom to provide services can be imposed by the national law of a member state provided four conditions are met, namely: (i) the restrictions must be applied in a manner that does not discriminate between nationals of different member states; (ii) the restrictions must be justified by imperative requirements in the general interest; (iii) the restrictions must be suitable for securing the objective they pursue; and (iv) the restrictions must not go beyond what is necessary to attain that objective (see *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* Case C-55/94 [1996] All ER (EC) 189, [1995] ECR I-4165).

11. The activities of the directors, as directors of Westminster Property Management Ltd (Westminster) and of its predecessor companies to which Mr Pickthall in his report has referred, involved the management of other companies some of which were established in and carried on business in other member states. Mr William Stern and Mr Mark Stern still carry on, and want to continue to carry on, those management activities. A disqualification order under s 6 of the CDDA would prevent them from doing so, at least through the medium of a limited company. It is easy to understand, therefore, that an order under s 6 would, or might, restrict the freedom of establishment or the freedom to provide services which arts 43 EC and 49 EC confer. So, are the four conditions fulfilled?

12. No point is taken as to conditions (i), (iii) and (iv). It is accepted that disqualification orders under the CDDA can meet these conditions. The debate has centred on condition (ii). It has been held, as a matter of Community law, that a restriction cannot satisfy this condition, namely that it is justified on grounds of public interest, unless it has been imposed in a manner which is compatible, in substance and procedurally, with the fundamental rights which form an integral part of the general principles of Community law. Restrictions which are imposed in a manner incompatible with the observance of human rights are not acceptable under Community law. That this is so is demonstrated by the judgment of the Court of Justice of the European Communities in *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis* Case C-260/89 [1991] ECR I-2925 (the *ERT* case). The question raised by the case was whether and in what circumstances the grant by a member state to a single broadcaster of an exclusive television franchise would infringe Community law. The court referred to art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the convention) and said (at 2963, para 41):

> '... fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated ...'

It continued (at 2964, paras 43–44):

> '43 ... where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.
>
> 44. It follows that in such a case it is for the national court, and, if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention of Human Rights, as a general principle of law the observance of which is ensured by the Court.'

13. These passages make good, in my opinion, the submission made to me by Miss Helen Davies, counsel for the directors, namely that the propriety under

Community law of disqualification orders under s 6 of the CDDA cannot be upheld if the procedure under which the orders were obtained was in breach of the directors' fundamental rights (see also *Rutili v Minister for the Interior* Case 36/75 [1975] ECR 1219 at 1229, 1231, paras 16, 24).

14. It is common ground that the directors' fundamental rights under Community law include those rights guaranteed to them under art 6 of the convention. Article 6 provides, so far as material:

> '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights ... (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ...'

15. In her skeleton argument Miss Davies submitted that the procedure used, or proposed to be used, for dealing with the CDDA proceedings against the directors involved breaches of each of the three limbs of art 6. The rights embodied in art 6(2) and (3), however, apply only to charges of criminal offences. Miss Davies argued that the nature and effect of restrictions imposed by a s 6 disqualification order justified categorising the restrictions as penal and that, in consequence, art 6(2) and (3) should be held to apply to applications for disqualification orders. At the hearing, however, she drew my attention to the decision of the European Court of Human Rights in *DC, HS and AD v UK* [2000] BCC 710. This was an application by three individuals against whom disqualification orders under s 6 had been made. The applicants contended that the proceedings against them involved violations of each of the three limbs of art 6. The court held that the disqualification proceedings 'determined "civil rights and obligations", but did not determine a "criminal charge"' and said (at 716):

> 'The criteria for ascertaining whether a "criminal charge" has been determined are the domestic classification of the "offence", the nature of the "offence", and the nature and degree of severity of the potential and actual penalty ... In the present case, the proceedings were classified as civil in domestic law, the disqualification of directors is a matter which is regulatory rather than criminal, and the "penalty" is neither a fine nor a prison sentence, but rather a prohibition on acting as a company director without the leave of the court. Whilst a great deal was undoubtedly at stake for the applicants, it cannot be said that what is inherently a regulatory matter can thereby become a "criminal charge" within the meaning of art. 6(1) of the Convention. Thus, none of these criteria indicates that the applicant was charged with a "criminal offence", and the court considers that the proceedings in the present case did not determine a criminal charge within the meaning of art. 6(1) of the Convention.'

16. These remarks apply equally to the present case. Accordingly, Miss Davies did not persist in her submission that art 6(2) and (3) was relevant. She confined her attention to art 6(1) and to the question whether the established procedures

under which applications for disqualification orders are conducted constitute a breach of the directors' right to a fair hearing.

17. Some of the complaints that were made by DC, HS and AD about the disqualification procedures are mirrored by complaints made by the directors in the present case. They have essentially two complaints. The first complaint is that the Secretary of State's evidence in support of the s 6 application includes information and material obtained from the directors under compulsion. This, it was submitted, constitutes a breach of the directors' right of silence and requires the conclusion that the hearing would not, for art 6(1) purposes, be a fair hearing. The second complaint is that the Secretary of State's evidence in support of the application will be accorded a status superior to that which will be accorded to the directors' evidence. Some description of the procedures which give rise to these complaints is necessary.

18. As to the right of silence point, both Mr William Stern and Mr Mark Stern were, following the winding-up order made against Westminster on 26 October 1994, asked to attend upon officials of the Insolvency Service to be interviewed pursuant to s 235 of the Insolvency Act 1986.

19. Each of them was, or had been, a director of Westminster. Section 235 requires officers or former officers of a company in liquidation to give the Official Receiver (or the liquidator of the company) such information about the company and its affairs as he may reasonably require and to attend on him for interview at such times as he may reasonably require. Under s 235(5) failure without reasonable excuse to comply with an obligation imposed by the section is a criminal offence punishable by a fine, including a daily default fine.

20. It is correct, therefore, that information obtained by the Official Receiver at s 235 interviews is obtained by compulsion. The director or ex-director cannot remain silent except at the risk of being proceeded against for a criminal offence under sub-s (5).

21. If, as a result of information he has obtained, whether at s 235 interviews or in any other way (see eg s 234), it appears to an office-holder that the conduct of a director or ex-director makes him unfit to be concerned in the management of a company (see s 6(1) of the CDDA), s 7(3) of the CDDA places the office-holder under an obligation to report the matter to the Secretary of State. And if it appears to the Secretary of State that it is expedient in the public interest to apply for a disqualification order against the individual in question, the Secretary of State may apply, or may direct the Official Receiver to apply, for an order (see s 7(1) of the CDDA).

22. It follows that information obtained from a director under compulsion may find its way into a report made by the office-holder to the Secretary of State and lead to an application being made against the director for a disqualification order.

23. As to the status of the Secretary of State's evidence, s 20 of the CDDA provides:

> 'In any proceedings (whether or not under this Act), any statement made in pursuance of a requirement imposed by or under sections 6 to 10 ... or by or under rules made for the purposes of this Act under the Insolvency Act, may be used in evidence against any person making or concurring in making the statement.'

24. Rule 3 of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023 requires evidence in support of an

application for a disqualification order to be filed when the claim form is issued. And r 3(2) provides:

> 'The evidence shall be by one or more affidavits, except where the claimant is the official receiver, in which case it may be in the form of a written report (with or without affidavits by other persons) which shall be treated as if it had been verified by affidavit by him and shall be prima facie evidence of any matter contained in it.'

25. The result of s 20 and r 3(2) is that the Official Receiver's report, which may contain (indeed is almost bound to contain) a good deal of hearsay evidence, is admissible as evidence at the hearing of the application. By contrast, directors' affidavit evidence, although it may include hearsay material (see s 1 of the Civil Evidence Act 1995), may only do so if the relevant provisions of the 1995 Act and CPR Pt 33 are complied with.

26. Miss Davies submits that these differences between the Official Receiver's evidence and that of the directors show that at the hearing there will be no 'equality of arms' between the two sides and that, in consequence, the hearing will not have the degree of fairness necessary for compliance with art 6(1).

27. Before examining these contentions in more detail, it is interesting to notice the way in which the European Court of Human Rights reacted to the comparable contentions made in *DC, HS and AD v UK*. The court noted the hearsay point but could see no unfairness in the way in which the procedural rules relating to evidence had actually operated. As to the point about statements being obtained under compulsion, the court dealt with this, too, pragmatically. It said:

> 'In the present case, whilst the information from the second applicant was relevant to the facts of the case, there is no indication in the documents that it played a predominant role. In any event, by the substantive hearing in the case, the parties had come to an agreed statement of the facts of the case.' (See [2000] BCC 710 at 717.)

28. As to both complaints, the court dealt with them by looking to see whether any actual unfairness had taken place. It concluded that there had been no unfairness at the hearing and so rejected the complaints. In the present case, the directors' complaints are not based on unfairness at the hearing. They could not be, for the hearing has not yet taken place. The directors are complaining that, because of the perceived defects in the procedural rules under which the hearing will be conducted, a fair hearing cannot take place.

29. Miss Davies has made the bold submission that even though, on the authority of the *DC, HS and AD* case, it might appear that the alleged defects do not necessarily invalidate the fairness of the hearing so as to constitute a breach of art 6(1) rights, none the less the 'fundamental rights' to which the directors as litigants are entitled under Community law are bound to be infringed by those defects. In support of this submission she relied on two Court of Justice cases. One was *Orkem v EC Commission* Case 374/87 [1989] ECR 3283. The other was *Otto BV v Postbank NV* Case C-60/92 [1993] ECR I-5683.

30. The issue in the *Orkem* case was whether the Commission was entitled to insist on Orkem supplying the Commission with information that, if supplied, might show that Orkem was in breach of the common market rules on competition. Orkem contended that it was being compelled, in breach of art 6 of

the convention, to incriminate itself by confessing to an infringement of these rules. The court said ([1989] ECR 3283 at 3351):

> '33 ... whilst it is true that the rights of the defence must be observed in administrative procedures which may lead to the imposition of penalties, it is necessary to prevent those rights being irremediably impaired during preliminary inquiry procedures which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings and for which they may be liable. Consequently, although certain rights of the defence relate only to contentious proceedings which follow the delivery of the statement of objections, other rights must be respected even during the preliminary inquiry.
>
> 34. Accordingly, whilst the Commission is entitled ... to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned.
>
> 35. Thus the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.'

31. A number of important points emerge from the *Orkem* judgment. First, the restriction placed by the court on the obtaining by the Commission of evidence by compulsion was limited. It extended only to seeking information which would undermine the undertaking's rights of defence. The restriction would, obviously, include seeking admissions of the existence of infringements. But it did not bar the Commission from seeking the disclosure of facts and documents that might be used by the Commission to establish the existence of infringements.

32. Second, the court was looking at preliminary procedures which might provide evidence of unlawful conduct that might be used in criminal proceedings. It was not pronouncing on preliminary procedures that might provide evidence to be used in regulatory civil proceedings.

33. Third, the court was dealing with an objection by the undertaking to being asked to provide the information. A quite different question would arise if, the information having already been provided, its use in subsequent proceedings were proposed. This was a question which the European Court of Human Rights addressed some years later in *Saunders v UK* (1996) 23 EHRR 313. The underlying facts in *Saunders v UK* are very well known and I need not repeat them. Suffice it to say that evidence had been taken by compulsion from Mr Saunders by DTI (Department of Trade and Industry) inspectors investigating the affairs of Guinness and acting under statutory powers. The evidence had subsequently been used at Mr Saunders' criminal trial. He had been convicted. He complained that his art 6 right to a fair hearing had been infringed. The court agreed. It took the view that there had been a breach of art 6(2) (see (1996) 23 EHRR 313 at 337, para 68). It went on, however, to emphasise that the question whether there had been an infringement of the right to a fair trial had to be examined in the light of all the circumstances of the case. The court added (at 338, para 69):

> 'In particular, it must be determined whether the applicant has been subject to compulsion to give evidence and whether the use made of the

a resulting testimony at his trial offended the basic principles of a fair procedure inherent in Article 6(1) of which the right not to incriminate oneself is a constituent element.'

34. This approach makes it very difficult, in my opinion, for Miss Davies to submit that the use in legal proceedings of a penal character of evidence taken by compulsion necessarily constitutes an art 6(1) infringement. The *DC, HS and AD* case allowed the use in disqualification proceedings of compulsorily obtained evidence. Nothing in the *Orkem* case goes so far as to say that the use of such evidence would necessarily be unfair. Indeed, in upholding the right of the Commission to obtain by compulsion facts and documents which might be used to show the existence of infringements, the *Orkem* case positively inferred that the use of such evidence would not necessarily be unfair.

35. In *Otto BV v Postbank NV* Case C-60/92 [1993] ECR I-5683 the Court of Justice held that a national court, in deciding on the propriety of an order for the provisional examination of witnesses prior to the initiation of civil proceedings, did not have to apply the principle that an undertaking was not bound to make admissions that it had infringed the rules of competition. But it said, also, that it followed from the *Orkem* case that information so obtained and brought to the attention of the Commission should not be used 'to establish an infringement of the competition rules in proceedings which may result in the imposition of penalties' (see [1993] ECR I-5683 at 5713, para 20).

36. Miss Davies relies particularly on para 20 of the *Otto BV v Postbank NV* judgment. But in para 20 of *Otto BV v Postbank NV*, as in the *Orkem* case, the proceedings in which the compulsorily obtained evidence might have been used and to which the court was referring were criminal proceedings. It may be right that the use of compulsorily obtained evidence in criminal proceedings can be barred under Community law without the need to examine whether the use of the evidence has made the hearing unfair. That is not a point I need to decide. Directors' disqualification proceedings, however, are not criminal proceedings. They are regulatory proceedings. They may, for some purposes, justify being described as penal proceedings; but they are none the less civil proceedings. I do not accept that Community law has recognised as a fundamental right that evidence of facts or documents obtained by compulsion from an individual cannot be used against that individual in regulatory civil proceedings, such as an application under the CDDA for a disqualification order. No case of the Court of Justice has so held. The European Court of Human Rights has, in *DC, HS and AD v UK*, held the contrary. It may be that, in some disqualification cases, reliance by the applicant on evidence taken by compulsion from the director would be unfair and infringe the art 6(1) right to a fair hearing. Whether that would be so might depend on the nature of the evidence and its significance to the findings made against the director. If an admission by a director that his conduct made him unfit to be a director were extracted from him by compulsion, I can see the force of an argument that reliance on that admission for the purpose of proving unfitness would be unfair. But, strictly, the admission would be irrelevant and inadmissible. It is the court's opinion of the director's conduct that matters, not the director's opinion. On the other hand, I do not see any reason, in principle, why the use in disqualification proceedings of an admission by a director that he had signed a particular letter, or given a particular instruction, or formed a particular view, necessarily infringes the director's right to a fair hearing. Circumstances can perhaps be constructed in which reliance on an admission of that character would

be inconsistent with a fair hearing. If, for example, a director were not permitted at the hearing to contradict the admission, or to explain it away, an unfairness conclusion might be compelling. But, even then, if the facts that had been admitted were insignificant, or if all reliance on them were disavowed by the applicant, the inference of unfairness might be countered. Everything must, in my judgment, depend on the particular circumstances of the case. In regulatory civil proceedings, such as disqualification proceedings under the CDDA, the mere fact that the applicant's evidence included material obtained from the respondent under compulsion would not, in my judgment, except perhaps in very rare cases, make the hearing unfair for art 6(1) purposes.

37. Let me, therefore, turn to Mr Pickthall's report. The hearing of the case before me straddled two days. In the interval between the conclusion of the first day and the commencement of the second I read Mr Pickthall's report. I could find in it nothing the use of which would obviously be unfair to the directors. So I asked Miss Davies to draw my attention to the parts of the report the use of which against the directors would, in her submission, be unfair. She was not able in response to point to any particular part of the report. She submitted, simply, that because the report contained information that had been supplied by one or other of the directors at their respective s 235 interviews reliance on the report as a whole would be unfair. In my judgment, this is an unacceptable approach to art 6(1) unfairness, as least so far as disqualification proceedings are concerned.

38. The importance of proper regulation of limited companies is obvious. Where a company has become insolvent and gone into liquidation it is obviously necessary that the regulatory authority should be able to examine the manner in which the company's affairs have been conducted and to take or to initiate steps to protect the public against any repetition. It is clearly established that the right to silence, the right against self-incrimination, do not entitle a director to decline to answer proper questions put to him in the course of a s 235 interview (see *Bishopsgate Investment Management Ltd (in prov liq) v Maxwell* [1992] 2 All ER 856, [1993] Ch 1). A bar against the use of incriminating answers in criminal proceedings against the director was established in *Saunders v UK*. But the bar was held in *DC, HS and AD v UK* not to apply to disqualification proceedings.

39. The Pickthall report contains a number of references to things that one or other of the directors, or both of them, had done and to their knowledge or state of mind about various matters. The report does not, save in a very few cases, state the source of the allegation. The source may be something or other said at one of the s 235 interviews, or it may be that the source is some document. If the source is a document, the document may be one belonging to the company; or it may be a document belonging to one of the directors and supplied by him to the Official Receiver. As to statements made by one or other of the directors, there are only a very few references in the report to these. (i) Paragraph 144 records that: 'The [director] states that had he been given more time by the Inland Revenue [Westminster's losses] would have been paid in full.' (ii) Paragraph 146 says that: '... according to the First [director], the mortgages did not allow Westminster any payment by way of management fee ...' (iii) Paragraph 147 contains the sentence that: 'The First [director] acknowledges that Westminster was unable to pay its debts as and when due as early as March 1993 ...' (iv) Paragraph 169 records that: 'The [directors] blame the failure of Westminster on the impatience of the Inland Revenue over PAYE.' (v) Paragraph 170 says that: '... on the First [director's] own admission [Crown moneys] were used to finance the Group as a whole'. (vi) Paragraph 172 says that: 'The First [director] states that he and the

Second [director] received the following salaries and benefits ...', and then sets out the relevant figures. (vii) Paragraphs 178 and 179 record explanations given by the first director for certain payments made to him by Westminster. (viii) Finally, para 195 says that: 'Each of the [directors] has confirmed that he had responsibility for financial and general management matters.'

40. There may be other references in the report to statements made by the directors, but if so they have escaped my notice.

41. I do not believe it could possibly be said that the inclusion in the evidence in support of the disqualification application of these references to information supplied by the directors would be unfair to them. In some instances the statements are exculpatory in character. In others, they are statements of the obvious. In relation to all, the directors can, if they wish, qualify them, explain them or contradict them. There is, in the report, nothing that I have found that corresponds remotely to the admissions that the Court of Justice referred to in the *Orkem* case.

42. In my judgment, there is nothing in Mr Pickthall's report that makes the use in the disqualification proceedings of information obtained from the directors in the course of their s 235 interviews unfair.

43. In support of the complaint based upon the alleged absence of 'equality of arms', Miss Davies referred me to *Dombo Beheer BV v Netherlands* (1993) 18 EHRR 213. This case concerned civil litigation about an oral agreement allegedly made between a company (acting by its managing director) and a bank (acting by a branch manager). Under the procedural rules of the national court, the managing director was, apparently, not allowed to be a witness. But the branch manager was allowed to be a witness. The European Court of Human Rights held that this imbalance was an infringement of the art 6(1) right to a fair hearing. The court said (at 229–230, para 33):

> '... certain principles concerning the notion of a "fair hearing" in cases concerning civil rights and obligations emerge from the Court's case law. Most significantly for the present case, it is clear that the requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to such cases as well as to criminal cases. The Court agrees with the Commission that as regards litigation involving private interests, "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. It is left to the national authorities to ensure in each individual case that the requirements of a "fair hearing" are met.'

44. Miss Davies has identified five features of the procedure and practice at disqualification proceedings which, she submits, place the directors under an unfair disadvantage. (i) She submits that the Official Receiver's evidence is given a superior status in that it is admissible in circumstances where the director's evidence would not be. This is a reference to s 20 of the CDDA and r 3(2) of the 1987 rules, which allow the Official Receiver's evidence to include hearsay. But so, too, can the directors' evidence include hearsay. It is true that the directors may need to accompany their hearsay evidence with a hearsay notice whereas the Official Receiver's report need not be so accompanied. This is a mere formality. It is not a point of substance. If, in the event, some of the directors' hearsay evidence were objected to, and the objection were upheld by the judge, an unfairness point might, if the evidence were relevant, then emerge. A further

point is that the director's affidavit evidence must be sworn whereas the Official Receiver's report is simply signed. But the comparative probative value of the director's evidence does not suffer at all as a result of this. (ii) Miss Davies points out that although, in relation to the directors' hearsay evidence, rules of court enable the Official Receiver to apply for the witnesses to be produced for cross-examination, there is no similar provision enabling the directors to call for the Official Receiver's hearsay witnesses to be produced for cross-examination. That, I agree, is a procedural anomaly. But the Official Receiver has made clear, at least in the course of the hearing before me if not previously, that if the directors indicate the hearsay statement or statements in respect of which they want to cross-examine, the relevant witness will, if available be tendered for that purpose. That undertaking produces an equality of arms so far as hearsay evidence is concerned. It will, of course, be for the trial judge to resolve any dispute as to whether a particular individual needs to be produced for cross-examination. But that applies to both sides. (iii) Miss Davies submits that since the sources of the allegations contained in the Official Receiver's report are mostly not identified, it will be difficult for the directors to challenge the allegations. She did not, however, identify any particular allegation in the report which presented this difficulty. I conclude that the difficulty is theoretical, not actual. Of course, a large number of the allegations in the report consist of inferences or conclusions drawn by the author from the underlying facts. The directors can, and no doubt will, challenge these inferences and conclusions. The judge must decide whether they are justified. And if the directors want to know the source of any particular allegation, they can ask the Official Receiver. The question of unfairness on account of inequality of arms will not arise unless a reasonable request is unreasonably refused. (iv) Miss Davies submits that the potentially heavy costs burden placed on directors by disqualification proceedings produces an unfair inequality of arms. The potential costs burden on directors to disqualification applications is, I agree, a serious one. But it does not, in my judgment, infringe these directors' art 6(1) right to a fair hearing. The directors, if they succeed, can expect a costs order in their favour. If they fail, and a disqualification order is made, they must expect a costs order to be made against them. The amount of costs ordered to be paid will be a matter for the discretion of the trial judge. The cost of litigation and an imbalance in the financial resources available to one party compared with the other is not, in civil cases at least, a ground for concluding that the less well-off party is deprived of a fair trial. Moreover, no attempt has been made by either of the directors to demonstrate that he cannot, for financial reasons, afford to contest the disqualification proceedings.

45. In my judgment, the matters relied on as constituting the inequality of arms do not, singly or cumulatively, demonstrate any infringement of the art 6(1) right to a fair hearing.

46. For these reasons, I propose to answer No to both limbs of the question posed by the preliminary issue.

Order accordingly. Permission to appeal refused.

Celia Fox Barrister

Application for permission to appeal

By a draft notice dated 23 December 1999 the directors applied to the Court of Appeal for permission to appeal.

Michael Beloff QC, *Cherie Booth QC* and *Helen Davies* (instructed by *Isadore Goldman*) for the directors.

David Donaldson QC and *Richard Hill* (instructed by the *Treasury Solicitor*) for the Official Receiver.

Cur adv vult

2 February 2000. The following judgment of the court was delivered.

HENRY LJ.

1. The first director, Mr William Stern, is a citizen of both Austria and the United States of America. He is aged 64 and has been a property developer or dealer since the 1960s. He is the father of the second director, Mr Mark Stern, who is a citizen of the United Kingdom. Both are resident in England.

2. The directors were closely associated with (the Official Receiver's case is that they controlled) a group of property companies (the group) whose holding company was Dollar Land Holdings plc. Management and administration services were provided to the group by two companies in succession, Kensington Management Services Ltd (Kensington) from the end of 1986 until the beginning of 1993, and then by Westminster Property Management Ltd (Westminster) from February 1993 until 26 October 1994, when the Companies Court made a winding-up order in respect of Westminster.

3. Kensington had gone into creditors' voluntary liquidation on 17 February 1993 with an estimated deficiency (as regards unsecured creditors) of £5·77m, of which almost £800,000 was in respect of value added tax, PAYE income tax and national insurance contributions. Westminster was wound up on the petition of the Inland Revenue with an estimated deficiency (as regards unsecured creditors) of £1·22m, including almost £500,000 due to the Inland Revenue and Customs and Excise. The directors were directors of Kensington from 1987 and 1986 respectively until its winding up, and of Westminster from 1990 until its winding up. The Official Receiver's case is that Westminster was a 'phoenix company', which arose from the ashes of Kensington and continued to provide services to the group from the same address, with the same telephone and fax numbers, and even with the same office furniture.

4. On 23 October 1996, just within the statutory two-year time limit, the Official Receiver commenced proceedings against the directors under the Company Directors Disqualification Act 1986 (the CDDA) seeking their disqualification under s 6. The proceedings were entitled 'In the matter of Westminster Property Management Ltd' but under s 6(1)(b) the Companies Court would be required to consider the conduct of each of the directors as a director of Westminster taken together with his conduct of other companies, including Kensington. The Official Receiver's case is based principally on the directors' conduct as directors of Kensington and Westminster. In relation to both companies the Official Receiver complains of trading at the risk of creditors; trading with Crown monies; excessive remuneration; and unlawful payments to directors. In relation to Westminster only there are further complaints of phoenix trading; misapplication (otherwise than by payments to themselves) of company funds; and inadequate accounting systems, practices and records.

5. Procedure on applications under the CDDA is regulated by the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023. The procedure is intended to be summary, but in practice regrettable delays have

often occurred (see the observations of Lord Woolf MR giving the judgment of this court in *Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths* [1998] 2 All ER 124 at 134–135). The delay which has occurred in the present case has been occasioned in large measure by a preliminary issue which the directors applied for as long ago as 12 June 1997 and which was directed by an order of Neuberger J made on 19 May 1998. The issue was in the following terms:

> 'Whether, in the particular circumstances of this case, European Community law, and in particular any fundamental rights deriving from the European Convention on Human Rights, preclude: (a) the making of an order pursuant to s 6 of the [CDDA] against the [directors] or either of them, or (b) the use in these proceedings by the [Official Receiver] of any evidence provided to him under legal compulsion.'

The reference to legal compulsion relates to interviews with officials of the Insolvency Service at which each of the directors was required, under powers conferred by s 235 of the Insolvency Act 1986, to attend and answer questions. Information which they provided was then reduced to the form of a typewritten statement which one or other signed, often with handwritten corrections, a few days after the interview. The scope of s 235 and the more formal procedure under s 236 are contrasted in the speech of Lord Browne-Wilkinson in *Re Arrows Ltd (No 4), Hamilton v Naviede* [1994] 3 All ER 814 at 826, [1995] 2 AC 75 at 101. Lord Browne-Wilkinson went on to describe the principle against self-incrimination in a passage which merits citation, not least because it refers to two decisions of the Court of Justice of the European Communities which have played a large part in the argument:

> 'One of the basic freedoms secured by English law is that (subject to any statutory provisions to the contrary) no one can be forced to answer questions or produce documents which may incriminate him in subsequent criminal proceedings. The principle evolved from the abhorrence felt for the procedures of the Star Chamber under which the prisoner was forced, by the use of torture, to answer self-incriminating questions on the basis of which he was subsequently convicted. Although physical torture is a thing of the past, the principle remains firmly embedded in our law: a witness can refuse to answer self-incriminating questions without punishment and a judge in civil proceedings customarily warns a witness that he need not answer such questions. Similarly, the privilege entitles a party to civil litigation to refuse to give discovery of documents which may incriminate him: *Rank Film Distributors Ltd v Video Information Centre* [1981] 2 All ER 76, [1982] AC 380 and *A T & T Istel Ltd v Tully* [1992] 3 All ER 523, [1993] AC 45. As Lord Wilberforce said in the *Rank Film* case [1981] 2 All ER 76 at 81, [1982] AC 380 at 442 the principle "has been too long established in our law as a basic liberty of the subject (in other countries it has constitutional status) to be denied". The principle has been carried over into the jurisprudence of all common law countries, including the United States. It is one of the basic rights protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmnd 9885). In *Funke v France* (1993) 16 EHRR 297, *Miailhe v France* (1993) 16 EHRR 332 and *Cremieux v France* (1993) 16 EHRR 357 art 6 of the convention was held to render unlawful a demand to produce self-incriminating documents.

a Similarly in *Orkem v European Commission* Case 374/87 [1989] ECR 3283 at 3350, para 28, the European Court of Justice held that under Community law an individual could not be compelled to give incriminating answers to the Commission since to do so would infringe "the general principles of Community law, of which fundamental rights form an integral part": cf *Otto BV v Postbank NV* [Case C-60/92 [1992] ECR I-5683] ...' (See [1994] 3 All ER b 814 at 820–821, [1995] 2 AC 75 at 95.)

6. The issue of European law raised as a preliminary issue arises under two articles of the Treaty of Rome, now renumbered art 43 EC (freedom of establishment) and art 49 EC (freedom to provide services within the Community), both of which have direct effect. Sir Richard Scott V-C heard argument on the c preliminary issue on 29 and 30 November 1999 and handed down a reserved judgment on 20 December. His judgment mentions an important concession which was made by the Official Receiver (and is embodied in a recital to the order directing the preliminary issue). Sir Richard Scott V-C's judgment also contains a full explanation of the implications of the direct effect of arts 43 EC and 49 EC. Since the judgment is being reported, and since there is no dispute in this court d (at any rate at a high level of generality) as to the principles of Community law to be applied, it is sufficient to provide a brief summary of Sir Richard Scott V-C's exposition.

7. Restrictions imposed by national law on freedom of establishment or freedom to provide services will be upheld if: (i) they are not discriminatory (as e between nationals of different member states); (ii) they are justified by imperative requirements in the general public interest; (iii) they are suitable for securing their objective; and (iv) they are proportionate (see *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* Case C-55/94 [1996] All ER (EC) 189, [1995] ECR I-4165). In this case it is the second condition that is contentious, since a restriction cannot be justified on grounds of public interest if it is incompatible with any f general principle of Community law, including fundamental rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the convention) (see *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis* Case C-260/89 [1991] ECR I-2925, especially at 2963–2964, paras 41–44). In this area, therefore, g the convention has been brought home to the national courts of this country in advance of the coming into force of the Human Rights Act 1998.

8. Sir Richard Scott V-C summarised his conclusion on those general principles as follows, in para 13 of his judgment:

h 'These passages [from *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis* Case C-260/89 [1991] ECR I-2925] make good, in my opinion, the submission made to me by Miss Helen Davies, counsel for the [directors], namely that the propriety under Community law of disqualification orders under s 6 of the CDDA cannot be upheld if the procedure under which the orders were obtained was in breach of the [directors'] fundamental rights j (see also *Rutili v Minister for the Interior* Case 36/75 [1975] ECR 1219 at 1229, 1231, paras 16, 24).'

9. Sir Richard Scott V-C then set out the relevant parts of art 6 of the convention and considered the competing submissions as to its application in this case. He concluded that the full hearing of the CDDA proceedings (which then lay, as it still lies, in the future) would not involve a breach of art 6. In reaching

that conclusion Sir Richard Scott V-C noted (see para 44 of his judgment) that various issues would or might arise at the hearing as to the admissibility of evidence, the identification of the source of particular allegations, the tendering of witnesses for cross-examination, and so on. Such issues could not be determined in advance and there was no reason to expect that they would not be dealt with fairly, as and when they arose, by the trial judge.

10. The full hearing has been fixed to begin on 7 February 2000, with an estimated duration of ten days. Unless the forthcoming hearing does inevitably involve a breach of art 6 of the convention, it is most desirable—in the interests of the directors as well as in the public interest—that it should proceed on the fixed date, and should not be postponed, with further delay and expense. Permission for an appeal to this court was refused by Sir Richard Scott V-C but an application to this court for permission to appeal (with the appeal to follow if permission is granted) has been brought on with the utmost expedition. At the start of the hearing the court thought it best to defer a decision on permission to appeal and to hear full argument at once.

11. The main issues argued before Sir Richard Scott V-C, and covered by his judgment, were whether disqualification proceedings under the CDDA, although not criminal proceedings, should be regarded as akin to criminal proceedings for the purposes of the rule against self-incrimination; the extent to which art 6(2) and (3) of the convention applied even if the proceedings were not classified as criminal; the use made in the Official Receiver's evidence of material obtained by his use of powers conferred by s 235 of the Insolvency Act 1986; and other matters relied on by the directors to show that there would not at the hearing be 'equality of arms'. But, before going further into Sir Richard Scott V-C's judgment, and the criticisms of it which have been made in this court, it is appropriate to note two very recent decisions of the reconstituted European Court of Human Rights, one on an application registered by the directors themselves, *WGS and MSLS v UK* [2000] BCC 719. The other, *DC, HS and AD v UK* [2000] BCC 710, was also a complaint about proceedings under the CDDA, but in that case the applicants had already been disqualified under the *Carecraft* procedure (see *Re Carecraft Construction Co Ltd* [1993] 4 All ER 499, [1994] 1 WLR 172).

12. The applicants in *DC, HS and AD v UK* had been disqualified for periods of between five and three years after misconduct (including a breach of s 151 of the Companies Act 1985) in the management of a company engaged in the insurance industry. They complained that they had not had a fair trial, in breach of art 6 of the convention, as well as alleging breaches of other articles which are not material. The unanimous judgment of the European Court of Human Rights, delivered on 14 September 1999, described the complaints under art 6 as follows:

> 'They claim that the proceedings determined both "civil rights and obligations" and "criminal charge[s]" within the meaning of art. 6 of the Convention, and that the proceedings were not fair. They see unfairness in the rules regulating the conduct of CDDA proceedings, in particular in that the character evidence was excluded, in that the evidence submitted for the Secretary of State had a special status, in that they were required by the rules to file their evidence in order to challenge the evidence of the Secretary of State, and in that the procedures are less favourable than those which are applied in criminal proceedings, and that the difference is discriminatory. The applicants also claim that they were denied the protection of the presumption of innocence guaranteed by art. 6(2) of the Convention and the

opportunity to bring their evidence and to cross-examine on equal terms under art. 6(3). Complaint is also made of the fact that the proceedings were based upon information obtained from the second applicant and others in respect of compulsory powers in circumstances which failed to respect the rights to due process and the right to silence.' (See [2000] BCC 710 at 715.)

13. In its judgment the European Court of Human Rights referred to the decision of the European Commission of Human Rights in another CDDA case, *EDC v UK* [1998] BCC 370, and to other authorities establishing the criteria for a 'criminal charge' within the meaning of art 6 (summarised as 'the domestic classification of the "offence", the nature of the "offence", and the nature and degree of severity of the potential and actual penalty'). It concluded that the proceedings should not be classified as criminal:

> 'In the present case, the proceedings were classified as civil in domestic law, the disqualification of directors is a matter which is regulatory rather than criminal, and the "penalty" is neither a fine nor a prison sentence, but rather a prohibition on acting as a company director without the leave of the court. Whilst a great deal was undoubtedly at stake for the applicants, it cannot be said that what is inherently a regulatory matter can thereby become a "criminal charge" within the meaning of art. 6(1) of the Convention.' (See [2000] BCC 710 at 716.)

It rejected the complaints of unfairness in the exclusion of character evidence, in the inclusion of hearsay evidence in the Secretary of State's evidence, and in the requirement for the applicants (respondents to the CDDA proceedings) to file written evidence in answer at an early stage. It distinguished the case of *Saunders v UK* (1996) 23 EHRR 313 on several grounds. It concluded that every part of the application was manifestly ill-founded within the meaning of art 35(3), and the application was declared inadmissible.

14. On 23 November 1999 (that is, less than a week before the preliminary issue was heard by Sir Richard Scott V-C) the same section of the European Court of Human Rights reached a similar conclusion on the application made by the directors alleging breaches of art 6 and other articles of the convention in the disqualification proceedings against them. Since it has such a direct bearing on the appeal it is appropriate to set out the relevant part of the unanimous judgment in its entirety:

> 'The applicants submit that they are at the present time subject to proceedings which are structurally unfair and contrary to art. 6 of the Convention, which provides in relevant part: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights ... (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ..." The applicants aver that their situation may be compared with a continuing situation of cumulative breaches of the presumption of the innocence and the right to a fair trial. Having regard to the fact that there is a growing number of disqualification proceedings initiated on the basis of the official receiver's reports, the applicants state that there is a general interest in having at this stage a clear

interpretation of the application of art. 6 to disqualification proceedings. The court notes that the proceedings of which the applicants complain have not yet been the subject of any judicial determination. It observes that the competence to make a disqualification order rests with the domestic court on the basis of the evidence put forward at a hearing. An appeal lies against the making of a disqualification order. In these circumstances the court is led to conclude that this part of the application is premature and on that account is inadmissible as being manifestly ill-founded within the meaning of art. 35(3) and (4) of the Convention. The court's conclusion in this respect is not affected by the applicants' contention that they are already victims of a legislative regime which is unimpeachable in terms of domestic law yet incompatible with Convention standards of fairness. The acceptance of such an argument would not only give rise to an illegitimate intervention by the court in any impending court proceedings against the applicants at the domestic level, it would also amount to impermissible speculation on the outcome of the fairness of those proceedings. The court would note in any event that it concluded in the case of *DC, HS and AD v United Kingdom* [2000] BCC 710 that, having regard to the domestic classification of the alleged "offence", its nature as well as the nature and degree of severity of the potential and actual penalty, the disqualification proceedings under the CDDA instituted against those applicants determined "civil rights" within the meaning of art. 6(1) of the Convention. The court stresses, however, that the fact that such proceedings are to be treated as regulatory civil proceedings and not criminal proceedings for the purposes of art. 6(1) does not remove from the applicants their right to a fair hearing. While contracting states have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases, it is still incumbent on them to secure fairness in the determination of civil rights and obligations (see [*Dombo Beheer BV v Netherlands* (1993) 18 EHRR 213 at 229–230, paras 32–33]). As the court has already observed, it is not its function to anticipate as to whether or not that requirement will be respected in the instant case. For the above reasons, the court finds that the applicants' complaint is premature and therefore, at this stage, manifestly ill-founded within the meaning of art. 35(3) and (4) of the Convention.' (See [2000] BCC 719 at 725–726.)

15. The judgment of the European Court of Human Rights in *WGS and MSLS v UK* is not referred to in any way in the judgment of Sir Richard Scott V-C. It appears from a chronology helpfully supplied by Miss Helen Davies (who appeared on her own before Sir Richard Scott V-C as counsel for the directors) that the directors did not receive a copy of the judgment from Strasbourg until 6 December, a week after Sir Richard Scott V-C had reserved judgment. A copy was provided to Sir Richard Scott V-C the next day. Sir Richard Scott V-C did not think it necessary to recall counsel for further argument but (not having heard argument on the judgment) he evidently thought it right to make no reference to it. Sir Richard Scott V-C could not be (and has not been) criticised for taking that course. But at first sight the unanimous judgment of the European Court of Human Rights provides powerful support for his own judgment.

16. In this court Mr Michael Beloff QC (appearing with Miss Cherie Booth QC and Miss Davies for the directors) made some preliminary points of a general nature. The right to a fair hearing 'holds so prominent a place in a democratic

society that there can be no justification for interpreting Article 6(1) ... restrictively' (see *Moreira de Azevedo v Portugal* (1990) 13 EHRR 721 at 737, para 66). To assess whether the right has been breached, the proceedings must be considered as a whole (see *Barbera v Spain* (1988) 11 EHRR 360 at 385). The doctrine of equality of arms (égalité des armes, first stated in *Neumeister v Austria (No 1)* (1968) 1 EHRR 91) applies to civil as well as to criminal cases (see *Dombo Beheer BV v Netherlands* (1993) 18 EHRR 213 at 229, para 33). Those general points are not in dispute.

17. Mr Beloff then advanced three main criticisms of Sir Richard Scott V-C's judgment. First he submitted that Sir Richard Scott V-C (especially in paras 34–38 of his judgment) came perilously close to saying that the issue of self-incrimination could never be relevant to the hearing of a civil case. Mr Beloff submitted that there is a sort of hierarchy of types of proceedings, with civil cases which have a penal element somewhere in the middle of the hierarchy. Miss Booth, replying on behalf of the directors, submitted that the correct distinction was between a composite class of criminal cases and cases concerned with the imposition of penalties by a public authority (on the one hand) and civil cases in the private law sector (on the other hand). That formulation may not squarely cover the whole ground but its general thrust is clear. On this point the directors rely on two cases in the Court of Justice, *Orkem v EC Commission* Case 374/87 [1989] ECR 3283 and *Otto BV v Postbank NV* Case C-60/92 [1993] ECR I-5683.

18. The other two criticisms advanced by Mr Beloff were that Sir Richard Scott V-C erred in his view that the fairness or unfairness of the hearing could not be determined in advance, and that he had also erred in his view that evidence obtained by compulsion was objectionable only if and so far as it consisted of admissions (see in particular para 41 of the judgment).

19. The *Orkem* case and *Otto BV v Postbank NV* were both concerned, although in different contexts, with the prohibitions on anti-competitive practices and abuses contained in what were arts 85 and 86 (now renumbered as arts 81 EC and 82 EC) of the EC Treaty. In the *Orkem* case the Commission was conducting a wide-ranging investigation into the thermoplastics industry. Orkem, a company operating in that industry, sought to annul a decision of the Commission to require Orkem to provide information about its activities, that requisition being backed by coercive powers. The judgment of the Court of Justice ([1989] ECR 3283 at 3350–3351, paras 28–35) contains an important passage, some of which is set out in Sir Richard Scott V-C's judgment:

> '28. In the absence of any right to remain silent expressly embodied in Regulation No 17 [Council Regulation (EEC) 17/62 implementing arts 85 and 86 of the Treaty (OJ 1962 L13 p 204 (S Edn 1959–62 p 87))] it is appropriate to consider whether and to what extent the general principles of Community law, of which fundamental rights form an integral part and in the light of which all Community legislation must be interpreted, require, as the applicant claims, recognition of the right not to supply information capable of being used in order to establish, against the person supplying it, the existence of an infringement of the competition rules.
>
> 29. In general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings. A comparative analysis of national law does not therefore indicate the existence of such a principle, common to the laws of the Member States, which may be relied upon by legal persons in relation to

infringements in the economic sphere, in particular infringements of competition law.

30. As far as Article 6 of the European Convention is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself.

31. Article 14 of the International Convenant [on Civil and Political Rights of 19 December 1966 (United Nations Treaty Series, vol 999, p 171)], which upholds, in addition to the presumption of innocence, the right (in paragraph 3(g)) not to give evidence against oneself or to confess guilt, relates only to persons accused of a criminal offence in court proceedings and thus has no bearing on investigations in the field of competition law.

32. It is necessary, however, to consider whether certain limitations on the Commission's powers of investigation are implied by the need to safeguard the rights of the defence which the Court has held to be a fundamental principle of the Community legal order (judgment of 9 November 1983 in [*NV Nederlandsche Banden-Industrie Michelin v EC Commission* Case 322/81 [1983] ECR 3461], para 7).

33. In that connection, the Court observed recently, in its judgment of 21 September 1989 in [*Hoechst AG v EC Commission* Joined cases 46/87 and 227/88 [1989] ECR 2859 at 2923], para 15, that whilst it is true that the rights of the defence must be observed in administrative procedures which may lead to the imposition of penalties, it is necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings and for which they may be liable. Consequently, although certain rights of the defence relate only to contentious proceedings which follow the delivery of the statement of objections, other rights must be respected even during the preliminary inquiry.

34. Accordingly, whilst the Commission is entitled, in order to preserve the useful effect of Article 11(2) and (5) of Regulation No 17, to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned.

35. Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.'

(As a footnote to the above reference to 'a comparative analysis of national law', it should be recorded that the Treasury Solicitor commissioned from the British Institute of International and Comparative Law a report on the comparative law issue of disqualification of company directors in different states of the European Union. That report was before Sir Richard Scott V-C and this court. Sir Richard Scott V-C has been criticised in the notice of appeal, although not in any oral submissions, for omitting to refer to the report. It is a thorough and interesting report but it does not disclose any regular pattern of national legislation within the Community.)

20. *Otto BV v Postbank NV* Case C-60/92 [1993] ECR I-5683 was also a competition case, but with the important difference that it was a piece of private litigation between Otto (a mail order company) and Postbank (which was accused of anti-competitive practice in its proposed charges on processing giro transfer slips). Otto sought pre-trial examination of some of Postbank's managerial staff, which Postbank sought to resist on the ground that it should not be coerced into admissions. The private character of the litigation was decisive. After a reference to the *Orkem* case the judgment of the Court of Justice continued (at 5712–5713):

> '16. Where, as in the main proceedings, a procedure is involved which concerns exclusively private relations between individuals and cannot lead directly or indirectly to the imposition of a penalty by a public authority, Community law does not require a party to be granted the right not to give answers which might entail admission of the existence of an infringement of the competition rules. That guarantee is essentially intended to protect an individual against measures of investigation ordered by public authorities to obtain his admission of the existence of conduct laying him open to administrative or criminal penalties.
>
> 17. It follows that the limitation on the Commission's power of investigation under Regulation No 17 with regard to an undertaking's obligation to reply to questions, which the Court deduced from the principle of respect for the rights of the defence in the *Orkem* case, cannot be transposed to national civil proceedings involving the application of Articles 85 and 86 of the Treaty which exclusively concern private relations between individuals, since such proceedings cannot lead, directly or indirectly, to the imposition of a penalty by a public authority.'

('Individuals', in this passage, plainly includes bodies corporate which are not public authorities.) The *Orkem* case was concerned with a preliminary investigation by the Commission, which might lead to the imposition of severe monetary penalties (which Mr Donaldson QC for the Official Receiver, not inaptly, referred to as fines). But Sir Richard Scott V-C was wrong, in our respectful view, if (in para 32 of his judgment) he intended to draw any sharp distinction between proceedings for a penalty brought by the Commission (characterised as criminal proceedings) and regulatory civil proceedings. The two judgments of the Court of Justice make clear that such proceedings by the Commission would not be criminal proceedings. They provide a considerable measure of support for Mr Beloff's hierarchical approach. So does the judgment of the European Court of Human Rights in *Albert v Belgium* (1983) 5 EHRR 533, a case concerned with disciplinary proceedings against a Belgian doctor who had been reckless in issuing certificates of unfitness to work without proper examination. The judgment of the European Court of Human Rights stated (at 542–543, para 30):

> '... the Court does not believe that the two aspects, civil and criminal, of Article 6(1) are necessarily mutually exclusive. Nonetheless, the Court does not consider it necessary to decide whether, in the specific circumstances, there was a "criminal charge". In point of fact, paragraph 1 of Article 6, violation of which was alleged by the two applicants, applies in civil matters as well as in the criminal sphere. Dr. Albert relied in addition on paragraph 2 and on sub-paragraphs (a), (b) and (d) of paragraph 3, but, in the opinion of

the Court, the principles enshrined therein, are, for the present purposes, already contained in the notion of a fair trial as embodied in paragraph 1; the Court will therefore take these principles into account in the context of paragraph 1.'

So disciplinary proceedings against a professional man or woman, although certainly not classified as criminal, may still bring into play some of the requirements of a fair trial spelled out in art 6(2) and (3), including the presumption of innocence (see also (1983) 5 EHRR 533 at 546, para 39).

21. It is important, therefore, to examine the nature of disqualification proceedings under s 6 of the CDDA in order to assess the degree to which they should be regarded as the imposition of a penalty by a public authority, and the position which they should occupy in any hierarchical ranking. It is also necessary, if the matter is to be considered in the round (as *Barbera v Spain* (1988) 11 EHRR 360 enjoins) to have some regard to the extent to which s 235 of the Insolvency Act 1986 ought to be regarded as an engine for self-incrimination.

22. The nature of disqualification proceedings has been considered by Rimer J and by this court in *R v Secretary of State for Trade and Industry, ex p McCormick* [1998] BCC 379 (a case concerned with proceedings under s 8 of the CDDA, following on an inspectors' investigation of Atlantic Computers plc). Both those decisions antedated the judgment of the European Court of Human Rights in *DC, HS and AD v UK* [2000] BCC 710 and have been confirmed by that judgment in so far as they proceeded on the basis that most probably disqualification proceedings were not criminal proceedings for the purposes of the convention. Rimer J said ([1998] BCC 379 at 386):

'The main features of disqualification proceedings which Mr Collings identified in developing this argument included the following: (i) such proceedings are taken only on the initiative of public authorities; (ii) they involve the levelling of specific allegations against the respondents; (iii) they can result in penalties of considerable severity on the respondents, also involving the suffering by them of some element of stigma. I accept that they do have these features and accept in particular that, even though they are not regarded by domestic law as brought for the purposes of punishment, disqualification orders do impose a substantial restriction on those subjected to them, a consequence which can fairly be regarded as of a penal nature. In *Re Lo-Line Electric Motors Ltd* ([1988] 2 All ER 692 at 696, [1988] Ch 477 at 486), Sir Nicolas Browne-Wilkinson V-C said ... "The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies have shown them to be a danger to creditors and others. Therefore, the power is not fundamentally penal. But if the power to disqualify is exercised, disqualification does involve a substantial interference with the freedom of the individual. It follows that the rights of the individual must be fully protected." Also, in *Re Swift 736 Ltd* ([1993] BCLC 1 at 3), Hoffmann J said ... "The question about Mr Ettinger, however, is the extent to which he must bear responsibility for that conduct. Mr Ettinger has given the explanation which I have recounted and, these being penal proceedings, Mr Ettinger must, I think, be given the benefit of the doubt."'

23. In this court Morritt LJ ([1998] BCC 379 at 391–392) analysed the structure and effect of the CDDA. He noted that the effect of a disqualification order is that

the disqualified person may not (during a disqualification period of not less than 2 and not more than 15 years) act, without the leave of the court, as a director, administrator, liquidator, receiver or manager of a company, or be otherwise concerned in promoting, forming or managing a company. The court has power to give leave under s 17 of the CDDA, and in practice that power is exercised from time to time, usually subject to fairly stringent conditions. So there is force in Mr Donaldson's submission that disqualification does not prevent a trader from earning his living, but it does prevent him from doing so with the privilege of limited liability unless he obtains permission to do so from the court.

24. After his analysis of the CDDA Morritt LJ continued (at 392–393):

> 'Counsel for Mr McCormick submitted in the alternative that as the article applied also to the determination of civil rights and obligations, the Secretary of State was bound to follow the same procedure in such proceedings as he applies to proceedings involving a criminal charge. I do not accept that submission either. It is true that in each case the person in question is entitled to "a fair and public hearing". But the requirement of fairness does not necessarily require the same treatment in civil cases as in criminal. This is clearly recognised in *Dombo Beheer BV v The Netherlands* ((1993) 18 EHRR 213). At para. 32 the court held: "The requirements inherent in the concept of a 'fair hearing' are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 applying to cases of the former category. Thus, although these provisions have a certain relevance outside the strict confines of criminal law (see *mutatis mutandis*, *Albert and Le Compte v Belgium* ((1983) 5 EHRR 533 at 546, para 39), the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases." Moreover it is apparent that the decision of the European Court of Human Rights in *Saunders v UK* which led to the policy of the Secretary of State with regard to the use of compelled evidence in criminal cases is inapplicable to civil cases.'

25. In *Saunders v UK* (1996) 23 EHRR 313 the European Court of Human Rights held that Mr Ernest Saunders had not had a fair trial, in breach of art 6(1) of the convention, because of the use during his trial on criminal charges (arising out of the Guinness share support operation) of transcripts of evidence given by Mr Saunders in the course of seven interviews, held between February and May 1987, with inspectors appointed under ss 432 and 442 of the Companies Act 1985 (evidence given at two later interviews, after Mr Saunders had been charged, was excluded by the trial judge under s 76 of the Police and Criminal Evidence Act 1984). Inspectors have wide powers of investigation backed by the sanction of punishment for contempt of court (see ss 434 and 436). Since the decision of the European Court of Human Rights in *Saunders v UK* successive Secretaries of State for Trade and Industry have had a policy of not seeking to use against a person accused in criminal proceedings transcripts of compelled evidence given by that person to inspectors. The decision of this court in *Ex p McCormick* confirms that a person against whom disqualification proceedings are brought has no right to require the same policy to be extended to him.

26. It is also right to note that interviews conducted by an officer of the Insolvency Service or other office-holder under s 235 of the Insolvency Act 1986 are

not directed exclusively, or even mainly, at obtaining material of a self-incriminatory nature. Their principal purpose is, as s 235(2)(a) makes clear, to furnish the office-holder with such information as he may reasonably require as to the affairs of a company in compulsory liquidation. The office-holder comes in at short notice and has the responsibility to conduct or supervise the liquidation; he may know little about the affairs of the company; its statutory books and accounting records may not be as full and reliable a source of information as they should be. That is the primary purpose of s 235 in the case of a company in compulsory liquidation, as it is of ss 312 and 333 of the same Act in the case of an individual who is adjudicated bankrupt.

27. Mr Donaldson did not make much of that point in his submissions, and he very fairly accepted that all interviews held pursuant to s 235 are backed by coercive sanctions, and that statements signed after such interviews must be regarded as compelled evidence. But since our judgment in this case may be looked to for guidance by judges of the Companies Court hearing disqualification proceedings (or pre-trial reviews before the full hearing of such proceedings) it seems right to point out that just as there is something of a hierarchy of civil proceedings (in terms of the penal element or stigma that may be involved) so there is something of a hierarchy of coercive powers for the purposes of obtaining information in cases of corporate or personal insolvency, and of investigating suspected fraud, misfeasance, or neglect of duty. Section 236 of the Insolvency Act 1986 contains machinery for the examination of witnesses by a procedure which is more formal and rigorous than that under s 235, and in relation to which punishment for contempt of court is available. Similarly, giving evidence to inspectors appointed under ss 432 or 442 of the 1985 Act is a more formal and rigorous procedure than an interview under s 235. There is already a large body of authority as to the circumstances in which an order for examination under s 236 may be refused, as being oppressive, because of the likelihood of future *civil* proceedings against a company officer (see for instance *Soden v Burns, R v Secretary of State for Trade and Industry, ex p Soden* [1996] 3 All ER 967 at 976–980, [1996] 1 WLR 1512 at 1521–1525, which refers to many of the most important recent cases in this area). These cases show that in the field of corporate insolvency, as in other fields, the human rights implications of compelled evidence are not a new or alien importation, but are already a familiar issue for judges whose duty it is to safeguard a fair trial.

28. In this case Sir Richard Scott V-C was faced with a wide general submission that the admission in evidence of the directors' statements at the hearing of the disqualification proceedings would mean that they would not receive a fair trial. This wide general submission does not seem to have been backed by any references to particular passages in the statements as being prejudicial to the directors' interests. Sir Richard Scott V-C himself undertook the task of trying to identify any such passages, and he has in consequence been criticised for his observation (in para 41 of the judgment) about the passages to which he drew attention:

> 'In some instances the statements are exculpatory in character. In others, they are statements of the obvious. In relation to all, the directors can, if they wish, qualify them, explain them or contradict them. There is, in the report, nothing that I have found that corresponds remotely to the admissions that the Court of Justice referred to in the *Orkem* case.'

Sir Richard Scott V-C did not by that imply that compelled evidence was always innocuous except so far as it consists of admissions. He was trying to assess the real weight of the directors' unparticularised complaints.

29. In our judgment Sir Richard Scott V-C was plainly right to reject the submission that use in disqualification proceedings of statements obtained under s 235 must necessarily involve a breach of art 6(1). The issue of fair trial is one that must be considered in the round, having regard to all relevant factors. The relevant factors include (but are not limited to): (i) that disqualification proceedings are not criminal proceedings, and are primarily for the protection of the public, but do nevertheless often involve serious allegations and almost always carry a degree of stigma for anyone who is disqualified; (ii) that there are degrees of coercion involved in different investigative procedures available in corporate insolvency, and these differences may be reflected in different degrees of prejudice involved in the admission, in disqualification proceedings, of statements obtained by such procedures; and (iii) that in this field as in most other fields, it is generally best for issues of fairness or unfairness to be decided by the trial judge, either at a pre-trial review or in the course of the trial. Sir Richard Scott V-C referred in detail (in para 44 of his judgment, summarised above) to the decisions as to evidence which the trial judge might have to make. He was right not to attempt to anticipate those decisions.

30. Some other points were taken as to equality of arms but Sir Richard Scott V-C rightly attached little weight to them and they have not been pressed in this court. The directors' application for permission to appeal has raised issues of general importance, and we grant them permission to appeal to this court. It is not appropriate to refer any question of law to the Court of Justice, since the principles of Community law are not in dispute. Their application, especially where it concerns procedural matters, is for the national court.

31. For the reasons set out above we dismiss this appeal.

Permission to appeal granted, but appeal dismissed. Permission to appeal to the House of Lords refused.

Kate O'Hanlon Barrister.

Northern Leisure plc v Schofield and others

QUEEN'S BENCH DIVISION, CROWN OFFICE LIST
JACK BEATSON QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT
30 JUNE, 6 JULY 2000

Licensing – Permitted hours – Special hours certificate – Whether music and dancing and substantial refreshment having to be provided simultaneously throughout permitted hours of special hours certificate – Licensing Act 1964, ss 76, 77.

The respondents were the licensees of a public house. The premises generally opened at 7 pm on Monday to Thursday, but on Friday, Saturday and Sunday the main bar opened at 11 am for television sport. Music and dancing were available from 7 pm each evening, and it was intended that a limited range of bar meals would be available throughout opening hours. The licensees applied for a special hours certificate (SHC), permitting them to sell liquor beyond the normal hours. Under s 77[a] of the Licensing Act 1964, licensing justices could grant such a certificate if they were satisfied, inter alia, that the whole or any part of the premises was bona fide used, or intended to be used, for the purpose of providing for persons resorting to the premises 'music and dancing and substantial refreshment, to which the sale of intoxicating liquor is ancillary'. The justices concluded that the purpose for which the licensees intended persons to resort to the premises was to take advantage of the entertainment and catering facilities, to which the sale of alcohol was ancillary. They therefore granted the application, despite opposition from the owners of a local nightclub. The latter appealed by way of case stated, contending, inter alia, that an SHC could not be granted unless music and dancing and substantial refreshment were provided simultaneously throughout the permitted licensing hours. The licensees submitted that s 76(2)[b] of the 1964 Act clearly showed that the Act envisaged that not all facilities would be provided at the same time and that liquor might be sold when music and dancing had ceased to be provided. Section 76(2) linked the end of permitted hours to the end of music and dancing, but made no such link with the point at which food ceased to be provided.

Held – On the true construction of s 77 of the 1964 Act, music and dancing and substantial refreshment did not have to be provided at the same time throughout the permitted licensing hours of an SHC. Rather, s 77 only required that the licensee, as opposed to customers, used the premises or intended to use them for the purpose of providing such facilities. Aided by the indication given in s 76(2), and accepting the submission that the concern of the statute, particularly in the case of an intended use, was with the overall aggregate rather than the position in individual cases, the position was to be assessed by considering the overall use of the premises by the licensee. That being so, it was not artificial to say that a licensee was providing music and dancing and substantial refreshment at times when they were not in fact available at a particular moment. Nor would such a

a Section 77 is set out at p 663 *b* to *d*, post
b Section 76 is set out at p 664 *b c*, post

conclusion negate the principle that SHCs would not be used to licence late night pubs, that the SHC regime operated in substitution for the general licensing hours and that, when trading under the SHC, the drinking had on the whole to be ancillary to the provision of food and entertainment. In cases such as the instant one, it would be necessary for the licensing justices to conclude that the purpose for which the applicant for an SHC intended persons to resort to the premises was to take advantage of the catering and entertainment facilities, to which the sale of liquor was ancillary. That would be a question of fact and degree for licensing committees to determine in individual cases. In the instant case, the justices had made the requisite finding of fact, and accordingly their decision was correct in law (see p 670 *j* to p 671 *f*, post).

R v Crown Court at Stafford, ex p Shipley [1998] 2 All ER 465 distinguished.

Notes

For special hours certificates, see 26 *Halsbury's Laws* (4th edn reissue) para 245.

For the Licensing Act 1964, ss 76, 77, see 24 *Halsbury's Statutes* (4th edn) (1998 reissue) 423, 425.

Cases referred to in judgment

Carter v Bradbeer [1975] 3 All ER 158, [1975] 1 WLR 1204, HL.

R v Crown Court at Stafford, ex p Shipley [1998] 2 All ER 465, [1998] 1 WLR 1438, CA.

Richards v Bloxham (Binks) (1968) 66 LGR 739, DC.

Young v O'Connell (1985) Times, 25 May.

Case stated

Northern Leisure plc appealed by way of case stated from the decision of the Loughborough Licensing Committee on 8 April 1999 to grant a special hours certificate under s 77 of the Licensing Act 1964 to 'Busters', a public house whose licensees were the first respondents, Eric William Schofield and Robert Baxter. The second respondent, the Lecistershire Constabulary, took no part in the appeal. The questions for the opinion of the High Court are set out at p 665 *d e*, post. The facts are set out in the judgment.

Richard Beckett QC and *James Lewis* (instructed by *Gosschalks*, Kingston-upon-Hull) for the appellant.

Gerald Gouriet (instructed by *Hawley Rodgers*, Loughborough) for the first respondents.

Cur adv vult

6 July 2000. The following judgment was delivered.

1. **JACK BEATSON QC.**

(1) THE BACKGROUND

2. This appeal by way of case stated from the Loughborough Licensing Committee raises a matter of importance in the licensing business on which there is a divergence of opinion by licensing committees, the trade, and legal practitioners. I am told that there is a divergence of practice by licensing committees. It concerns the conditions required by s 77 of the Licensing Act 1964 as amended for the issue of a special hours certificate (hereafter SHC).

3. In this case the Loughborough Licensing Committee granted an SHC to 'Busters', a public house in Loughborough of which the first respondents, Mr Schofield and Mr Baxter, are the licensees. The effect of an SHC is to allow the sale of liquor beyond the normal hours—broadly by extending the terminal hour from 11 p m to 2 a m or 3 a m in London.

4. The appellant, an entertainment company which owns a large number of nightclubs, including one in Loughborough, objected to the grant of the SHC to 'Busters' and now appeals against the grant. The second respondent, the Leicestershire Constabulary, took part in proceedings before the licensing committee but not in this court.

5. At 'Busters', music and dancing are available from 7 p m. 'Busters' generally opens from 7 p m on Mondays to Thursdays but on Fridays and Saturdays the main bar opens at 11 a m 'for TV sport' (case stated para 3(a)). The primary issue before me is whether, as the licensing justices held, an SHC can be given even though, on an SHC day, music and dancing and substantial refreshment are not (as they are not at 'Busters') provided at the same time throughout the permitted licensing hours of the SHC on that SHC day. The appellant submits that it cannot. Although the licensing committee certified two other questions for this court, it was agreed by both parties that these are of less importance.

6. I should, at this point, refer to para 6.25 of the 'Good Licensing Guide', a document produced in 1999 by the Justices' Clerks' Society, which it is said is the source of some of the differences in the practice of licensing committees, although there were also differences of practice on this matter before its publication. I will read para 6.25:

> 'One of the questions still not fully resolved by case law is whether during the operation of a special hours certificate there needs to be refreshment and entertainment available throughout the whole of the period. Some police forces and a number of committees have taken the view that both should be available all the time. We disagree with this interpretation. In the case of *Young v O'Connell* ((1985) Times, 25 May), it was made clear that the relative priorities as between the provision of refreshment and entertainment does not matter provided that in all cases drinking is seen to be secondary to one or other of these requirements. We interpret this case to mean that as long as either refreshment or entertainment is available and that drinking is secondary it is not necessary for both refreshment and entertainment to be available at the same time. By analogy, for example, where a licensee makes provision under a special hours certificate for a dinner dance we do not think it reasonable for there to be food available once dinner has been eaten, nor would one expect there to be entertainment going on whilst the meal was being taken. In determining whether drinking is ancillary the purpose for which people resort to the premises will be relevant. We recommend that Clerks to the Licensing Justices ensure committees are aware of the implications of the Shipley case (*R v Crown Court at Stafford, ex p Shipley* [1998] 2 All ER 465, [1998] 1 WLR 1438) and the case of *Young v O'Connell*.'

7. I will come back to *R v Crown Court at Stafford, ex p Shipley* [1998] 2 All ER 465, [1998] 1 WLR 1438.

8. The appellant submits that this paragraph, which was relied on by Mr Rankin who appeared on behalf of the first respondents before the justices, contains a misleading summary of the relevant authorities. Mr Beckett QC, on behalf of the appellant, stated that some police forces and licensing justices have

chosen to adopt these guidelines and this opens the door to a more lax view of what he referred to as 'late night pubs'. Mr Gouriet, who appeared on behalf of the first respondents in this court, submitted that, provided music and dancing and substantial refreshment are available at some time on an SHC day, and the sale of liquor is ancillary to them, they do not all have to be provided at the same time. He did not, however, seek to support the way the guide put the matter.

(2) THE STATUTORY PROVISIONS

9. I first turn to the statutory provisions governing SHCs. First, s 77 of the Act:

> 'If, on an application made to the licensing justices with respect to licensed premises, the justices are satisfied—(a) that the premises are—(i) casino premises, or (ii) premises for which a music and dancing licence is in force, and (b) that the whole or any part of the premises is structurally adapted, and bona fide used, or intended to be used, for the purpose of providing for persons resorting to the premises—(i) in the case of casino premises, gaming facilities and substantial refreshment, and (ii) in the case of any other premises, music and dancing and substantial refreshment, to which the sale of intoxicating liquor is ancillary, the licensing justices may grant, with or without limitations, a special hours certificate for the premises or, if they are satisfied that part only of the premises is adapted or used or intended to be used as mentioned in paragraph (b) of this section, for that part.'

10. The section thus sets out 'requirements' which the justices must be 'satisfied' are met. Once they are so satisfied they are given a discretion to grant an SHC with or without limitations for the premises or part of them.

11. Next there is s 81 of the Act, which deals with revocation of an SHC. Section 81(2) provides:

> 'At any time while a special hours certificate for any premises or part of premises is in force, the chief officer of police may apply to the licensing justices or, if it was granted under section 78 or 78ZA of this Act, to the magistrates' court, for the revocation of the certificate on the ground that, while the certificate has been in force—(a) the premises have not, or the part has not been used as mentioned in section 77, 77A, 78 or, as the case may be 78ZA of this Act; or (b) a person has been convicted of having at those premises or that part contravened section 59 of this Act; or that on the whole the persons resorting to the premises or part are there, at times when the sale or supply of intoxicating liquor there is lawful by virtue only of the certificate, for the purpose of obtaining intoxicating liquor rather than for an appropriate purpose; and if the licensing justices or magistrates' court are satisfied that the ground of the application is made out they may revoke the certificate.'

12. And then s 81(2)(a) of the Act:

> 'For the purposes of subsection (2) of this section, the following are appropriate purposes—(a) in the case of casino premises, gaming and the obtaining of refreshments other than intoxicating liquor, (b) in the case of any other premises, dancing and the obtaining of such refreshments.'

13. Section 81(2) thus describes three situations in which the police can apply to revoke an SHC. The power of revocation is the only sanction for failure to comply with their conditions. The three situations can be described as: (a) the

premises have not been used to provide customers with music and dancing and food to which the sale of liquor is ancillary, (b) conviction of selling drink outside permitted hours at the premises, and, the tail piece, which is described in *Ex p Shipley* as (c) 'on the whole' persons resorting to the premises are there for the purpose of obtaining drink rather than music, dancing or food.

14. Section 76 of the Act deals with permitted hours where a special hours certificate is in force. Section 76(2) states:

> 'Subject to the following provisions of this section, the permitted hours on weekdays in any premises or part of premises to which this section applies shall extend until two o'clock in the morning following, except that—(a) the permitted hours shall end at midnight on any day on which music and dancing is not or, in the case of casino premises, gambling facilities are not provided after midnight; and (b) on any day that music and dancing end or, in the case of casino premises, gaming ends between midnight and two o'clock in the morning, the permitted hours shall end when the music and dancing end or, as the case may be, when the gaming ends ...'

(3) R v CROWN COURT AT STAFFORD, EX P SHIPLEY

15. I now turn to the case of *R v Crown Court at Stafford, ex p Shipley* [1998] 2 All ER 465, [1998] 1 WLR 1438, which, apart from statute, is the starting point in any consideration of the SHC regime. The decision of the Court of Appeal sets out the scheme of the Act and the history of the SHC scheme, in particular in the judgments of Henry and Simon Brown LJJ. The court held that when an SHC is in operation, the SHC permitted hours operate in substitution for the general licensing hours. Henry LJ stated: 'Thus during the whole of an SHC day, the sale of liquor was lawful by virtue only of that certificate, as that certificate laid down the permitted hours.' (See [1998] 2 All ER 465 at 478, [1998] 1 WLR 1438 at 1452.)

16. The SHC is thus not a 'bolt-on' to the normal licensing regime and, as stated by Simon Brown LJ, 'an SHC should not be granted to an ordinary public house so as to turn it into a "late night pub".' (See [1998] 2 All ER 465 at 482, [1998] 1 WLR 1438 at 1456.)

(4) THE FACTS FOUND BY THE LICENSING COMMITTEE

17, 18. In the present case the licensing committee found the following facts:

> '(a) The premises are located in the town centre area of Loughborough and have the benefit of a Justices' On-Licence.
>
> (b) Since the transfer of the licence in 1992, the first respondents had refurbished and sound-proofed the premises with a view to promoting entertainment for their customers.
>
> (c) General permitted hours applied to the premises, but as a rule, they opened from 7 p m on Monday to Thursday inclusive, with the main bar opening during the daytime on Friday, Saturday and Sunday.
>
> (d) The premises comprised three separate bar areas on three levels, each having a DJ console providing music aimed at different age groups from 7 p m every evening.
>
> (e) The bar to the rear on the ground floor had a small raised dance floor and the furniture in all areas had been arranged to facilitate and encourage dancing.
>
> (f) A number of security staff were employed to supervise the premises.
>
> (g) The premises included a kitchen and catering equipment.

(h) In the past, food had not been generally available, but in future a limited range of bar meals would be available throughout opening hours.

(i) A significant percentage of "wet" sales was attributable to non-alcoholic beverages.

(j) A variation had been granted to the Public Entertainment Licence relating to the premises on 18 February 1999 extending the hours of opening to 1 a m on Monday to Saturday.

(k) There is no evidence regarding incidents of disorder or nuisance in connection with these premises.

(l) The respondents had taken reasonable steps to ensure that disturbance did not emanate from the premises.'

(5) THE QUESTIONS CERTIFIED FOR THIS COURT

19. As indicated, the licensing committee certified three questions for this court:

'(a) Were we entitled to find the premises structurally adapted and bona fide used, or intended to be used, for the purposes of providing persons resorting to the premises, music and dancing and substantial refreshment to which the sale of intoxicating liquor is ancillary?

(b) Were we correct in law in deciding that music and dancing and substantial refreshment did not have to be provided at the same time throughout the permitted licensing hours of the SHC?

(c) Were we correct in law in finding that we were not obliged to place a commencement hour on the certificate granted?'

Question (a)

20. There are two issues. First, the question of provision of facilities. Secondly, the question whether music, dancing and food can be ancillary to the sale of intoxicating liquor where all three facilities are not provided at the same time. The second issue properly falls for consideration together with the second certified question and I therefore set it aside at this stage.

21. With regard to the first issue, at the hearing before the justices the appellant submitted that the provisions for catering were unsuitable and the facilities for dancing were inadequate within the meaning of s 83(2) of the Act. Section 83(2) provides that adequacy is to be judged 'having regard to the number of persons for whose reception in the premises ... provision is made'; here the public entertainment licence is for 1,040 people, but there was only one dance floor (see the summary of the evidence in case stated at para 3(a) of the transcript (at 30)).

22. As far as food is concerned, the appellant questioned the adequacy of the equipment and staffing arrangements. They also argued that since it was estimated that only some 2% of turnover would be from food sales, the sale of liquor was not ancillary to the sale of food. Before the justices, this concern had been shared by the police.

23. I have set out the findings of fact made by the justices. Before them evidence was given of dancing facilities other than the dance floor, the arrangement of the furniture, the catering equipment provided, and the staffing arrangements (see, for example, transcript at 29–30 and 32–34). The facts found by the justices relevant to this question are (b), (d), (e), (g) and (h) above: the refurbishment and sound-proofing of the premises; three separate bar areas

having a DJ console in each; the bar to the rear of the ground floor had a small raised dance floor; the furniture in all areas had been arranged to facilitate and encourage dancing; the premises included a kitchen and catering equipment; and in the future a limited range of bar meals would be available throughout opening hours.

24. The appellant did not press me to find that the justices had fallen into error on this point. They were right not to do so. There was clearly evidence upon which a properly directed bench could find, as this one did, that the premises were structurally suitable and intended to be used for the purpose of providing for customers music, dancing and food, and the available facilities were adequate.

Question (b)

25. As I have observed, this was the principal issue in this appeal. The Loughborough justices took the view that it was not necessary for music and dancing and substantial refreshment (ie 'food') to be available at the same time. They say in para 8:

> '(d) *Shipley* does not appear clear authority to support the contention that music and dancing and substantial refreshment must all be provided simultaneously for the whole of permitted hours, but rather suggests that if neither entertainment nor food were available, the premises must not open for the sale of alcohol on days when a Special Hours Certificate is in force. (e) The relative priority between the provision of entertainment and food was not important, provided the sale of alcohol was ancillary. (f) The proposed menu at Busters amounted to substantial refreshment for the purposes of the licensing legislation. (g) The respondents proposed to have food available for the entire period of opening and were already providing music with dancing facilities throughout the evening. (h) The purpose for which the first respondents intended persons to resort to Busters was to take advantage of the entertainment and catering facilities, to which the sale of alcohol was ancillary.'

26. The appellant submits that the justices fell into error. They submit that their reliance on the decision in *Ex p Shipley* was misplaced. It was suggested that they may have been misled by the summary of *Young v O'Connell* (1985) Times, 25 May in the Good Licensing Guide, which I have set out. The appellant's case before the justices and in this court is that s 77 of the Act requires there to be music and dancing and food available at all times on an SHC day so that, in the present case, what the respondents proposed for Fridays, Saturdays and Sundays did not meet this requirement. The justices could not therefore be 'satisfied', it was submitted, that the requirements of s 77 had been met, and therefore could not meet the precondition to their statutory discretion to grant an SHC. In para 10 of their skeleton argument it is said:

> 'The appellant submits that on a true construction of section 77: 10.1 At all times there must be adequate provision of music and dancing and substantial refreshment; 10.2 The relative participation of customers in music and dancing and food is not important; 10.3 At all times the consumption of liquor must be ancillary to music and dancing and substantial refreshment.'

27. The appellant first relies on the plain and natural meaning of the words as conjunctive and not disjunctive. If there was no provision of music or no provision for dancing or no provision of substantial refreshment the sale of liquor

could not be ancillary to music and dancing and substantial refreshment. That is set out in the skeleton argument at para 11.

28. Secondly, (see paras 5 and 16 of their skeleton arguments) it is said that the practical effect of the decision of the Loughborough committee and of the construction applied in the Good Licensing Guide is to negate the decision in *Ex p Shipley* that SHCs were not to be used to license late night pubs, that the SHC regime operates in substitution for the general licensing hours on the whole of any day when it was being applied, and that when trading under the SHC the drinking must 'on the whole' be ancillary to the provision of food and entertainment.

29. This was said to be because one of the central findings in *Ex p Shipley* was that summarised in the headnote as follows: '... when the SHC was in operation the sale of intoxicating liquor during the permitted hours had to be ancillary to the provision of entertainment and food throughout.' (See [1998] 2 All ER 465.)

30. In this regard, the passage I have quoted from Henry LJ's judgment ([1998] 2 All ER 465 at 478, [1998] 1 WLR 1438 at 1452) is relied on, as is his Lordship's words:

> '... it is clear to me that at all times when the SHC is in operation, the licensee cannot rely on a combination of his on-licence and s 60 to make any non-ancillary sale of liquor compliant with the law.' (See [1998] 2 All ER 465 at 479, [1998] 1 WLR 1438 at 1452.)

(See also Henry LJ ([1998] 2 All ER 465 at 473, [1998] 1 WLR 1438 at 1446) quoting Viscount Dilhorne in *Carter v Bradbeer* [1975] 3 All ER 158 at 166–167, [1975] 1 WLR 1204 at 1212.)

31. Reliance is also placed by the appellant on Simon Brown LJ's words ([1998] 2 All ER 465 at 482, [1998] 1 WLR 1438 at 1456) immediately before his conclusion, that an SHC should not be granted to an ordinary public house so as to turn it into a 'late night pub'. He stated: 'During whatever hours of trading are permitted by the SHC the drinking must "on the whole" be ancillary to the provision of food and/or entertainment ...'

32. The use of 'and/or' may be one reason for the approach taken in the Good Licensing Guide and for the statement in para 8(d) of the case stated that *Ex p Shipley* 'suggests that if neither entertainment nor food were available, the premises must not open for the sale of alcohol on days when a special hours certificate is in force'.

33. But I accept Mr Beckett's submission that this passage, summing up his Lordship's conclusions on revocation under s 81(2) of the Act, does not justify the conclusion that the provision of food or music and dancing can be alternatives. The word 'or' is only used by his Lordship in dealing with the third situation in which the police can apply to revoke an SHC: that 'on the whole' persons resorting to the premises are there for the purpose of obtaining drink rather than music, dancing or food. The power of revocation, as I have noted, is the only sanction for failure to comply with their conditions. His Lordship does not use 'or' when referring to the first situation, the s 77 situation, (a), that the premises have not been used to provide customers with music and dancing and food to which the sale of liquor is ancillary. In context it is clear that this summary refers to all the s 81(2) situations; hence the use of 'and/or', the former relating to the first two situations, the latter to the third.

34. I have mentioned the summary of *Young v O'Connell* in the Good Licensing Guide. The guide cited the decision for the proposition that: 'The relative

priorities as between the provision of refreshment and entertainment does not matter provided that in all cases drinking is seen to be secondary to one or other of these requirements.' a

35. Mr Beckett rightly submitted that drinking must be secondary to both. *Young v O'Connell* is only authority for the proposition that the relative priorities between the participation in entertainment and food is not relevant (unless one was de minimis), and does not allow the reduction of music or dancing or food b to non-existence. But whereas he would test whether the provision of one of these facilities has been reduced to non-existence by looking at the position at any given point of time during the premises' opening hours, as will be seen, it is argued on behalf of the first respondents that this is not the correct way to do it. Mr Gouriet submitted that in determining what facilities are provided one looks at the operation as a whole and not as a snapshot at a single point in time. c

36. Mr Beckett submitted that (subject to de minimis exceptions to deal with staff breaks and events described as 'composite' or 'concept' events, such as dinner-dances) if at any time of an SHC day there is no provision of music or no provision for dancing or no provision of food, the sale of liquor could not be ancillary to music and dancing and substantial refreshment. d

37. Against this, Mr Gouriet observed that nowhere in the judgments in *Ex p Shipley* is it suggested that 'ancillary to' means 'contemporaneously with'. Moreover, the case stated for the opinion of this court arises out of very different facts. *Ex p Shipley* involved a contention by a licensee that until 11 p m his premises could operate as a normal pub selling liquor ancillary to nothing; as a 'bolt-on' to normal hours. Here, Mr Gouriet submitted, the proposal was not to e obtain the SHC as a 'bolt-on'. The justices concluded that the purpose for which the first respondents intended persons to resort to the premises was to take advantage of the catering and entertainment facilities to which the sale of liquor was ancillary, that music and dancing and food would be provided on each of the days on which the SHC operated. With the exception of Friday and Saturday f when the premises opened at lunchtime but music and dancing were only to be available from 7 p m, all three facilities would be available throughout the period of opening.

38. The appellant's third submission is based on s 83(2) of the Act. This inter alia provides:

g

> 'References in those sections to providing music and dancing and refreshment ... shall be construed as references to providing them on every weekday or on particular weekdays in every week ... and references to those sections to providing dancing shall be construed as references to providing facilities for dancing that are adequate having regard to the number of h persons for whose reception in the premises or part of the premises in question provision is made.'

39. The use of the word 'them', the references to providing them on every weekday and the specific references to the provision of dancing were said by Mr Beckett to make it clear that facilities for dancing must be available at all j times. I do not, however, consider that this provision is of significant assistance to the appellant. It refers to providing music and dancing and food 'on every weekday'. It does not follow from this that they are to be provided throughout the permitted times on every weekday.

40. I turn to the first respondents' submissions on question (b). They submit that the statute requires only that the premises are used or intended to be used

for the purposes of providing music and dancing and substantial refreshment for persons resorting to the premises and that there is no express requirement that all three facilities have to be provided at the same time. The present case was concerned with an intended use.

41. Mr Gouriet's submissions can be summarised as follows.

(1) The premises must be structurally adapted for music and dancing and substantial refreshment. The justices found that they were and, in considering the first question certified, I have concluded that they did not fall into error in so doing. The premises must also be licensed for the sale of liquor and have a music and dancing licence. These requirements in s 77 of the Act relate to the licensing and the structure of the premises.

(2) The premises must bona fide be used or intended to be used for the purpose of providing music and dancing and substantial refreshment to which the sale of liquor is ancillary. The requirement relates to the use of the premises by the licensee, not by the customers. So, an SHC should not be refused on the grounds that all those resorting to the premises will not make use of both the music and the dancing or the availability of food, or that some will make use of neither and go there to drink: see *Richards v Bloxham (Binks)* (1968) 66 LGR 739 (although it should be noted that if 'on the whole' people only go there to drink that will be a ground for revocation of the SHC under s 81(2) of the Act).

(3) So long as the licensee intends to use the premises for those purposes there is no requirement that all three be available at the same time. Paragraph 15 of Mr Gouriet's skeleton argument states: '... it is accepted as axiomatic that the draftsman wrote "music and dancing and substantial refreshment". But those words do not require the provision of all three facilities at the same time.' Mr Beckett's response to this is: how can it be said that the premises are being used by the licensee for music and dancing and substantial refreshment when in fact they are not all available? On the present facts, when a customer visits 'Busters' in the afternoon, how can it be said that the licensee is providing music and dancing or using the premises for music and dancing? This is prime facie a powerful point to which I will return.

(4) There is no requirement in the Act that each or any facility be provided for any specific length of time, and there is little in the Act relating to the length of time for which music and dancing and substantial refreshment must be provided.

(5) Section 76(2) of the Act clearly shows that the Act envisaged that not all facilities will be provided at the same time and that liquor may be sold when music and dancing has ceased to be provided. Mr Gouriet submits that this is because: (a) s 76(2)(a) provides that 'the permitted hours shall end at midnight on any day on which music and dancing is not ... provided after midnight'. It is thus implicit, he submits, that if music and dancing end before midnight, permitted hours none the less extend to midnight although there is no provision in fact of music and dancing then. He submits that a similar implication should be made where the provision of food ceases before midnight: the permitted hours extend to midnight whether or not music and dancing is still being provided. (b) Section 76(2)(b) provides that 'on any day that music and dancing end ... between midnight and two o'clock in the morning, the permitted hours shall end when the music and dancing end'. Mr Gouriet submits that it is implicit from this provision that if the provision of food ceases before two o'clock, the permitted hours extend to two o'clock provided music and dancing are still being provided.

This, it is said, shows that the facilities may be provided at different times under an SHC and that the sale of intoxicating liquor may be ancillary to the provision

of music and dancing and substantial refreshment even at times when one or more of the facilities is not being provided.

Mr Beckett submitted that s 76 of the Act only relates to the hours when an SHC is in force, and has nothing to say as to when an SHC shall be granted. It is, however, difficult not to regard it as of assistance. If justices have no power to grant an SHC unless all the facilities are provided at the same time, ie at times the premises are open during the permitted hours, this provision would not have been necessary.

(6) Mr Gouriet's sixth submission is that the use of the word 'sale' rather than 'sales' of liquor in s 77 of the Act provides further support for the view that the sale of liquor may be ancillary to the provision of music and dancing and substantial refreshment even at times when one or more of all the facilities is not being provided. The use of the word 'sale' was said to show that the concern of the statute is with the overall aggregate rather than the position in individual cases, so that one asks whether the sale of liquor was ancillary to the licensee's operation. Justices are entitled to look at the entirety of the provision and the generality of the sale in determining this question. It is one of fact and degree. In determining what facilities are provided, it was submitted, one looks at the operation as a whole and not at a snapshot.

(7) Finally, the first respondents relied on the analogy of the dinner dance, which it was said the original legislation was aimed at providing for, and which the appellant accepted as legitimately falling within the SHC regime although all three facilities are not provided at the same time. Dinner dances start with drinking but neither food nor dancing, then move into a second stage of eating and drinking without dancing, and finally into a third stage of dancing and drinking without eating. If they qualify, it was said, so do other arrangements in which the facilities are not all provided throughout the permitted hours. Mr Beckett's submission that dinner dances are distinguishable from the facts here—on the ground that a dinner dance is a composite event or concept at which each participant is offered music and dancing and food—has force. They are indeed different from the provision at different times of the day of different facilities, because, on the scenario canvassed in argument, of food at lunchtime and music and dancing in the evening, no customer could be offered all three facilities on a single visit, unless he stayed for a very long time. But the fact that, until the 1988 amendments to the SHC regime, SHC hours were 12.30 to 3.00 p m and 6.30 to 2.00 a m, and that before 1961 the SHC regime did not extend to all licensed premises but only applied to clubs and restaurants (see *Ex p Shipley* [1998] 2 All ER 465 at 471, [1998] 1 WLR 1438 at 1444 per Henry LJ) may be of some assistance at this stage. Taking the case of restaurants, which might well provide dinner dances in the evening, it seems unlikely that music and dancing were generally available during the lunchtime period of a day on which the restaurant was to have a dinner dance in the evening. This suggests that it is not necessary for all three facilities to be provided at the same time.

Conclusions on (b)

42. The first respondents' basic submission is that s 77 of the Act requires only that the premises are used or intended to be used for the purpose of providing music and dancing and substantial refreshment, and that this requirement relates to the use or intended use of the premises by the licensee, not by the customers. This submission appears to involve the artificiality of the court's concluding that provision is made for a facility which is not in fact provided during part of the

permitted hours, and I have noted that Mr Beckett's response to it is at first sight a compelling one. But, aided by the indication given in s 76(2) of the Act and accepting the submission that the concern of the statute, particularly in the case of an intended use, is with the overall aggregate rather than the position in individual cases, I have, on balance, concluded that the first respondents' basic submission is correct. Although it may seem artificial to say that a licensee is providing music and dancing and substantial refreshment at times when they are not in fact available at a particular moment, if one assesses the position by considering the overall use of the premises by the licensee during the permitted hours it is not in fact artificial.

43. There remains the submission that the practical effect of this construction of s 77 of the Act would be to negate the decision in *Ex p Shipley*, which, of course, I am bound by. I have referred to the factual differences between this case and *Ex p Shipley*. I do not consider that the practical effect of this construction of s 77 would be to negate the decision in that case that SHCs were not to be used to license late night pubs, that the SHC regime operates in substitution for the general licensing hours and that when trading under the SHC the drinking must 'on the whole' be ancillary to the provision of food and entertainment. This is because in cases such as this, it will be necessary for the justices to conclude, as the justices did in this case, that the purpose for which the applicant for an SHC intends persons to resort to the premises is to take advantage of the catering and entertainment facilities to which the sale of liquor is ancillary. This will be a question of fact and degree for licensing committees to determine in individual cases. Clearly, in cases where there are large periods when all three are not available, there will be difficult cases at the border line.

44. In this case the justices made this finding and I conclude that in circumstances in which the justices find that the purpose for which an applicant for an SHC intends persons to resort to the premises is to take advantage of the catering and entertainment facilities to which the sale of liquor is ancillary, music and dancing and substantial refreshment do not have to be provided at the same time throughout the permitted licensing hours of the SHC. The Loughborough committee's decision was accordingly correct in law.

45. I should not leave this part of the case without referring to the summary of *Young v O'Connell* in the Good Licensing Guide, to which reference has been made. This states that drinking must 'be seen to be secondary to one or other of these requirements', rather than to both of them, and in this sense it is misleading. Although para 8(d) of the case stated can possibly be read as stating that if neither entertainment nor food were available on the same day, the SHC cannot be given, the formulation used in para 8(d) is not tied in to the statutory requirement. If this is due to what is said in the Good Licensing Guide, that is unfortunate.

Question (c)

46. Were the justices correct in law in finding that they were not obliged to place a commencement hour on the certificate granted? I have concluded that the justices were correct in law in deciding that music and dancing and substantial refreshment did not have to be provided at the same time throughout the permitted licensing hours of the SHC. That meant that the statutory preconditions to the exercise of their discretion regarding the grant of an SHC were satisfied. Section 78A(1) of the Act provides that the magistrates 'may' grant a certificate under s 77 of the Act limited to particular times of the day, particular days of the

week or to particular periods of the year. Section 78A(4) of the Act provides that, where there are such limits, the magistrates 'may', on the application of the licensee, vary any limitation. *a*

47. In the present case the justices considered that there was no requirement to place a commencement hour on an SHC, and considered that a certificate should be granted for the maximum permitted period unless they can be satisfied that there are good reasons for imposing a limitation. They did not consider there was such a reason because the sale of alcohol is conditional on compliance with the terms of the certificate. They also took account of the fact that the general trend in licensing legislation has been to deregulation rather than increased restriction. *b*

48. The appellant submits that where, as in this case, it is clear that no music and dancing are to be provided before 7 p m, a commencement hour of 7 p m should be set. It is not, however, in my view, appropriate to interpret the power in s 78A as obliging the justices to place a commencement hour on the certificate. For one thing, it would preclude them from relying on a known licensee's expression of intent, or enabling flexibility without the need for applications for variations under s 78A(4). Moreover, to say that in a case such as this a commencement hour must be imposed to ensure that music and dancing and food are always provided at the same time is, in effect, to preclude the exercise of discretion in such cases and to reopen, at this stage of the inquiry, the question of the statutory preconditions considered under question (b). *c* *d*

49. I therefore answer all three questions certified 'yes'.

Appeal dismissed.

Dilys Tausz Barrister.

Phillips and another v Brewin Dolphin Bell Lawrie Ltd and another

[2001] UKHL/2

HOUSE OF LORDS

LORD STEYN, LORD HUTTON, LORD HOBHOUSE OF WOODBOROUGH, LORD MILLETT AND LORD SCOTT OF FOSCOTE

30, 31 OCTOBER 2000, 18 JANUARY 2001

Insolvency – Transaction at an undervalue – Linked transactions – Company's assets including computer equipment held on lease – Purchaser wishing to buy company's business – Company transferring business to subsidiary and agreeing to transfer its shares in subsidiary to purchaser – Purchaser's parent company covenanting to pay rent to company for use of computer equipment – Whether parent company's covenant to be taken into account in determining whether shares sold at an undervalue – Whether covenant having any value – Insolvency Act 1986, s 238(4).

AJB was a company which carried on a stockbroking business. Its assets included computer equipment which was held on lease. Under the terms of the leases, AJB was barred from sub-letting the equipment, and the lessors were entitled to terminate the leases if, inter alia, AJB failed to pay the rents due or breached any of their terms. In 1989 another company, B Ltd, wished to acquire the business of AJB, and a price of £1.25m was agreed. For commercial and tax reasons, the transfer was effected in a number of stages. As a preliminary step, AJB sold its stockbroking business and business assets to a wholly-owned subsidiary for a consideration of £1. Shortly afterwards, on 10 November 1989, AJB entered into agreements with B Ltd. On the same day, it also entered into agreements with B Ltd's parent company, PCG. By one of the agreements with B Ltd, AJB transferred to B Ltd its shares in the subsidiary. In return, B Ltd assumed AJB's obligations to its employees, while AJB also received from PCG, under one of the other agreements, a covenant to pay it £312,500 a year for four years, with the first payment due in November 1990. That agreement was expressed to be a computer equipment leasing agreement, and the payments were expressed to be rent payable for the right to use the equipment. B Ltd and PCG were aware that the equipment was itself held by AJB under headleases, and B Ltd had already decided that it would not use the equipment in operating the business. In January 1990 AJB defaulted in the payment of rents due under the headleases. As a result, those leases were terminated and the lessors recovered the equipment. On 23 February 1990 PCG treated the sublease has having been brought to an end, and consequently did not make any of the agreed payments. However, PCG had already lent AJB a sum of £312,500, with the intention that the loan would be repaid by set-off against the first rental payment. In April 1990 AJB was wound up, and its liquidator subsequently brought proceedings against B Ltd and PCG, contending that the share transfer had been a transaction at an undervalue within the meaning of s 238[a] of the Insolvency Act 1986. Under s 238(4)(b), a company entered into a transaction with a person at an undervalue if it entered into a 'transaction' with that person for a 'consideration' the value of which was significantly less than the value, in

a Section 238, so far as material, is set out at [5], post

money or money's worth, of the consideration provided by the company. At the hearing, B Ltd and PCG contended that the latter's covenant in the sublease was to be treated as part of the consideration for the purchase of the shares. The judge rejected that contention, holding instead that the only consideration given for the shares was a sum of £325,000 paid by B Ltd in redundancy payments to AJB's employees. Since he valued the subsidiary's shares at £1,050,000, the judge concluded that the share sale had been at an undervalue and ordered B Ltd to pay the amount of the undervalue. His decision was affirmed by the Court of Appeal which held that the share sale agreement alone had been the relevant 'transaction' for the purposes of s 238. On B Ltd's and PCG's appeal to the House of Lords, their Lordships considered whether the Court of Appeal's focus on the 'transaction' had been correct and, if not, whether PCG's covenant under the sublease had any value. As regards the latter question, the appellants contended that the covenant was worth something because the benefit of the sublease could have been assigned by AJB to the head lessors. In so contending, they submitted that no account should be taken of events subsequent to 10 November 1989.

Held – (1) Section 238(4)(b) of the 1986 Act did not stipulate by what person or persons the consideration was to be provided, and simply directed attention to the consideration for which the company had entered into the transaction. The identification of that 'consideration' was a question of fact, though it might also involve an issue of law, eg as to the construction of some document. Where, however, a company agreed to sell an asset to A on terms that B agreed to enter into some collateral agreement with the company, the consideration for the asset would be the combination of the consideration, if any, expressed in the agreement with A and the value of the agreement with B. Thus in the instant case the issue was the identity of the s 238(4) 'consideration', not the identity of the s 238(4) 'transaction'. It was plain that the consideration for the subsidiary's shares was, apart from the obligations assumed by B Ltd under the share sale agreement itself, the entry by PCG into the sublease agreement. Accordingly, the agreement for the sale of the shares was entered into for a consideration which included the benefit of the sublease agreement. It therefore followed that it was necessary to consider the issue of value (see [1]–[4] and [20]–[21], post).

(2) For the purposes of s 238(4) of the 1986 Act, and the valuation of the consideration for which a company had entered into a transaction, reality should be given precedence over speculation. In the instant case, the sublease had in itself constituted a breach by AJB of a term of the headleases. Those leases had therefore become terminable at any time by the head lessors who could, at any time, have repossessed the equipment comprised in the sublease. The repossession of the equipment would, and did, bring an end to the sublease and PCG's payment obligations. Moreover, there was no evidence that the head lessors would have had any interest in taking an assignment from AJB of PCG's covenant in the sublease. If a covenant with such a precarious character was to have a value attributed to it for s 238 purposes, the value had to be placed on a more firm footing than that of speculative suggestion. The critical uncertainty in valuing the covenant as at 10 November 1989 was whether the sublease would have survived for the four years necessary to enable all the payments to fall due, or would have survived long enough to enable some of them to fall due, or would have come to an end before any had fallen due. Where the events, or some of them, on which the uncertainties depended had actually happened, it was unsatisfactory and unnecessary for the court to wear blinkers and pretend that it

did not know what had happened. By 23 February 1990 at the latest, PCG's covenant, precarious at the outset, had become worthless. It followed that the value of the consideration for which AJB had entered into the share sale agreement was confined to the value of the consideration under that agreement. Accordingly, the appeal would be dismissed, save that credit would be given for the loan of £312,500 (see [1]–[4], [23]–[28], [32] and [34], post).

Decision of the Court of Appeal [1999] 2 All ER 844 affirmed on different grounds.

Notes

For transactions at an undervalue, see 7(3) *Halsbury's Laws* (4th edn) (1996 reissue) paras 2603–2604.

For the Insolvency Act 1986, s 238, see 4 *Halsbury's Statutes* (4th edn) (1998 reissue) 907.

Case referred to in opinions

MC Bacon Ltd, Re [1990] BCLC 324.

Appeal

Brewin Dolphin Bell Lawrie Ltd (formerly Brewin Dolphin & Co Ltd) (Brewin Dolphin) and Private Capital Group Ltd (PCG), the defendants to proceedings brought by the first claimant, Ian Peter Phillips, as liquidator of the second claimant, AJ Bekhor & Co (AJB), appealed with permission of the Appeal Committee of the House of Lords given on 26 October 1999 from the decision of the Court of Appeal (Lord Woolf MR, Morritt and Laws LJJ) on 17 March 1999 ([1999] 2 All ER 844, [1999] 1 WLR 2052) dismissing an appeal from the decision of Evans-Lombe J on 28 January 1998 ([1998] 1 BCLC 700) whereby he held that the sale to Brewin Dolphin by AJB of its shares in a wholly-owned subsidiary, Bekhor Securities Ltd, was a transaction at an undervalue for the purposes of s 238 of the Insolvency Act 1986. The facts are set out in the opinion of Lord Scott of Foscote.

Gregory Mitchell QC, Ewan McQuater and *Christopher Hare* (instructed by *Goodman Derrick*) for Brewin Dolphin and PCG.

Michael Briggs QC and *Richard Slade* (instructed by *CMS Cameron McKenna*) for the liquidator.

Their Lordships took time for consideration.

18 January 2001. The following opinions were delivered.

LORD STEYN. My Lords,

[1] For the reasons given by Lord Scott of Foscote in his opinion I would also make the order which he proposes.

LORD HUTTON. My Lords,

[2] I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Scott of Foscote and for the reasons which he gives I would dismiss the appeal and make the order which he proposes.

LORD HOBHOUSE OF WOODBOROUGH. My Lords,

[3] I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Scott of Foscote. I agree with the order which he is to propose and with the reasons which he will give.

LORD MILLETT. My Lords,

[4] I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Scott of Foscote. I agree with it, and with the order he proposes.

LORD SCOTT OF FOSCOTE. My Lords,

[5] Section 238 of the Insolvency Act 1986 provides a remedy where a company goes into liquidation within two years after entering into a transaction at an undervalue. Where the section applies the liquidator may apply to the court for an order (sub-s (2)) and the court—

> 'shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.' (Subsection (3).)

Subsection (4)(b) elucidates the meaning of a transaction at an undervalue:

> '... a company enters into a transaction with a person at an undervalue if ... the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.'

The company in the present case is AJ Bekhor & Co (AJB). On 10 November 1989 AJB entered into agreements with Brewin Dolphin & Co Ltd (Brewin Dolphin) and into agreements with Private Capital Group Ltd (PCG). PCG was the parent company of Brewin Dolphin. These agreements were linked. I will describe later the nature of the link and how it arose. The purpose of the agreements was the sale of AJB's stockbroking business to Brewin Dolphin. On 17 October 1989, in order to facilitate and set the stage for the sale, AJB sold its stockbroking business and business assets to Bekhor Securities Ltd (BSL), a wholly-owned subsidiary, for a consideration of £1. The transfer of the business to Brewin Dolphin was to be brought about by a transfer of the BSL shares. Accordingly, under one of the 10 November 1989 agreements with Brewin Dolphin, AJB transferred to Brewin Dolphin its shares in BSL. Brewin Dolphin thus acquired AJB's business. AJB received in return (i) from Brewin Dolphin, the assumption by Brewin Dolphin of AJB's obligations to its employees, including, in particular, the obligation to make redundancy payments; and (ii) from PCG, under one of the 10 November 1989 agreements between AJB and PCG, a covenant by PCG to pay AJB £312,500 per annum for four years, the first payment to be made on 10 November 1990. This agreement was expressed to be a computer equipment leasing agreement and the payments were expressed to be rent payable for the right to use the computer equipment. The total 'rent' to be paid over the four years was £1·25m. It was by no means a coincidence that £1·25m was the sum that it had been agreed would be paid for the stockbroking business. The computer equipment in question was not owned by AJB but had been leased from two lessors, Wirral Equipment Ltd and Asterrose Ltd. Each of the leases required the consent of the lessor to any subletting by AJB. Consent to the subletting of the equipment by

AJB to PCG had neither been sought nor given. On account of default by AJB in paying the rent due under these headleases, the headleases were terminated in early 1990 and the computer equipment was recovered by the head lessors. This took place before the date, 10 November 1990, on which the first payment of £312,500 was due to be paid to AJB under the 10 November 1989 sublease to PCG. So PCG treated the sublease as having been brought to an end by the termination of the head leases, and consequently made none of the £312,500 payments.

[6] In the negotiations between AJB and Brewin Dolphin that had led to the 10 November 1989 agreements, the value of AJB's stockbroking business, and the sum to be paid for it, had first been agreed at £2·5m but later negotiated down to the £1·25m. There were two reasons why, under the form the transaction finally took, the £1·25m was to be paid to AJB not by Brewin Dolphin, the purchaser of the business, but by PCG as rent for the computer equipment spread over four years. One reason was that PCG hoped to be able to deduct the 'rent' from its taxable profits. The other reason was that the payment of £1·25m for the goodwill of the stockbroking business would have prompted requirements by the regulatory authority for additional capital funding for that business.

[7] AJB was, at the time of these agreements, in deep financial trouble. A winding up order was made against AJB on 25 April 1990. The petitioners were Wirral and Asterrose. On 4 May 1990 an administrative receiver was appointed by AJB's debenture holder. There is no dispute but that AJB is, and was when the winding up order was made, hopelessly insolvent.

[8] On 24 June 1994 Mr Phillips, the liquidator and administrative receiver of AJB, and AJB in liquidation commenced proceedings against Brewin Dolphin and PCG. It was contended that the transaction under which AJB had transferred its shares in BSL to Brewin Dolphin, thereby, in effect, transferring its stockbroking business to Brewin Dolphin, was a sale at an undervalue. An order against Brewin Dolphin under s 238 was sought. As against PCG, payment of the four annual sums of £312,500 was claimed. The payment of these was said to be the means by which 'part of the value of the share capital of Bekhor Securities Limited was due to be paid to [AJB]' (para 10 of the amended statement of claim).

The judgment of Evans-Lombe J

[9] The trial took place before Evans-Lombe J ([1998] 1 BCLC 700). An important issue at the trial was the extent to which the 10 November 1989 agreement under which the BSL shares were transferred to Brewin Dolphin and the 10 November 1989 agreement under which PCG was to make the four annual £312,500 payments should be treated as together providing the consideration for the transfer to Brewin Dolphin of the BSL shares. The judge held that the two agreements were linked 'in the sense that it was never contemplated that one would not be entered into without the other'. (There is an obviously unintentional double negative in this sentence). This finding of fact by the judge was not challenged in the Court of Appeal or before your Lordships. Brewin Dolphin and PCG were, said the judge, contending on the one hand that the 10 November 1989 sublease of the computer equipment was to be treated as a separate transaction, capable of being treated as at an end on the recovery of the equipment by the head lessors, but contending on the other hand that PCG's covenant in the sublease should be treated as part of the consideration for Brewin Dolphin's purchase of the BSL shares.

The judge said (at 723–724):

> 'It seems to me that it is not open to the defendants to put forward these two contentions simultaneously. If the payments made under the lease agreement were, in truth, part of the consideration for the purchase of the BSL shares under the share purchase agreement, then the lease agreement is not to be treated as a contract for the hire of goods within s 7 of the 1982 Act. Failure to ensure that PCG would be in position to enjoy possession of the leased equipment was not a breach going to the root of the share acquisition agreement nor did it constitute a repudiation of that agreement nor has the consideration for that agreement wholly failed, nor does the doctrine of eviction by title paramount have the effect of terminating that agreement.'

[10] PCG and Brewin Dolphin were, he said, trying to 'blow hot and cold'. He held that it was not open to Brewin Dolphin and PCG to represent the four £312,500 payments as being part of the consideration for the shares, and, thus, of the stockbroking business. PCG's intention had been to set-off the four £312,500 payments against profit for the purposes of corporation tax. This could not be done if the payments were in truth part of the purchase price of the BSL shares. The judge concluded, therefore, that the covenant to make the payments under the computer equipment sublease had to be left out of account in considering whether, in selling the BSL shares to Brewin Dolphin, AJB had entered into a transaction at an undervalue. Leaving out of account the covenant to make the four annual payments of £312,500 the judge then set about the task of considering, on the one hand, what the value was of the shares, ie in effect what the value was of AJB's stockbroking business, and, on the other hand, what the value was of the consideration that AJB had received.

[11] As to the value of the consideration received by AJB, the judge took account of the obligation cast on Brewin Dolphin under the share-sale agreement to meet redundancy costs. These costs, he noted, were the reason why, in the negotiations, an initial valuation of the business of £2·5m was reduced by £500,000 in early September 1989. The redundancy obligations were in the event discharged by Brewin Dolphin at a net cost, after the gross cost had been taken into account for corporation tax purposes, of £325,000. The judge's calculation of this figure has not been challenged nor has his conclusion that the £325,000 should be treated as consideration given by Brewin Dolphin for the BSL shares. The £325,000 was, he held, the only consideration given for the shares that could be taken into account. I have already explained why he declined to allow the value of PCG's covenant to pay the four £312,500 payments to be taken into account, notwithstanding that the total, £1·25m, was the sum it had been agreed AJB should receive for the business.

[12] On 9 November 1989 PCG had lent AJB £312,500 as a loan for a year intended to be repaid by set-off against the £312,500 payment that would become due on 10 November 1990. Consistently with his view about the 'rent' to be paid by PCG under the sublease, the judge declined to allow that £312,500 to be treated as consideration for the transfer of the shares.

[13] As to the value of the shares, the judge noted that Brewin Dolphin/PCG had treated £1·25m payable over a period of four years as the value of the stockbroking business. He discounted the £1·25m to £875,000 in order to arrive at the value as at 10 November 1989. He took into account certain other business assets and put a total value of £1,050,000 on the value of the BSL shares as at 10 November 1989.

[14] It had been argued for Brewin Dolphin that for s 238 purposes the value of the stockbroking business, and thus of the shares, was no more than nominal. Various pieces of evidence were referred to and various arguments were advanced in support of this contention but, at the end of the day, the judge declined 'to depart from the prima facie value which results from what Brewin Dolphin were prepared to spend in acquiring the BSL shares'. He deducted the £325,000 from the £1·05m and ordered Brewin Dolphin to pay £725,000 with interest. He dismissed the claim against PCG.

The Court of Appeal

[15] Both Brewin Dolphin and PCG appealed. It is not clear to me why PCG did so. AJB cross-appealed, reviving the claim that PCG should be held liable to AJB in respect of the sums covenanted to be paid under the sublease notwithstanding that all the subleased equipment had been recovered by the head lessors. The Court of Appeal ([1999] 2 All ER 844, [1999] 1 WLR 2052) dismissed both the appeal and the cross-appeal. Their grounds, however, were rather different from those of the judge.

[16] The judge had held that the 10 November 1989 share sale agreement and the 10 November 1989 computer equipment sublease were linked in that one would not have been entered into without the other and the four £312,500 payments under the sublease were the means by which the agreed consideration of £1·25m for the shares was to be paid to AJB. But he held that Brewin Dolphin and PCG were barred from relying on the £312,500 payments as part of the consideration for the shares. Morritt LJ, with whose judgment Laws LJ and Lord Woolf MR agreed, took a stricter approach to the identification for s 238 purposes of the 'transaction'. Morritt LJ said that unless the sublease agreement could be said to be a sham, or unless there had been an artificial division of the real transaction entered into by the parties, the form of the agreement into which the parties had entered would be determinative in identifying the transaction on which s 238 would bite. He identified the two issues before the court as being (1) the value of the shares in BSL to be taken into account for s 238 purposes and (2) the value of the consideration for those shares provided to AJB. And, he said:

> 'The first two issues to which I referred earlier, particularly the second, depend on ascertaining, for the purposes of s 238, what was the transaction alleged to have been entered into by the company at an undervalue. The allegation of the liquidator is that the share sale agreement was the transaction so that only the consideration passing to and from the company thereunder is to be taken into account. This was disputed by Brewin Dolphin on the basis that the court must have regard to the whole transaction not just that part of it the liquidator seeks to challenge. This is a point of some importance on the true construction and application of s 238. It is true that the word "transaction" is very widely defined. It is also true, as submitted by counsel for Brewin Dolphin, that, given the purposes of ss 238, 339 and 423 to which it applies, the court should not strain to narrow the definition by judicial decision. However, the word "transaction" is to be construed and applied as part of s 238 as a whole ... First, the transaction must be identified by reference to the person (or persons, for the singular must include the plural) with whom the company entered into it. Only the elements of the transaction between the company and that person may be taken into account. Thus, without more, a contract between the company, A, and B

> cannot be part of a transaction entered into by the company, A, with C. I introduce the caveat "without more" to guard against cases where the transaction is artificially divided. The second limit appears to me to flow from the comparison the statute requires the court to make. In each case it is necessary to ascertain the consideration to be received by the company. In the case of s 238(4)(a), the transaction is either a gift or "on terms that provide for the company to receive no consideration". In other cases, as provided for in sub-s (4)(b), the task is to ascertain the value of the consideration provided by the other person "for" the consideration provided by the company. Whether or not the word "consideration" in those contexts is confined to its legal meaning, it clearly connotes the quid pro quo for that which it is alleged the company disposed of at an undervalue.' (See [1999] 2 All ER 844 at 852–853, [1999] 1 WLR 2052 at 2060.)

Then, addressing himself to the facts of this case, Morritt LJ concluded that 'the transaction' was the share sale agreement alone. He explained his conclusion in the following passage:

> 'First, the parties acting at arms length and for readily understandable commercial reasons chose so to structure the deal between them so that, on the face of the documents, the share sale agreement and the lease agreement effected two separate, though linked, transactions. There is no indication that this different treatment was a sham or otherwise colourable. If parties in such circumstances choose so to structure their commercial dealings in my view the court should give full weight to their intentions. Second, for the reasons I have already given, the share sale agreement and the lease agreement cannot be the same transaction for the purposes of the section because, though the company was party to both of them, only Brewin Dolphin was party to the first and only PCG party to the second. Third, the parties to the lease agreement ... unambiguously attributed the four annual payments of £312,500 to rent due thereunder for possession and use of the computer equipment to which it related. The promise to make those payments cannot be recharacterised as consideration from PCG or Brewin Dolphin "for" the shares being sold by the company.' (See [1999] 2 All ER 844 at 853, [1999] 1 WLR 2052 at 2061.)

[17] For those reasons, different from those of the judge, Morritt LJ declined to allow the value of PCG's covenant to pay the £312,500 to be treated as part of the consideration for the shares.

[18] On the values to be attributed to the shares on the one hand and to the consideration given for the shares on the other, Morritt LJ agreed with the judge. So the appeal and cross-appeal were dismissed.

[19] This appeal by Brewin Dolphin and PCG is brought with the leave of your Lordships' House. There is no cross-appeal by AJB. So PCG stands excused from any liability to AJB under the 10 November 1989 sublease. The four payments of £312,500 each are not going to be made.

The first issue

[20] The first issue for your Lordships to decide is whether Evans-Lombe J and the Court of Appeal were right in declining to allow PCG's covenant in the sublease to be taken into account in assessing the value of the consideration for which AJB entered into the share sale agreement. Evans-Lombe J would, I think,

have allowed it but for the view he took about Brewin Dolphin and PCG 'blowing hot and cold'. The Court of Appeal based its decision on the form of the agreements into which the parties had entered. In my respectful opinion, neither approach was right. One must, obviously, start with the share sale agreement. That was the agreement under which AJB agreed to divest itself of its allegedly valuable asset, namely, the shares in BSL. It is worth repeating the language of s 238(4)(b): 'the company [AJB] enters into a transaction [the share sale agreement] with that person [Brewin Dolphin] for a consideration the value of which' etc. The subsection does not stipulate by what person or persons the consideration is to be provided. It simply directs attention to the consideration for which the company has entered into the transaction. The identification of this 'consideration' is in my opinion, a question of fact. It may also involve an issue of law, for example, as to the construction of some document. But if a company agrees to sell an asset to A on terms that B agrees to enter into some collateral agreement with the company, the consideration for the asset will, in my opinion, be the combination of the consideration, if any, expressed in the agreement with A and the value of the agreement with B. In short, the issue in the present case is not, in my opinion, to identify the s 238(4) 'transaction'; the issue is to identify the s 238(4) 'consideration'.

[21] On the facts of this case it is, in my opinion, plain that the consideration for the BSL shares was, apart from obligations assumed by Brewin Dolphin under the share sale agreement itself, the entry by PCG into the sublease agreement under which it covenanted to pay £312,500 per annum for four years. The facts are fully and clearly set out in Evans-Lombe J's judgment and are concisely and accurately summarised by Morritt LJ ([1999] 2 All ER 844 at 848–850, [1999] 1 WLR 2052 at 2056–2058). Both set out the relevant part of a memorandum prepared in September 1989 by Brewin Dolphin's finance director. The memorandum described what had been agreed:

> 'The basic concept is that Brewin Dolphin purchases the trade of [AJB] for a consideration of £1·25m payable over four years ... The detailed scheme is as follows: 1. [AJB] forms [BSL] as a subsidiary. [AJB] sells its business excluding its computer and other fixed assets to [BSL] ... [AJB] sells [BSL] to Brewin Dolphin ... the purchase consideration would be £1 ... 2. [AJB] enters into a finance lease for the computer and other assets with PCG. PCG enters into an operating lease with Brewin Dolphin for the computer, the lease payments to be yearly in arrears for four years at a rate of £312,500. This means that the purchase price will be tax allowable and there will be no goodwill.'

So the purchase price of £1·25m was to be paid under the sublease in four annual payments of £312,500 each. No other conclusion is, in my opinion, possible but that on those facts the consideration for the BSL shares included the benefit of the covenant given by PCG under the sublease. In *Re MC Bacon Ltd* [1990] BCLC 324 at 340 my noble and learned friend, Lord Millett, then a Chancery judge, analysed the requirements of s 238(4)(b). He said:

> 'To come within that paragraph the transaction must be (i) entered into by the company; (ii) for a consideration; (iii) the value of which measured in money or money's worth; (iv) is significantly less than the value; (v) also measured in money or money's worth; (vi) of the consideration provided by the company.'

In my respectful opinion, that is a useful breakdown of the statutory requirements. In the present case the agreement for the sale of the shares was entered into for a consideration which included the benefit of the sublease agreement. So I now move on to the issues of value.

What was the value, in money or money's worth, of PCG's covenant under the sublease?

[22] This was not an issue which either Evans-Lombe J or the Court of Appeal had to consider. The approaches of each, different though they were, were alike in treating this issue as irrelevant. Naturally enough Mr Mitchell, counsel for Brewin Dolphin and PCG, contends that the value of the covenant was its face value. He points out that there is not, and never has been, any question as to PCG's ability to pay. I agree that there is no doubt as to PCG's ability to pay but the value of the covenant needs, in my opinion, to be investigated a little more deeply. The covenant was, according to the sublease, given in exchange for the right to use the computer equipment. But it appears that, by the end of September 1989, Brewin Dolphin had decided not to use the equipment in order to run the business it was negotiating to acquire but, instead, to update its own existing computer system. This decision did not, of course, affect the willingness of PCG to pay the £312,500 per annum for four years. The amount of those payments was attributable to the purchase, via the BSL shares, of AJB's business and was not attributable in the least to any value placed on the right to use the computer equipment. None the less, the payments, according to the terms of the sublease, were for the right to use the computer equipment. The computer equipment, as Brewin Dolphin and PCG knew, was held by AJB under headleases from Wirral and Asterrose. Under each of these headleases, the lessee, AJB, was barred from assigning or subletting any of the equipment. The bar was expressed as an absolute one. It was not subject to the lessor's consent first being obtained or anything of that character. In each headlease the events on the occurrence of which the lessor would become entitled to terminate the lease include (i) failure by the lessee to pay the due rent, (ii) the appointment of an administrative receiver of the lessee's assets, and (iii) breach by the lessee of any of the terms of the lease. The right to terminate was expressed to be exercisable 'at any time [after the event in question] notwithstanding any subsequent acceptance by the lessor of any rental'.

[23] The 10 November 1989 sublease, under which the four £312,500 payments were to be made, constituted, ipso facto, a breach by AJB of a term of the headleases. So the headleases became terminable at any time by the head lessors and the equipment comprised in the sublease could at any time have been repossessed by the head lessors. The re-possession of the computer equipment, which is what happened, would, and did, bring to an end the sublease and the payment obligations of PCG. So, what was the value, in money or money's worth, of a covenant by PCG that was so precarious?

[24] Mr Mitchell suggested that the covenant was worth something, because the benefit of the sublease, and of PCG's obligation to pay the £312,500 sums, could have been assigned by AJB to the head lessors. There is, however, no evidence that the head lessors would have had any interest at all in such an assignment. If a covenant with the precarious character of PCG's covenant in the sublease is to have value attributed to it for s 238 purposes, the value must, in my opinion, be placed on a more firm footing than that of speculative suggestion. The actual events that took place in 1990, before any payment under the sublease

had become due, are in my opinion, relevant. First, within a week of the date of the sublease agents for the head lessors wrote to AJB complaining about the sublease and threatening proceedings. In January 1990 AJB defaulted in payment of the rents due under the headleases and shortly thereafter the head lessors demanded the return of the equipment. On 5 February PCG confirmed that neither it nor Brewin Dolphin would obstruct the repossession of the equipment by the head lessors and on 23 February 1990 solicitors for PCG wrote to solicitors for AJB notifying them that—

> 'our client intends to accept your clients' repudiatory breach of the agreement between them. Alternatively there has been a total failure of consideration by your clients in relation to the lease of equipment dated 10 November 1989.'

[25] PCG's covenant, which had been precarious at the outset, had become worthless by 23 February 1990 at the latest. To complete the point, AJB went into compulsory winding up in April 1990 and an administrative receiver was appointed in May. These events would inevitably have led the head lessors to terminate the headleases and recover their equipment, if they had not done so previously, thereby bringing the sublease to an end.

[26] Mr Mitchell submitted that these ex post facto events ought not to be taken into account in valuing PCG's sublease covenant as at 10 November 1989. I do not agree. In valuing the covenant as at that date, the critical uncertainty is whether the sublease would survive for the four years necessary to enable all the four £312,500 payments to fall due, or would survive long enough to enable some of them to fall due, or would come to an end before any had fallen due. Where the events, or some of them, on which the uncertainties depend have actually happened, it seems to me unsatisfactory and unnecessary for the court to wear blinkers and pretend that it does not know what has happened. Problems of a comparable sort may arise for judicial determination in many different areas of the law. The answers may not be uniform but may depend upon the particular context in which the problem arises. For the purposes of s 238(4), however, and the valuation of the consideration for which a company has entered into a transaction, reality should, in my opinion, be given precedence over speculation. I would hold, taking account of the events that took place in the early months of 1990, that the value of PCG's covenant in the sublease of 10 November 1989 was nil. After all, if, following the signing of the sublease, AJB had taken the sublease to a bank or finance house and had tried to raise money on the security of the covenant, I do not believe that the bank or finance house, with knowledge about the circumstances surrounding the sublease, would have attributed any value at all to the sublease covenant.

[27] Where the value of the consideration for which a company enters into a s 238 transaction is as speculative as is the case here, it is, in my judgment, for the party who relies on that consideration to establish its value. PCG and Brewin Dolphin are, in the present case, unable to do so.

[28] For these reasons I, as did Evans-Lombe J and the Court of Appeal for different reasons, would treat the value of the consideration for which AJB entered into the share sale agreement as being confined to the value of the consideration under that agreement. The sublease covenant, in my opinion, adds nothing.

The value of the consideration given by the company

[29] On this issue, Mr Mitchell submitted that AJB's business as at 10 November 1989 was worthless and that the BSL shares were therefore valueless. This submission was based on the fact that AJB appears to have been hopelessly insolvent and by November 1989 was trading at a substantial loss of £13,000 odd per day. The judge's findings on the value of the BSL shares are conveniently summarised at para 4.3 of AJB's case:

> '(1) Bekhor's business assets were an attractive package to buyers such as Brewin Dolphin. (2) It could not be inferred that Brewin Dolphin was the only potential purchaser. (3) Brewin Dolphin was a reasonably well informed potential purchaser from the class of typical purchasers. (4) The contemporary view of what a reasonably well-informed potential purchaser was prepared to pay was some evidence in assessing the market value of the BSL shares. (5) Brewin Dolphin had been prepared to pay about £1,050,000 for the BSL shares.'

[30] I respectfully agree with this approach. The value of an asset that is being offered for sale is, prima facie, not less than the amount that a reasonably well informed purchaser is prepared, in arms' length negotiations, to pay for it.

[31] On this issue the judge reached his figure of £1,050,000 after hearing and assessing the evidence, including expert evidence. It has not been demonstrated that in doing so he misdirected himself. The Court of Appeal reviewed the judge's conclusion. Morritt LJ ([1999] 2 All ER 844 at 855, [1999] 1 WLR 2052 at 2063), described his conclusion as 'eminently sensible and evidently right' and upheld it. Your Lordships have, in my opinion, been provided with no reason to come to any different conclusion.

The £312,500 loan

[32] In my opinion, in agreement with the judge and the Court of Appeal, AJB succeeded in establishing that, for the purposes of s 238, it had entered into a transaction, namely the share sale agreement, at an undervalue and that the amount of the undervalue was £725,000, ie £1,050,000 less £325,000. The order made by the judge and upheld by the Court of Appeal required Brewin Dolphin to pay that sum, with interest, to AJB. Neither before the judge nor before the Court of Appeal was any account taken of the £312,500 loan that had been made by PCG to AJB on 9 November 1989 and that had been intended to be repaid by set-off against the same amount due on 10 November 1990. In my opinion, however, that sum ought to be taken into account. It constituted an advance payment, as a loan, of a part of the consideration that had been given for the BSL shares. The receipt of that sum was an advantage that AJB would not have received but for its entry into the share sale agreement and the sublease agreement.

[33] PCG has proved for that sum in the liquidation of AJB, but what, if any, dividend will be received is not known. I imagine it will be negligible.

[34] Under s 238(3), the court has a broad discretion to make 'such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction'. In my opinion, an order under the subsection that did not take account of AJB's receipt of the £312,500 would be unfair to Brewin Dolphin and PCG. I would, therefore, vary the order against Brewin Dolphin by allowing credit to be taken for the £312,500 and interest thereon. The interest should run from the same date and at the same rate as the interest on the

a sum payable by Brewin Dolphin. PCG will, of course, have to withdraw its proof for the £312,500 in the liquidation. With that variation to the order made by Evans-Lombe J, however, I would uphold the order and dismiss the appeal.

Appeal dismissed.

Celia Fox Barrister.

R v Forbes

HOUSE OF LORDS
LORD BINGHAM OF CORNHILL, LORD STEYN, LORD HOFFMANN, LORD COOKE OF THORNDON AND LORD HUTTON
27, 28 NOVEMBER, 14 DECEMBER 2000

Criminal evidence – Identity – Visual identification – Victim identifying defendant to police in street shortly after commission of offence – Defendant disputing identification and requesting identity parade – Police failing to hold identity parade – Whether provision of code of practice requiring identity parade applying where suspect had previously been postitively identified – Code of Practice for the Identification of Persons by Police Officers, para 2.3.

The appellant, F, was identified to the police in the street as the perpetrator of an attempted robbery by the victim shortly after the offence had been committed. He was charged with the offence, which he denied. Three times before his trial he asked for an identification parade to be held, but no such parade was held. At trial, objection was taken to the admission in evidence of the street identification because, inter alia, no identification parade had been held. F contended that that constituted a breach of para 2.3[a] of the Code of Practice for the Indentification of Persons by Police Officers (Code D of the codes of practice made under the Police and Criminal Evidence Act 1984). Paragraph 2.3 provided that, with certain exceptions, an identification parade had to be held whenever a suspect disputed an identification, if the suspect consented. The judge rejected F's submission, holding that a full and complete identification had been made at the scene, and that in those circumstances it was unnecessary for there to be an identification parade. In so concluding, the judge relied on a Court of Appeal authority which held that a distinction was to be drawn between cases where a suspect was produced by a witness to the police rather than the other way round, and that para 2.3 did not apply where there had previously been a 'fully satisfactory' or 'actual and complete' or 'unequivocal' identification of the suspect by the relevant witness. F was convicted, and appealed. The Court of Appeal, declining to follow the earlier authority, held that there had been a breach of para 2.3, but concluded that that breach had not rendered the conviction unsafe. Accordingly, it dismissed the appeal. On F's appeal to the House of Lords, their Lordships were required to determine whether para 2.3 applied even where the suspect had already been positively identified.

Held – On its true construction, para 2.3 of Code D applied even where there had previously been a 'fully satisfactory' or 'actual and complete' or 'unequivocal' identification of the suspect by the relevant witness. A conclusion to the contrary would subvert the clear intention of the code which was intended to be an intensely practical document, giving police officers clear instructions on the approach that they should follow in specified circumstances. It was not old-fashioned literalism but sound interpretation to read it as meaning what it said. Paragraph 2.3 imposed a mandatory obligation on the police. There was no

a Para 2.3 is set out at p 691 *j* to p 692 *a*, post

warrant for reading additional conditions into the text and no basis for drawing a distinction between cases where a suspect was produced by the police to a witness rather than by a witness to the police. However, para 2.3 should not be construed to cover all possible situations. It might be futile to mount an identification parade if an eye witness to a crime had made it plain to the police that he could not identify the culprit, or if the case was one of pure recognition of someone well-known to the eye witness. Save, however, in cases such as those, or other exceptional circumstances, the effect of para 2.3 was clear: if the police had sufficient information to justify the arrest of a particular person for suspected involvement in an offence, and an eye witness had identified that person, and the suspect disputed his identification as a person involved in the commission of that offence, an identification parade had to be held if the suspect consented and the exceptions did not apply. It followed that in the instant case there had been a breach of Code D. However, F's conviction could not, in all the circumstances, be regarded as unsafe. Accordingly, the appeal would be dismissed (see p 696 *e* to p 697 *d*, p 698 *j* to p 699 *b*, post); *R v Popat* [1998] 2 Cr App R 208 disapproved.

Per curiam. Where a breach of Code D has been established, but the trial judge has rejected an application to exclude evidence to which the defence has objected because of that breach, the judge should in the course of his summing up explain that there has been a breach of the code and how it has arisen, and invite the jury to consider the possible effect of that breach (see p 698 e, post).

Notes

For street identifications, see 11(1) *Halsbury's Laws* (4th edn reissue) para 770.

Cases cited in the opinion of the Committee

R v Anastasiou [1998] Crim LR 67, CA.
R v Brizey (10 March 1994, unreported), CA.
R v Brown [1991] Crim LR 368, CA.
R v Bush (27 January 1997, unreported), CA.
R v Conway (1990) 91 Cr App R 143, CA.
R v Graham [1994] Crim LR 212, CA.
R v Greaves (6 May 1994, unreported), CA.
R v Hickin [1996] Crim LR 584, CA.
R v Macmath [1997] Crim LR 586, CA.
R v Oscar [1991] Crim LR 778, CA.
R v Popat [1998] 2 Cr App R 208, CA.
R v Popat (No 2) [2000] 1 Cr App R 387, CA.
R v Quinn [1995] 1 Cr App R 480, CA.
R v Rogers [1993] Crim LR 386, CA.
R v Togher (9 November 2000, unreported), CA.
R v Turnbull [1976] 3 All ER 549, [1977] QB 224, [1976] 3 WLR 445, CA.
R v Vaughan (30 April 1997, unreported), CA.
R v Wait [1998] Crim LR 68, CA.
Stott v Brown (5 December 2000, unreported), PC.

Appeal

The appellant, Anthony Leroy Forbes, appealed with leave of the Appeal Committee of the House of Lords given on 11 January 2000 from the decision of the Court of Appeal (Laws LJ, Garland J and Judge Crane) on 30 April 1999 ([1999]

2 Cr App R 501) dismissing his appeal against his conviction for attempted robbery on 11 September 1998 following a trial before Recorder J Hughes QC and a jury at the Crown Court at Snaresbrook. The Court of Appeal certified that a point of law of general public importance was involved in its decision, set out at p 688 *e*, post. The facts are set out in the opinion of the Appellate Committee.

Robin Purchas QC and *Sherry Nabijou* (instructed by *Sternberg Reed Taylor & Gill*) for the appellant.

David Perry and *Piers Wauchope* (instructed by the *Crown Prosecution Service*) for the Crown.

Their Lordships took time for consideration.

14 December 2000. The following opinion of the Committee was delivered.

LORD BINGHAM OF CORNHILL.

1. This is the considered opinion of the Committee.

2. The appellant Anthony Leroy Forbes was convicted by a jury of attempted robbery. He appealed to the Court of Appeal Criminal Division which upheld much of his argument but dismissed his appeal. Leave to appeal to the House was refused but the Court of Appeal certified that a point of law of general public importance was involved in its decision. The question is:

> 'Do the provisions of para D 2.3 of the Code of Practice apply where a suspect has already been positively identified, whether or not in the manner permitted under para D 2.17 of the Code?'

The House gave leave to appeal against the decision of the Court of Appeal. At issue are the proper construction and application of the provisions relating to identification parades in Code D of the Codes of Practice issued under the Police and Criminal Evidence Act 1984. In its judgment in the present case the Court of Appeal departed from an earlier considered judgment of the court (Hobhouse LJ, Bracewell and Sachs JJ) in *R v Popat* [1998] 2 Cr App R 208. Implicit in the certified question is an invitation to the House to choose between these two decisions. Should the certified question be answered in the affirmative, a subsidiary question arises as to the proper determination of this appeal.

3. The judgment of the Court of Appeal (Laws LJ, Garland J and Judge Crane) in this case is reported at [1999] 2 Cr App R 501, where the facts are fully rehearsed. For present purposes a brief summary will suffice. In the early evening of 2 May 1998 Mr Tabassum was driven by a friend into Ilford to obtain some money from a cashpoint machine. He left his friend's parked car and withdrew £10. He was then approached by a man who blocked his path and asked for money, at first on compassionate grounds. On being refused, the man became aggressive. Mr Tabassum went away but was pursued by the man who threatened to 'cut him up' and, standing very close to Mr Tabassum, revealed what looked like the handle of a knife. Mr Tabassum made good his escape and rejoined his friend in his car. They drove off and Mr Tabassum (as he later testified) saw his assailant in the street. As their car passed Mr Tabassum made eye contact with the man who spat towards the car as it went by. Mr Tabassum called the police on a mobile telephone, and gave a description of his assailant. The police answered Mr Tabassum's call a few minutes later and drove Mr Tabassum around the

streets in a police car to look for the man. In due course Mr Tabassum identified to the police as his assailant a man who turned out to be the appellant. Mr Tabassum was sure he had identified the right man, and the police arrested the appellant, who denied he had done anything wrong. The appellant continued to deny the accusation against him, and on three occasions before the trial asked for an identification parade to be held. No identification parade was held.

4. At the trial objection was taken to the admission of evidence of Mr Tabassum's identification of the appellant in the street, partly because of inconsistencies in different descriptions given by him of his assailant and partly because there had been no identification parade, which was contended to be a breach of para 2.3 of Code D of the Codes of Practice. The recorder rejected that submission and said:

> 'I am satisfied in this case, for the purposes of the definition in *R v Popat* and indeed for the definition as required by the codes, that a full and complete identification had been made at the scene and in those circumstances it was not necessary for there to be an identification parade and I rule that the evidence of identification shall be admitted.'

The judgments of the Court of Appeal in *R v Popat* and in the present case will be considered in detail below.

Background

5. In many criminal investigations and trials there is little or no doubt that a crime has been committed and the issue (at both the investigatory and trial stages) is who committed it. In such cases reliance may be placed on a wide range of means, of which DNA samples and fingerprints are obvious examples, to link the suspect or defendant with the crime. Where such means are available they are invaluable, whether to confirm suspicion and strengthen proof or to avert suspicion and defeat proof. In many cases of this class, however, it is the evidence of eye witnesses who saw (or claim to have seen) the criminal incident, or the events leading up to or following it, which is relied on to connect the suspect or defendant with the commission of the offence. Such eye witnesses, relying on what they have seen, identify the suspect or defendant as the person responsible for the criminal conduct in question. This appeal is concerned, and concerned only, with eye-witness evidence of this kind, which we shall call 'eye-witness identification evidence'. For purposes of this discussion we shall assume that the identification is disputed by the suspect or defendant, because if it is not no issue arises.

6. It has been recognised for very many years that eye-witness identification evidence, even when wholly honest, may lead to the conviction of the innocent. Following two notorious miscarriages of justice caused by honest but mistaken eye-witness identification, a Departmental Committee was appointed under the chairmanship of Lord Devlin. In its report (*Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (HC Paper 338 (1976)) the Departmental Committee highlighted the problem in para 8.1:

> 'We are satisfied that in cases which depend wholly or mainly on eye-witness evidence of identification there is a special risk of wrong conviction. It arises because the value of such evidence is exceptionally difficult to assess; the witness who has sincerely convinced himself and whose sincerity carries

> conviction is not infrequently mistaken. We have found no forensically practicable way of detecting this sort of mistake.' *a*

The Departmental Committee shared the general view that identification of the defendant in the dock was undesirable, for obvious reasons, and favoured the extended use of identification parades. In para 8.7 it stated:

> 'Identification on parade or in some other similar way in which the witness takes the initiative in picking out the accused should be made a condition precedent to identification in court, the fulfilment of the condition to be dispensed with only when the holding of a parade would have been impracticable or unnecessary. An example of its being impracticable is when the accused refuses to attend. An example of its being unnecessary is when the accused is already well-known to the witness.' *b c*

Recognising the danger inherent in cases dependent on eye-witness identification evidence and in the light of this report, a specially constituted Court of Appeal of exceptional strength gave guidance in *R v Turnbull* [1976] 3 All ER 549, [1977] QB 224 both on the circumstances in which a trial judge should withdraw a case from the jury and on the directions which should be given where a case is left to the jury for decision. *d*

7. The Royal Commission on Criminal Procedure under the chairmanship of Sir Cyril Philips, which reported in 1981 (Cmnd 8092), did not examine identification procedures in detail, partly because of the work which had already been done on the subject. But in para 3.138 the Royal Commission said: *e*

> 'We would, however, comment that, in accordance with our general approach, there is a case in principle for regulating by statute identification procedures as well as other aspects of pre-trial criminal procedure. We therefore recommend that when the Government is considering legislation in the field of pre-trial criminal procedure it should examine the possibility of making identification procedures subject to statutory control as well.' *f*

8. The report of the Philips Royal Commission bore fruit in the Police and Criminal Evidence Act 1984 (PACE). Among other detailed objectives that Act sought to recommend procedures which would provide for the effective investigation and prosecution of crime while at the same time, and importantly, safeguarding the legitimate rights and interests of those suspected and accused. *g*

9. In pursuance of this objective s 66 of PACE provided for the issue by the Secretary of State of Codes of Practice to govern the exercise by police officers of statutory powers to search persons and vehicles; the detention, treatment, questioning and identification of persons by police officers; the searching of premises by police officers; and the seizure by police officers of property found on persons or premises. Thus such Codes, requiring the approval of Parliament by affirmative resolution, were to govern the conduct of police officers, who were (by s 67(8) as originally enacted) to be liable to disciplinary proceedings for failure to comply, although such failure was not of itself to render the officer liable to any criminal or civil proceedings (see s 67(10)). Being directed by the Secretary of State to police officers, the Codes could not govern the admissibility at trial of any evidence obtained in breach of the Codes. But s 67(11) of PACE provided: *h j*

> 'In all criminal and civil proceedings any such code shall be admissible in evidence; and if any provision of such a code appears to the court or tribunal

a conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.'

This provision was supplemented by s 78 of PACE which conferred discretion on the court (or confirmed the discretion of the court) to refuse to allow prosecution evidence to be given if it appeared to the court that having regard to all the b circumstances, including the circumstances in which the evidence had been obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

10. The first version of Code D, applicable to eye-witness identification procedure, took effect on 1 January 1986. Section 2 was headed (as in succeeding versions of the Code): 'Identification by witnesses'. The opening paragraphs c were headed: '(a) Suspect at the police station: the decision as to the method of identification', and para 2.1 provided:

> 'In a case which involves disputed identification evidence a parade must be held if the suspect asks for one and it is practicable to hold one. A parade may also be held if the officer in charge of the investigation considers that it would d be useful.'

Paragraph 2.11 was headed: '(e) Street identification' and read:

> 'A police officer may take a witness to a particular neighbourhood or place to observe the persons there to see whether he can identify the person whom e he said he saw on the relevant occasion. Care should be taken however not to direct the witness's attention to any individual. Where the suspect is at a police station, the provisions of paragraphs 2.1 to 2.10 must apply.'

11. The second version of Code D, applicable from 1 April 1991, reproduced f para 2.1 of the earlier Code as para 2.3 and para 2.11 of the earlier Code as para 2.17. But the distinction between the suspect at the police station and street identification was replaced by a distinction between '(a) Cases where the suspect is known' and '(b) Cases where the identity of the suspect is not known'. In this version of the Code para 2.1 listed the methods of identification by witnesses which might be used by the police, the first of these being an identification g parade.

12. The third version of Code D, which took effect on 10 April 1995, is the version applicable to this case. The distinction between cases where the suspect is known and cases where the identity of the suspect is not known was preserved, but guidance was given on the meaning of this distinction. A guidance note h provides:

> 'References in this section to a suspect being "known" means there is sufficient information known to the police to justify the arrest of a particular person for suspected involvement in the offence.'

j Paragraph 2.1 continued to list the methods of identification which might be used, still listing an identification parade first. But in para 2.3 the duty laid on the police investigating officer was rephrased and strengthened:

> 'Whenever a suspect disputes an identification, an identification parade shall be held if the suspect consents unless paragraphs 2.4 or 2.7 or 2.10 apply. A

parade may also be held if the officer in charge of the investigation considers that it would be useful, and the suspect consents.' *a*

The paragraphs which provide limited exceptions to the requirement stated in the first sentence of para 2.3 are in these terms:

'2.4 A parade need not be held if the identification officer considers that, whether by reason of the unusual appearance of the suspect or for some other reason, it would not be practicable to assemble sufficient people who resembled him to make a parade fair ... *b*

2.7 A group identification takes place where the suspect is viewed by a witness amongst an informal group of people. The procedure may take place with the consent and co-operation of a suspect or covertly where a suspect has refused to co-operate with an identification parade or a group identification or has failed to attend. A group identification may also be arranged if the officer in charge of the investigation considers, whether because of fear on the part of the witness or for some other reason, that it is, in the circumstances, more satisfactory than a parade ... *c*

2.10 The identification officer may show a witness a video film of a suspect if the investigating officer considers, whether because of the refusal of the suspect to take part in an identification parade or group identification or other reasons, that this would in the circumstances be the most satisfactory course of action.' *d*

Thus it is plain that if an identification parade is practicable it is the preferred mode of identification. Paragraph 2.17 was also revised, to strengthen the protection afforded to the suspect. It now reads: *e*

'A police officer may take a witness to a particular neighbourhood or place to see whether he can identify the person whom he said he saw on the relevant occasion. Before doing so, where practicable a record shall be made of any description given by the witness of the suspect. Care should be taken not to direct the witness's attention to any individual.' *f*

13. Thus the operation of the Code hinges on the distinction between cases where the suspect is known and cases where the identity of the suspect is not known. This distinction may be directed to different cases or to different stages of the same case. The test is whether there is sufficient information known to the police to justify the arrest of a particular person for involvement in a suspected offence. There will not be sufficient information known to the police to justify the arrest of a particular person unless the police have some apparently reliable evidence implicating that person. In cases where the identity of the suspect is known to the police, various methods of identification are in some circumstances permissible, but the Code is clear that an identification parade is the preferred method. While the second sentence of para 2.3 confers a discretion on the investigating officer, the first sentence imposes a duty to which the exceptions are of very limited scope. Thus, if the police have sufficient information to justify the arrest of a particular person for suspected involvement in an offence, and that person disputes that he has been correctly identified as the person who has committed the offence, and the identification of him as the person who committed the offence depends (even in part) on eye-witness identification evidence, and the suspect consents, the Code requires that an identification parade be held unless *g* *h* *j*

one of the exceptions applies. At the identification parade the eye witness will have the opportunity, subject to the strict regime governing the conduct of such parades, to identify the suspect. If the eye witness fails to identify the suspect, that will ordinarily strengthen his position during the investigation and at trial. If the eye witness does identify him at the identification parade, this is likely to weaken his position at both stages, unless it appears that the eye witness is identifying not the culprit who committed the crime but the person identified on an earlier occasion. If the suspect apprehends that an identification parade may strengthen the prosecution case, he will no doubt be advised to withhold his consent to the holding of a parade.

The authorities

14. In three cases decided by the Court of Appeal under the two earlier versions of Code D it was held to be a plain breach of para 2.1 or 2.3 not to hold an identification parade if eye-witness identification evidence was disputed and the suspect expressly or impliedly requested one, and the court recognised the potential detriment to a suspect denied the opportunity to test by means of a parade the reliability of an eye witness's identification (see *R v Brown* [1991] Crim LR 368; *R v Conway* (1990) 91 Cr App R 143 and *R v Graham* [1994] Crim LR 212). In *R v Brown* the court did not accept a submission that if there was a satisfactory street identification there was no need for an identification parade, although accepting that there might be circumstances in which, following a street identification, an identification parade might be otiose. We know of no cases to the contrary effect on these two versions of the Code. The 1995 revision of the Code must, we conclude, have been drafted on this foundation of authority. *R v Macmath* [1997] Crim LR 586 decided under the current version of the Code, again treated failure to hold an identification parade as a breach of a mandatory requirement of the Code. A similar ruling was given in *R v Wait* [1998] Crim LR 68.

15. The Court of Appeal gave judgment in *R v Popat* [1998] 2 Cr App R 208 on 23 March 1998. The appellant had been convicted of sexual and other offences committed on 10 June and 6 November 1996. Following a watch kept by the victim and a police officer on the street where the victim lived, the victim had identified the appellant to the police officer and he had been arrested. There had been no identification parade. It was argued on appeal that the trial judge should have excluded evidence of the street identification under s 78, because there had, in breach of Code D, been no identification parade. In the course of a lengthy reserved judgment of the court delivered by Hobhouse LJ the legislation and the Codes were reviewed and it was pointed out, quite correctly, that even where non-compliance with the Code is shown exclusion of evidence is not an inevitable consequence. The court said (at 213):

> 'Although section D of the Code does not contain any broad statement of principle or object, there is a clear objective that identification parades, well conducted, should be the normal method of identification. It is clearly intended that practices should be avoided which might corrupt or devalue identification evidence. It is also implicitly recognised that the inability of a witness to pick out a suspect on a formal parade may be helpful to the administration of justice and to the suspect should he subsequently have to stand trial. (e.g. *Graham*.)'

Then (at 214) the court continued:

> 'The proposition advanced by the appellant with some support from previous judgments of this Court is that once the suspect has become known to the police there arises a duty in all disputed cases to hold an identification parade attended by the witness. There must always be an identification parade (unless excused by paragraphs 2.4, 2.7 or 2.10) unless the suspect admits that it is he who committed the alleged crime. In our judgment this is a misinterpretation of the Code. The identification of the suspect by the witness has already taken place and it is not a case where the suspect is being produced to the witness by the police but rather the other way round.'

Having referred to the discretionary power of the investigating officer to call for an identification parade under the second sentence of para 2.3 of the Code, the court said (at 215):

> 'In our judgment the second section of Code D is not to be construed as if it expressly provided for all possible situations. It provides a scheme to be followed and principles to be applied. The mandatory obligation in the first sentence of paragraph 2.3 relates to a situation where a suspect is being produced by the police to a witness not by the witness to the police. It outlaws the police attempting to obtain an identification of a known suspect by a witness otherwise than by a formal identification parade or one of the other methods of identifying known suspects authorised by paragraphs 2.4, 2.7 or 2.10. Further, where a previous identification was made under adverse circumstances or may for other reasons have been unreliable or doubtful, good practice may require that the suspect be put on an identification parade to establish whether the witness can confirm his believed identification. Decided cases illustrate this. There ought to be an identification parade where it would serve a useful purpose. The failure to hold an identification parade may affect the fairness of the trial or the safety of a verdict.'

16. The court then considered *R v Brown*, *R v Conway*, *R v Macmath* and *R v Wait*, to which we have made reference above, and observed (at 219):

> 'In each of these cases the informal identification of the suspect was treated as being open to doubt. If there has not been a fully satisfactory previous identification of the suspect by the witness then there is no reason to say that paragraph 2.3 does not apply. This is to be contrasted with the class of case where (whatever other *Turnbull* points might be available on other aspects of the case) there is no basis to criticise the informal identification. If it is a one to one identification carried out under good conditions and there is no risk of any corruption of the reliability of the identification then made, the identification by the witness is complete and it can truly be said that no further identification is required and no useful purpose would be served by holding an identification parade.'

17. The court referred (at 220) to a sequence of cases which it considered to have been decided on a basis inconsistent with what were described as dicta in *R v Brown*, *R v Conway*, *R v Macmath* and *R v Wait*. With one exception, we do not think that these authorities were inconsistent with the cases mentioned. In *R v Oscar* [1991] Crim LR 77, decided under the 1986 Code, there was no request for an identification parade and it was held not to be an identification case at all. In *R v Rogers* [1993] Crim LR 386, there was again no request for a parade: the case concerned

an informal identification and no reference was made in the judgment to para 2.1. *R v Brizey* (10 March 1994, unreported) and *R v Greaves* (6 May 1994, unreported) focused on para 2.17; no request was made in either case for a parade and no reference was made to para 2.3. In *R v Hickin* [1996] Crim LR 584, a case arising under the 1991 Code to which considerable weight was attached, reference was made to paras 2.13 and 2.17, but not to para 2.3. No request for a parade was made. *R v Vaughan* (30 April 1997, unreported) and *R v Bush* (27 January 1997, unreported) both turned on para 2.17. The exception is *R v Anastasiou* [1998] Crim LR 67 in which the Court of Appeal held that an identification parade following an informal identification would be a farce: it could have added nothing to the identification already made, and in the circumstances the police officers would have been doing no more than confirm that the man upon the parade was the man that they had already arrested. The Code was thus held to have no apparent application.

18. Following its review of these cases the court in *R v Popat* expressed its conclusion:

> 'In our judgment it is important in evaluating these authorities to differentiate between what are in truth breaches of the Code and what are only failures to have proper regard to the purposes of the Code. The cases illustrate also that the specific provisions of the Code are not all-embracing and that there may be situations which fall outside them. Viewed as a whole the decisions do not bear out the literalist *dicta* which treat the first sentence of paragraph 2.3 as requiring the holding of a formal identification parade whenever a suspect has become known and notwithstanding that he has previously been properly and adequately identified by the relevant witness. It is thus not correct that paragraph 2.3 requires that an already identified suspect be stood on an identification parade simply because he continues to dispute his identification. Therefore, in our judgment, the effect of the Code and the law is that when a suspect has become known and disputes his identification as the person who committed the crime alleged and the police wish to rely upon identification evidence provided by a witness, the question must be asked whether that witness has already made an actual and complete identification of that individual. If the answer to that question is yes then the mandatory requirement of the first sentence of paragraph 2.3 does not apply. If the answer is no, paragraph 2.3 must be complied with and any failure to do so will amount to a breach of the Code. What is an actual and complete prior identification of the relevant individual by the relevant witness will depend upon the facts of each individual case and the difficulties of assessment which this may involve have already been illustrated by the cases to which we have referred. But it is clear from the authorities that they may include situations which do not fit within paragraph 2.17 or any other individual paragraph of the Code. But where, as in the present case, there has been unequivocal identification of the relevant person by the relevant witness properly carried out in accordance with the provisions of paragraph 2.17, there can, in our judgment, be no question but that the requirements of the Code have been complied with and that there is no obligation thereafter under the first sentence of paragraph 2.3 to hold an identification parade for that witness again to identify the same man.' (See [1998] 2 Cr App R 208 at 223–224.)

The appeal was accordingly dismissed. That decision has been followed in later cases, including *R v Popat (No 2)* [2000] 1 Cr App R 387.

19. In the present case the Court of Appeal declined to follow *R v Popat*. It was argued on appeal, as at trial, that the failure to hold an identification parade following Mr Tabassum's street identification of the appellant had been a breach of para 2.3 of Code D and that evidence of the street identification should therefore have been excluded by the trial judge. Since the trial judge had relied on *R v Popat* in concluding that there had been no breach, the Court of Appeal considered that authority and other authorities in considerable detail. Its conclusion was that there had been a breach on the facts of this case. The court held that the obligation to hold an identification parade was mandatory if the conditions specified in para 2.3 were met, which in this case they were, unless the exceptions applied, which they did not. The interpretation of para 2.3 adopted in *R v Popat* was held to amount to a rewriting of the Code. While the existence and cogency of other identifying evidence (including evidence of a street identification under para 2.17) might be very relevant to the trial judge's decision whether or not to admit identification evidence despite a breach of para 2.3, it was not relevant to the separate and prior question whether there had been such a breach.

The application of Code D, para 2.3

20. In argument before the House the appellant contended that there had been a breach of para 2.3 for very much the same reasons as had been given by the Court of Appeal. For the Crown it was argued that the law had been correctly stated in *R v Popat*. We are of opinion that there was a breach of the Code for the following reasons: (1) Code D is intended to be an intensely practical document, giving police officers clear instructions on the approach that they should follow in specified circumstances. It is not old-fashioned literalism but sound interpretation to read the Code as meaning what it says. (2) Paragraph 2.3 was revised in 1995 to provide that an identification parade shall be held (if the suspect consents, and unless the exceptions apply) *whenever* a suspect disputes an identification. This imposes a mandatory obligation on the police. There is no warrant for reading additional conditions into this simple text. (3) Neither the language of Code D nor the decided cases support the distinction drawn in *R v Popat* between a suspect being produced by the police to a witness rather than by a witness to the police. (4) We cannot accept that the mandatory obligation to hold an identification parade under para 2.3 does not apply if there has previously been a 'fully satisfactory' or 'actual and complete' or 'unequivocal' identification of the suspect by the relevant witness. Such an approach in our opinion subverts the clear intention of the Code. First, it replaces an apparently hard-edged mandatory obligation by an obviously difficult judgmental decision. Such decisions are bound to lead to challenges in the courts and resulting appeals. Second, it entrusts that decision to a police officer whose primary concern will (perfectly properly) be to promote the investigation and prosecution of crime rather than to protect the interests of the suspect. An identification parade, if held, may of course strengthen the prosecution, but it may also protect the suspect against the risk of mistaken identification, and a suspect should not save in circumstances which are specified or exceptional be denied his prima facie right to such protection on the decision of a police officer. Third, this approach overlooks the important fact that grave miscarriages of justice have in the past resulted from identifications which were 'fully satisfactory', 'actual and complete' and 'unequivocal'

but proved to be wholly wrong. It is against such identifications, as well as against uncertain and equivocal identifications, that para 2.3 is intended to offer protection to the suspect.

21. We agree with the Court of Appeal in *R v Popat* that para 2.3 should not be construed to cover all possible situations. If an eye witness of a criminal incident makes plain to the police that he cannot identify the culprit, it will very probably be futile to invite that witness to attend an identification parade. If an eye witness may be able to identify clothing worn by a culprit, but not the culprit himself, it will probably be futile to mount an identification parade rather than simply inviting the witness to identify the clothing. If a case is one of pure recognition of someone well known to the eye witness, it may again be futile to hold an identification parade. But save in cases such as these, or other exceptional circumstances, the effect of para 2.3 is clear: if (a) the police have sufficient information to justify the arrest of a particular person for suspected involvement in an offence, and (b) an eye witness has identified or may be able to identify that person, and (c) the suspect disputes his identification as a person involved in the commission of that offence, an identification parade must be held if (d) the suspect consents and (e) paras 2.4, 2.7 and 2.10 of Code D do not apply.

22. We accordingly answer the certified question in the affirmative.

The effect of the breach

23. It was readily and rightly accepted for the appellant that even if the failure to hold an identification parade was (as we have concluded) a breach of para 2.3 of Code D, it does not necessarily follow that the evidence of Mr Tabassum's identification should have been excluded. That would depend on an exercise of judgment under s 78 of PACE, taking account of all the circumstances of the case. But it was argued that in the circumstances here the appellant had been denied a fair trial and his conviction should be considered unsafe. The starting point of this argument was the recorder's ruling (correct in the light of *R v Popat*, but wrong in the light of our decision) that there had been no breach of para 2.3. From this it had followed that the recorder had never exercised her judgment whether evidence of Mr Tabassum's street identification should be admitted or not, that the appellant's counsel had been denied the opportunity to cross-examine the police investigating officer on his decision not to hold an identification parade and that the jury had not been directed on the breach of the Code and the possibility of prejudice to the defence of the appellant.

24. Reference was made in argument to the right to a fair trial guaranteed by art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969). That is an absolute right. But, as the Judicial Committee of the Privy Council has very recently held in *Stott v Brown* (5 December 2000, unreported), the subsidiary rights comprised within that article are not absolute, and it is always necessary to consider all the facts and the whole history of the proceedings in a particular case to judge whether a defendant's right to a fair trial has been infringed or not. If on such consideration it is concluded that a defendant's right to a fair trial has been infringed, a conviction will be held to be unsafe within the meaning of s 2 of the Criminal Appeal Act 1968. We would endorse the recent judgment of the Court of Appeal Criminal Division (Lord Woolf CJ, Steel and Butterfield JJ) in *R v Togher* (9 November 2000, unreported).

25. Since no accusation of bad faith was made against the police investigating officer in this case, and since he acted in accordance with the law as then authoritatively laid down, the appellant could have gained no benefit from cross-examination of that officer. That is a complaint without substance.

26. The appellant has a more substantial complaint that the recorder made no exercise of judgment under s 78 whether to admit evidence of Mr Tabassum's street identification or not. It is true that she did not. But the Court of Appeal had no doubt that this evidence was rightly admitted, despite the breach of para 2.3 of Code D and we agree with the Court of Appeal's conclusion:

> 'The evidence was compelling and untainted, and was supported by the evidence (which it was open to the jury to accept) of what the appellant said at the scene. It did not suffer from such problems or weaknesses as sometimes attend evidence of this kind: as, for example, where the suspect is already visibly in the hands of the police at the moment he is identified to them by the complainant.' (See [1999] 2 Cr App R 501 at 517.)

In this case there were in effect two informal identifications, one when the appellant spat at the passing car and a second when Mr Tabassum identified the appellant to the police.

27. The appellant also has a substantial complaint that the recorder did not direct the jury that there had been a breach of the Code nor give any direction on the effect of that breach. It is in our judgment important that the position should be clear. In any case where a breach of Code D has been established but the trial judge has rejected an application to exclude evidence to which the defence objected because of that breach, the trial judge should in the course of summing up to the jury: (a) explain that there has been a breach of the Code and how it has arisen, and (b) invite the jury to consider the possible effect of that breach. The Court of Appeal has so ruled on many occasions, and we approve those rulings (see, for example *R v Quinn* [1995] 1 Cr App R 480 at 490). The terms of the appropriate direction will vary from case to case and breach to breach. But if the breach is a failure to hold an identification parade when required by para 2.3 of Code D, the jury should ordinarily be told that an identification parade enables a suspect to put the reliability of an eye-witness's identification to the test, that the suspect has lost the benefit of that safeguard and that the jury should take account of that fact in its assessment of the whole case, giving it such weight as it thinks fair. In cases where there has been an identification parade with the consent of the suspect, and the eye witness has identified the suspect, in circumstances involving no breach of the Code, the trial judge will ordinarily tell the jury that they can view the identification at the parade as strengthening the prosecution case but may also wish to alert the jury to the possible risk that the eye witness may have identified not the culprit who committed the crime but the suspect identified by the same witness on the earlier occasion.

28. It remains to consider whether the recorder's failure to direct the jury on the breach of para 2.3 of Code D and its consequences infringed the appellant's right to a fair trial or rendered his conviction unsafe. On this question we are of the same opinion as the Court of Appeal which said ([1999] 2 Cr App R 501 at 518–519):

> 'In the present case, however, in our judgment the conviction is not rendered unsafe by the Recorder's exiguous reference to the fact that no

a parade was held. As we have already said, the evidence of street identification was compelling and untainted. It would be wholly artificial to suppose that a reasonable jury might have taken a different view if they had been told that the appellant had been deprived of the chance that the complainant might not have picked out the appellant on a parade.'

b Again, we bear in mind that there were in effect two informal identifications.

29. The circumstances of this case do not lead us to regard the appellant's trial as unfair or his conviction as unsafe.

Appeal dismissed.

Kate O'Hanlon Barrister.

Designers Guild Ltd v Russell Williams (Textiles) Ltd

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD MILLETT AND LORD SCOTT OF FOSCOTE

23, 24 OCTOBER, 23 NOVEMBER 2000

Copyright – Infringement – Artistic work – Fabric design – Claimant alleging that defendant's fabric design infringing copyright in its own design – Judge finding that defendant had copied claimant's design and that copying had been in relation to substantial part – Defendant not challenging judge's finding on copying but Court of Appeal reversing judge's conclusion on substantiality – Whether Court of Appeal entitled to interfere with judge's conclusion.

The claimant, DGL, brought proceedings against the defendant, RWT, alleging that a fabric design produced by the latter infringed the copyright in one of its own designs. At trial, the judge, relying primarily on the similarities between the two designs, concluded that RWT had copied DGL's design. He further concluded that the copying had been in relation to a substantial part of the copyright work and accordingly upheld DGL's claim. On its appeal, RWT did not challenge the judge's finding of copying but instead attacked his conclusion on substantiality. The Court of Appeal analysed the components parts of RWT's design, pointed to certain differences between it and DGL's design and concluded that the parts that had been copied did not amount to a substantial part. Accordingly, the appeal was allowed, and DGL appealed to the House of Lords.

Held – It was not for a Court of Appeal to embark on the issue of substantiality afresh in the manner of a first instance court by making original findings of fact. Rather, as an appellate court it should review findings already made. Unless, therefore, the judge had misdirected himself there was no ground for interfering with his conclusion. In the instant case, there was no ground for interfering with the judge's conclusion. Moreover, the Court of Appeal had erred by analysing the individual features of the two designs and highlighting certain dissimilarities, and it had not given effect to the judge's unchallenged conclusion that the similarities between the two designs were so marked as to warrant a finding that one had been copied from the other. While the finding of copying did not in theory conclude the issue of substantiality, it was almost bound to do so on the facts. Accordingly, the appeal would be allowed. (see p 701 *f*, p 702 *d* to *f*, p 705 *a g*, p 707 *d* to *g*, p 708 *c d*, p 709 *j*, p 717 *g h* and p 718 *a e*, post).

Notes

For infringing act in relation to substantial part of work, see 9(2) *Halsbury's Laws* (4th edn reissue) para 320.

Cases referred to in opinions

Biogen Inc v Medeva plc (1996) 38 BMLR 149, HL.

Francis Day & Hunter Ltd v Bron (t/a Delmar Publishing Co) [1963] 2 All ER 16, [1963] Ch 587, [1963] 2 WLR 868, CA.

Kenrick & Co v Lawrence & Co (1890) 25 QBD 99.
Kleeneze Ltd v DRG (UK) Ltd [1984] FSR 399.
Ladbroke (Football) Ltd v William Hill (Football) UK Ltd [1964] 1 All ER 465, [1964] 1 WLR 273, HL.
LB (Plastics) Ltd v Swish Products Ltd [1979] RPC 551, HL.
Norowzian v Arks Ltd (No 2) [1999] IP & T 223, CA.
Pro Sieben Media AG v Carlton UK Television Ltd [1999] 1 WLR 605, CA.
Warwick Film Productions Ltd v Eisinger [1967] 3 All ER 367, [1969] Ch 508, [1967] 3 WLR 1599.

Appeal

The plaintiff, Designers Guild Ltd (DGL), appealed with permission of the Appeal Committee of the House of Lords given on 7 December 1999 from the decision of the Court of Appeal (Morritt, Auld and Clarke LJJ) on 26 March 1999 ([2000] FSR 121) allowing an appeal by the defendant, Russell Williams Textiles Ltd (trading as Washington DC) (RWT), from the decision of Lawrence Collins QC, sitting as a deputy judge of the Chancery Division, on 14 January 1998 ([1998] FSR 803) upholding DGL's claim for copyright infringement against RWT. The facts are set out in the opinion of Lord Scott of Foscote.

Alastair Wilson QC and *Jonathan D C Turner* (instructed by *Taylors*, Blackburn) for DGL.
Michael Fysh QC and *Iain Purvis* (instructed by *Philip Conn & Co*, Manchester) for RWT.

Their Lordships took time for consideration.

23 November 2000. The following opinions were delivered.

LORD BINGHAM OF CORNHILL. My Lords, in common with all of your Lordships I agree that this appeal should be allowed and the judge's order restored, and I would order that the appellants, Designers Guild Ltd (DGL), have their costs before the House and in the Court of Appeal. But since there are some differences of approach among my noble and learned friends most expert in this field I venture to summarise, very shortly and simply, my own reasons for reaching the conclusion I do. For that purpose I gratefully adopt the account given by my noble and learned friend Lord Scott of Foscote of the facts and background of the case and of the judgments delivered by the judge and the Court of Appeal.

The law of copyright rests on a very clear principle: that anyone who by his or her own skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. No one else may for a season reap what the copyright owner has sown.

It is not now disputed that DGL's *Ixia* design was an original product of DGL's skill and labour. That is not to say that DGL drew no inspiration from elsewhere: 'there is no new thing under the sun'. But the design was sufficiently original to earn copyright protection.

DGL complained that Russell Williams (Textiles) Ltd (RWT), in its *Marguerite* design, had copied the *Ixia* design and so infringed its copyright. RWT strongly contested that accusation at trial, seeking to show that it had not and could not have copied the *Ixia* design. That, as I infer, was the central issue at the trial. But

the judge rejected RWT's evidence. Relying in the main on similarities, which he listed, between the *Marguerite* and *Ixia* designs, he concluded in round terms that the one had been copied from the other.

That finding did not conclude the case in favour of DGL. For, realistically recognising that no real injury is done to the copyright owner if no more than an insignificant part of the copyright work is copied, s 16(3) of the Copyright, Designs and Patents Act 1988 provides that, to infringe, an act must be done 'in relation to the work as a whole or any substantial part of it'. So the judge had to consider whether RWT had copied DGL's work as a whole or any substantial part of it. Since the judge had based his finding of copying largely on the similarity between the two designs it would have been very surprising if he had found that RWT had not copied a substantial part of DGL's *Ixia* design, but it was necessary for the judge to consider that question, and he did. He found that there had been copying of a substantial part.

While not accepting the judge's finding of copying, RWT recognised the virtual impossibility of dislodging it in the Court of Appeal and did not challenge it. RWT's challenge was accordingly directed to the judge's finding that a substantial part of the *Ixia* design had been copied. The Court of Appeal upheld this challenge. But in doing so, as it seems to me, it fell into error. First, by analysing individual features of the two designs and highlighting certain dissimilarities the court failed to give effect to the judge's conclusion, not challenged before it, that the similarities between the two designs were so marked as to warrant a finding that the one had been copied from the other. While the finding of copying did not in theory conclude the issue of substantiality, on the facts here it was almost bound to do so. Secondly, the Court of Appeal approached the issue of substantiality more in the manner of a first instance court making original findings of fact than as an appellate court reviewing findings already made and in very important respects not challenged. It was not for the Court of Appeal to embark on the issue of substantiality afresh, unless the judge had misdirected himself, which in my opinion he had not.

There was, I conclude, no ground for interfering with the judge's conclusion.

LORD HOFFMANN. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I agree with it, but in view of the fact that we are differing from the Court of Appeal, I shall give my reasons in rather greater detail.

1. THE ISSUES

There is no dispute that the plaintiff was entitled to copyright in the artwork for the fabric design *Ixia*. The infringement of which the plaintiff complained was that for the purpose of creating its own design *Marguerite* the defendant had copied a substantial part of *Ixia*. There were accordingly two main issues at the trial. First, what, if anything had the designers of *Marguerite* copied from *Ixia*. Secondly, did what had been copied amount to 'the whole or a substantial part' of *Ixia*?

2. THE FINDINGS OF THE JUDGE

On the first issue, the position taken by the defendant at the trial was that its designers had copied nothing. Mrs Aileen Williams, the director in charge of design, and Miss Ibbotson, who produced the art work under her direction, each said in evidence that they was not aware of *Ixia* at the relevant time. The judge

([1998] FSR 803) did not believe them. He found them unsatisfactory witnesses and decided that they must have copied. In coming to this conclusion, he relied first upon similarities in the design which went 'far beyond the similarities which would be expected simply from both being based on an impressionistic style or from both being based on a combination of stripes and scattered flowers and leaves'. He listed these similarities as follows (at 813):

> '1. Each fabric consists of vertical stripes, with spaces between the stripes equal to the width of the stripe, and in each fabric flowers and leaves are scattered over and between the stripes, so as to give the same general effect. 2. Each is painted in a similar neo-Impressionistic style. Each uses a brush-stroke technique, *i.e.* the use of one brush to create a stripe, showing the brush marks against the texture. 3. In each fabric the stripes are formed by vertical brush strokes, and have rough edges which merge into the background. 4. In each fabric the petals are formed with dryish brushstrokes and are executed in a similar way (somewhat in the form of a comma). 5. In each fabric parts of the colour of the stripes show through some of the petals. [Technically called the "resist effect".] 6. In each case the centres of the flower heads are represented by a strong blob, rather than by a realistic representation. 7. In each fabric the leaves are painted in two distinct shades of green, with similar brush strokes, and are scattered over the design.'

Secondly, the judge relied upon the inferences to be drawn from the fact that the defendant's designers had given a false explanation of the provenance of their design. Thirdly, he relied as similar fact evidence upon the fact that they had, as he found, copied the design of another competitor and falsely denied doing so.

On the second issue, the judge summarised the submissions of counsel for the defendant. This took the traditional form of dissecting the *Ixia* design into its component elements, assigning reasons why each element (such as 'stripes', 'flowers' etc) lacked originality or had in some respects not been copied and concluding that those elements which had been copied were not a substantial part. The judge rejected the submission. He said (at 828) that the whole work should be considered:

> 'It is the combination of the flowers and the stripes, the way in which they related to each other, the way in which they were painted, and the way in which there was a "resist" effect which makes the overall combination the copying of a substantial part.'

3. THE COURT OF APPEAL

In the Court of Appeal ([2000] FSR 121) Mr Fysh QC, for the defendant, conceded that he could not challenge the judge's findings on copying. Only the issue of substantiality therefore remained alive. The Court of Appeal said that substantiality was a question of judgment on which they were in as good a position to form a view as the judge. They disagreed with him for three reasons.

(a) *Visual comparison*

Morritt LJ said (at 133 (para 30)) that when he compared the two designs, it appeared to him that the one did not involve the copying of a substantial part of the other: '... they just do not look sufficiently similar.' Clarke LJ agreed.

(b) *Dissection*

Morritt LJ (with whom Auld and Clarke LJJ agreed) analysed the component parts of the design. Although both had stripes and flowers, the layout of the flowers in *Marguerite* was different and the flowers themselves were not copies. That left only the idea of stripes and flowers, which was not original. The brushwork and resist effect involved the use of 'comparable techniques' but the visual results were in certain respects different. The effects which were the same did not add up to a substantial part.

(c) *Ideas rather than expression*

Morritt LJ (at 135 (para 37)) said that the plaintiff was not entitled to a monopoly in ideas. The defendant copied 'the idea of Ixia', they 'adopted the same techniques' but did not copy a substantial part of the expression of the idea.

My Lords, I must examine each of these three reasons.

4. VISUAL COMPARISON

Mr Fysh was the author of the suggestion that the question of substantiality could be resolved by a visual comparison between the two fabrics. He said that the question of substantiality was one of impression. That, in a sense, is true. When judges say that a question is one of impression, they generally mean that it involves taking into account a number of factors of varying degrees of importance and deciding whether they are sufficient to bring the whole within some legal description. It is often difficult to give precise reasons for arriving at a conclusion one way or the other (apart from an enumeration of the relevant factors) and there are borderline cases over which reasonable minds may differ. But the first step in trying to answer any question (whether of impression or otherwise) is to be clear about what the question is. In the present case, it is whether the features which the judge found to have been copied from *Ixia* formed a substantial part of *Ixia* as an artistic work. That is certainly a question of judgment or impression. But why, in answering that question, should it be relevant to consider whether *Ixia* did or did not look like *Marguerite*?

The similarities between *Ixia* and *Marguerite* were of course highly relevant to the question of whether there had been copying and, if so, what features had been copied. They were the foundation upon which the judge constructed his conclusion that the features I have enumerated had been copied. But once those features have been identified, the question of whether they formed a substantial part of the plaintiff's design cannot be decided by revisiting the question of whether it looks like the defendant's. The more I listened to Mr Fysh's submissions as to why it was relevant to compare *Ixia* with *Marguerite*, the more it seemed to me that he was skilfully trying to undermine his concession that he could not challenge the judge's finding that certain features of the design had been copied. Mr Alastair Wilson QC met this submission on its own ground by producing two artistically draped samples of the two designs in similar colourways. I am bound to say that, at some distance, they looked remarkably similar to me. But, in a case in which there is no longer an issue over what has been copied, I do not regard this as a relevant exercise. In my respectful opinion the Court of Appeal erred in principle by allowing itself to be distracted from the statutory question, which was whether the elements found as a fact to have been copied formed a substantial part of *Ixia*.

5. DISSECTION

The exercise in dissection also, as it seems to me, involved two errors. First, it ignored substantial parts of the judge's findings on what had been copied and, secondly, it dealt with the copied features piecemeal instead of considering, as the judge had done, their cumulative effect. Thus the judge's findings on copying were by no means confined to the notion of stripes and flowers. There are many ways of depicting both stripes and flowers and the judge was obviously impressed by the fact that the defendant had been unable to find any other stripe and flower pattern which resembled *Ixia* or *Marguerite* in anything like the degree to which they resembled each other. With the assistance of the expert evidence of Mr Victor Herbert, a design consultant, the judge identified the additional visual similarities as arising from such matters as the brushwork, the resist effect and the loose arrangement of freely drawn leaves and flowers. These features, he found, had been copied and cumulatively constituted a substantial part of the work.

My Lords, here again it seems to me that Mr Fysh's invitation to the Court of Appeal to reduce the copied elements to the mere notion of stripes and flowers amounted to an attempt to withdraw his concession that he could not challenge the judge's findings on copying. The Court of Appeal dismissed some of the elements which the judge found to have been copied as 'technique'. That is true. The creation of artistic work involves having ideas and using technique to express them. But that cannot detract from the fact that the results of the use of the techniques were visual effects forming part of the artistic work. They were what produced the distinctive impression of looseness and boldness combined with lightness and fragility which the designer wished to achieve.

The Court of Appeal also dismissed the significance of these copied elements on the ground that the visual effects they produced as applied to the two designs were in certain respects different. For example, the underlying stripe colour showing through the petals in *Ixia* made them look translucent whereas in *Marguerite* they looked perforated. But this seems to me the same fallacy as that involved in visual comparison. When one is considering the question of substantiality, it is no longer relevant to examine in what respects the two designs are different. The difference between translucency and perforation may have led to the conclusion that the defendant did not copy its resist effect from the plaintiff. But once it is concluded that it did, the only question is whether the resist effect as such, together with all the other copied elements, added up to a substantial part of the plaintiff's work.

If there had been no finding that anything had been copied except the notion of flowers and stripes, the conclusion of the Court of Appeal would have been unexceptionable. But this involved ignoring the findings of fact, both in their detail and their cumulative effect.

6. IDEAS AND EXPRESSION

It is often said, as Morritt LJ said in this case, that copyright subsists not in ideas but in the form in which the ideas are expressed. The distinction between expression and ideas finds a place in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) (Marakesh, 15 April 1994; TS 10 (1996); Cm 3046) (OJ 1994 L336 p 214), to which the United Kingdom is a party (see art 9.2: 'Copyright protection shall extend to expressions and not to ideas ...'). Nevertheless, it needs to be handled with care. What does it mean? As Lord Hailsham of St Marylebone said in *LB (Plastics) Ltd v Swish Products Ltd* [1979] RPC 551 at 629, 'it all depends on what you mean by "ideas"'.

Plainly there can be no copyright in an idea which is merely in the head, which has not been expressed in copyrightable form, as a literary, dramatic, musical or artistic work. But the distinction between ideas and expression cannot mean anything so trivial as that. On the other hand, every element in the expression of an artistic work (unless it got there by accident or compulsion) is the expression of an idea on the part of the author. It represents her choice to paint stripes rather than polka dots, flowers rather than tadpoles, use one colour and brush technique rather than another, and so on. The expression of these ideas is protected, both as a cumulative whole and also to the extent to which they form a 'substantial part' of the work. Although the term 'substantial part' might suggest a quantitative test, or at least the ability to identify some discrete part which, on quantitative or qualitative grounds, can be regarded as substantial, it is clear upon the authorities that neither is the correct test. *Ladbroke (Football) Ltd v William Hill (Football) UK Ltd* [1964] 1 All ER 465, [1964] 1 WLR 273 establishes that substantiality depends upon quality rather than quantity ([1964] 1 All ER 465 at 469, 473, 477, 481, [1964] 1 WLR 273 at 276, 283, 288, 293 per Lord Reid, Lord Evershed, Lord Hodson and Lord Pearce respectively). And there are numerous authorities which show that the 'part' which is regarded as substantial can be a feature or combination of features of the work, abstracted from it rather than forming a discrete part. That is what the judge found to have been copied in this case. Or to take another example, the original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original. If one asks what is being protected in such a case, it is difficult to give any answer except that it is an idea expressed in the copyright work.

My Lords, if one examines the cases in which the distinction between ideas and the expression of ideas has been given effect, I think it will be found that they support two quite distinct propositions. The first is that a copyright work may express certain ideas which are not protected because they have no connection with the literary, dramatic, musical or artistic nature of the work. It is on this ground that, for example, a literary work which describes a system or invention does not entitle the author to claim protection for his system or invention as such. The same is true of an inventive concept expressed in an artistic work. However striking or original it may be, others are (in the absence of patent protection) free to express it in works of their own (see *Kleeneze Ltd v DRG (UK) Ltd* [1984] FSR 399). The other proposition is that certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of the work. *Kenrick & Co v Lawrence & Co* (1890) 25 QBD 99 is a well-known example. It is on this ground that the mere notion of combining stripes and flowers would not have amounted to a substantial part of the plaintiff's work. At that level of abstraction, the idea, though expressed in the design, would not have represented sufficient of the author's skill and labour as to attract copyright protection.

Generally speaking, in cases of artistic copyright, the more abstract and simple the copied idea, the less likely it is to constitute a substantial part. Originality, in the sense of the contribution of the author's skill and labour, tends to lie in the detail with which the basic idea is presented. Copyright law protects foxes better than hedgehogs. In this case, however, the elements which the judge found to have been copied went well beyond the banal and I think that the judge was amply justified in deciding that they formed a substantial part of the originality of the work.

7. THE APPELLATE FUNCTION

The question of substantiality is one of mixed law and fact in the sense that it requires the judge to apply a legal standard to the facts as found. It is, as I said, one of impression in that it requires the overall evaluation of the significance of what may be a number of copied features in the plaintiff's design. I think, with respect, that the Court of Appeal oversimplified the matter when they said that they were in as good a position to decide the question as the judge. I say this for two reasons.

First, although the question did not depend upon an assessment of the credibility of witnesses, there seems to me no doubt that a judge may obtain assistance from expert evidence in identifying those features of an artistic work which enable it to produce a particular visual effect. The plaintiff's expert Mr Herbert described his expertise as 'the art of visual literacy'. This seems to me to be right. So I think that the judge, having heard Mr Herbert, was well placed to assess the importance of the plaintiff's designer's brush strokes, resist effect and so forth in the overall artistic work. The Court of Appeal, on the other hand, adopted a reductionist approach which ignored these elements.

Secondly, because the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle (see *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605 at 612–613). I agree with Buxton LJ in *Norowzian v Arks Ltd (No 2)* [1999] IP & T 223 at 230–231 when he said:

> '... [W]here it is not suggested that the judge has made any error of principle a party should not come to the Court of Appeal simply in the hope that the impression formed by the judges in this court, or at least by two of them, will be different from that of the trial judge.'

In my opinion the judge made no error of principle. His decision that the copied features formed a substantial part of the work should therefore not have been reversed. I would allow the appeal.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I agree with it, and for the reasons which he has given I too would allow the appeal.

LORD MILLETT. My Lords, both parties design and sell fabrics and wallpapers. The plaintiffs brought proceedings against the defendants for infringement of the copyright in one of their designs. The trial judge (Mr Lawrence Collins QC) found that the defendants had prior access to the copyright work and that their design reproduced many of its features. He rejected the defendants' evidence of independent origin, and found that their design was copied from and reproduced a substantial part of the copyright work. He accordingly gave judgment for the plaintiffs (see [1998] FSR 803).

The defendants appealed to the Court of Appeal, but they did so on a very narrow ground. They abandoned most of the grounds in their notice of appeal, and did not challenge the judge's findings of fact, in particular that the defendants' design was copied from and reproduced features of the copyright work. They contented themselves with challenging his conclusion that what they had taken was a substantial part of the copyright work.

The Court of Appeal began by making a visual comparison of the two designs. Their initial reaction was that it did not look as if the defendants' design involved the copying of a substantial part of the copyright work. As Morritt LJ put it ([2000] FSR 121 at 133 (para 30)): 'On the broadest level they just do not look sufficiently similar.'

Recognising that it would not be right to reach a concluded view 'on so subjective and unanalytical approach alone', they proceeded to conduct a detailed analysis of the judge's findings of fact and recorded the many differences of detail in those features of the defendants' design which the judge had found to have been copied from the copyright work. This only served to confirm their initial impression. They concluded that, while the defendants had copied the idea of the copyright work and adopted the same techniques, they had not copied a substantial part of the expression of the idea. They accordingly allowed the defendants' appeal.

It is difficult to avoid the impression that the Court of Appeal were not persuaded that the defendants had copied the copyright work at all. Unable to reverse the judge's unchallenged findings that they had, they thought that if the defendants had copied any features of the copyright work they could not have copied very much. By adopting this approach they not only went behind the judge's unchallenged findings of fact, which they were not entitled to do, but rejected his finding of substantiality which, being essentially a matter of impression, an appellate court should always be very slow to do.

If this were all, I doubt that I would have wished to add anything to what my noble and learned friends have said. But I think that the Court of Appeal erred in principle in the approach which they adopted. In particular, I think that they misunderstood the function of a visual comparison of the two works in a case concerned with artistic copyright and the stage at which such a comparison should be undertaken.

It must be borne in mind that this is an action for infringement of copyright. It is not an action for passing off. The gist of an action for passing off is deceptive resemblance. The defendant is charged with deceiving the public into taking his goods as and for the goods of the plaintiff. A visual comparison of the competing articles is often all that is required. If the overall impression is that 'they just do not look sufficiently similar' then the action will fail.

An action for infringement of artistic copyright, however, is very different. It is not concerned with the appearance of the defendant's work but with its derivation. The copyright owner does not complain that the defendant's work resembles his. His complaint is that the defendant has copied all or a substantial part of the copyright work. The reproduction may be exact or it may introduce deliberate variations—involving altered copying or colourable imitation as it is sometimes called. Even where the copying is exact the defendant may incorporate the copied features into a larger work much and perhaps most of which is original or derived from other sources. But while the copied features must be a substantial part of the copyright work, they need not form a substantial part of the defendant's work (see *Warwick Film Productions Ltd v Eisinger* [1967] 3 All ER 367, [1969] Ch 508). Thus the overall appearance of the defendant's work may be very different from the copyright work. But it does not follow that the defendant's work does not infringe the plaintiff's copyright.

The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The court undertakes a visual comparison of the

two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. It is at this stage that similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas. If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying.

Even at this stage, therefore, the inquiry is directed to the similarities rather than the differences. This is not to say that the differences are unimportant. They may indicate an independent source and so rebut any inference of copying. But differences in the overall appearance of the two works due to the presence of features of the defendant's work about which no complaint is made are not material. In the present case the disposition of the flowers and (except in one instance) the colourways of the defendants' design are very different from those of the plaintiffs' design. They were not taken from the copyright work, and the plaintiffs make no complaint in respect of them. They make a significant difference to the overall appearance of the design. But this is not material where the complaint is of infringement of copyright and not passing off.

Once the judge has found that the defendants' design incorporates features taken from the copyright work, the question is whether what has been taken constitutes all or a substantial part of the copyright work. This is a matter of impression, for whether the part taken is substantial must be determined by its quality rather than its quantity. It depends upon its importance to the copyright work. It does not depend upon its importance to the defendants' work, as I have already pointed out. The pirated part is considered on its own (see *Ladbroke (Football) Ltd v William Hill (Football) UK Ltd* [1964] 1 All ER 465 at 481, [1964] 1 WLR 273 at 293 per Lord Pearce) and its importance to the copyright work assessed. There is no need to look at the infringing work for this purpose.

The Court of Appeal were concerned only with this second stage. They were not entitled to reverse the judge's finding that the defendants' design reproduced features of the copyright work, nor his identification of the features in question. The only issue was whether those features represented a substantial part of the copyright work. A visual comparison of the two designs was not only unnecessary but likely to mislead.

My noble and learned friend Lord Scott of Foscote has drawn attention to the differences between the copying of a discrete part of the copyright work and the altered copying of the whole, or the copying with or without modifications of some but not all the features of the copyright work. The distinction is not material in the present case. Whether or not it is alleged that a discrete part of the copyright work has been taken, the issues of copying and substantiality are treated as separate questions. Where, however, it is alleged that some but not all the features of the copyright work have been taken, the answer to the first question will almost inevitably answer both, for if the similarities are sufficiently numerous or extensive to justify an inference of copying they are likely to be sufficiently substantial to satisfy this requirement also.

For these reasons, as well as those given by my noble and learned friends Lord Hoffmann and Lord Bingham of Cornhill, I would allow the appeal.

LORD SCOTT OF FOSCOTE. My Lords, both the appellant, Designers Guild Ltd (DGL) and the respondent, Russell Williams (Textiles) Ltd (RWT), design and sell fabrics. The issue in this litigation is whether RWT's *Marguerite* design is an infringing copy of DGL's *Ixia* design. The trial judge, Mr Lawrence Collins QC, sitting as a deputy judge of the Chancery Division, held that it was ([1998] FSR 803). The Court of Appeal ([2000] FSR 121) held that it was not.

The Ixia design

Of the two designs *Ixia* came first. It was produced in 1994, in art form, by Helen Burke, a designer employed by DGL. From Helen Burke's design the *Ixia* fabric was produced. The design, in its artwork form, consisted of vertical stripes of alternating pink and pale yellow and with flowers scattered haphazardly across the stripes. The flowers consisted of four, and sometimes three, white petals with a centre stamen in a bold deep red and with green leaves in the vicinity of, but not actually connected to, each set of white petals. The stripes were painted with rough edges and rough brushwork. The flower petals and the leaves were painted in an impressionistic style with the colour of the stripes showing through the petals. Indeed the design as a whole was impressionistic in character. When the artwork design was transposed on to fabric there were some differences. Three distinct versions of stripes were produced. One version alternated pink with pale yellow as the artwork had done. The other two alternated deep blue stripes with very pale blue stripes and turquoise stripes with very pale blue stripes. The pale yellow and the pale blue stripes on the fabric do not, unlike the artwork pale yellow stripes, show the brushwork. But there were no other significant differences between the stripes on the fabric and the stripes on the artwork. The fabric stripes, whichever of the three colourways, pink, blue or turquoise, one looks at, give the impression as do the artwork stripes of rough, impressionistic brushwork, with the underlying colour of the fabric showing through and with rough edges to the stripes. The flower petals, the stamen and the leaves on the fabric have no significant differences from their artwork counterparts, save that on the blue colourway design the stamen are turquoise instead of red. It is accepted, that the *Ixia* design is, for copyright purposes, an original artistic work and that the copyright is owned by DGL.

Fabric with the *Ixia* designs was included by DGL in its 1995 Orientalis collection. DGL distributed pattern books of its collection, some 1,500 or thereabouts, to its wholesale and retail customers and the *Ixia* fabrics went on sale at DGL's shop in the King's Road, London, on 1 September 1995. The fabrics were shown at a trade fair in London on 1 October 1995. The trade fair was attended by Mrs Williams, a director of RWT. Mrs Williams works with RWT's designers on the design of their textile patterns. The evidence of the marketing of the *Ixia* fabrics led the judge to conclude that, by October or November 1995 when RWT's *Marguerite* design was created, RWT had had the opportunity to copy.

The litigation

In September 1996 DGL was alerted to the presence at a trade fair in Utrecht of fabrics with the *Marguerite* design. An examination of these fabrics led DGL to believe that the *Marguerite* design was a copy of the *Ixia* design. Letters passed between the parties' respective solicitors and litigation then followed.

The deputy judge, in a conspicuously careful judgment, came to the conclusion that the *Marguerite* design had been copied from the *Ixia* design. His conclusion of copying was not challenged in the Court of Appeal and is not challenged before

your Lordships. The point taken in the Court of Appeal, successfully as it turned out, was a substantiality point. Section 16(3) of the Copyright, Designs and Patents Act 1988 provides that:

> 'References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it—(a) in relation to the work as a whole or any substantial part of it, and (b) either directly or indirectly ...'

The Court of Appeal was persuaded that although there had been copying—as I have said, the deputy judge's finding of fact to that effect was not challenged—the copying did not extend to the copying of a substantial part of *Ixia*. Morritt LJ, who gave the leading judgment in the Court of Appeal, succinctly stated RWT's case thus ([2000] FSR 121 at 127 (para 12)):

> '[RWT's] case on this appeal is quite simply that notwithstanding such copying and notwithstanding such similarities the claim that RWT infringed the copyright of DGL in the painting of Ixia fails because there was no copying of the whole of the painting of Ixia and such copying as there was of part of the painting of Ixia did not extend to a substantial part.'

In assessing the manner in which this issue of substantiality should be approached and whether the Court of Appeal's answer on the issue was right, it is necessary, in my opinion, to start with the judge's finding that copying was established. What was it that he found to have been copied? Clarity as to the answer to that question must precede the question as to whether what was copied was the whole or a substantial part of the copyright work.

The finding of copying

The judge came to the conclusion of copying via a consideration of the similarities between the two designs, a recognition of the opportunity to copy that RWT had had, and a consideration of RWT's evidence as to the independent provenance of the *Marguerite* design.

The *Marguerite* design, like the *Ixia* design, is based on vertical stripes in alternating colours and with flowers and associated stalks and leaves scattered across the stripes. The flower petals, like those on the *Ixia* design, are white. The stalks and leaves are two-tone green. As with the *Ixia* design, the *Marguerite* design was reproduced on fabric in different versions with different colourways. Each version has pale yellow stripes. The stripes that alternate with the pale yellow stripes are either pink, blue, green or orange. A difference between the *Ixia* fabric and the *Marguerite* fabric is that on *Marguerite* the pale yellow stripes, as well as the alternate stripes, show brushwork lines. On the *Ixia* fabric it is only the alternate colour stripes that show the brushwork lines. The *Marguerite* flower petals and stalks and leaves show, when compared with those on *Ixia*, both similarities and differences.

On *Marguerite* the white petals are painted more boldly, or less delicately, than those on *Ixia* but, still, like those on *Ixia*, the underlying stripe colour shows through the petals. The *Marguerite* stamen on the pink colourway design are of a somewhat deeper shade of red than those on the *Ixia* pink colourway design. On the *Ixia* fabric with a blue colourway the stamen are turquoise; on the fabric with a turquoise colourway, the stamen are the same shade of red as on the pink colourway fabric. On each of the *Marguerite* fabrics, other than that with a pink colourway, the stamen are biscuit coloured. The leaves on the *Ixia* fabric are two-tone green. The stalks and leaves on the *Marguerite* fabric, too, are

two-tone green of much the same shades. But the latter are more firmly and less impressionistically drawn than the former.

The judge came to the following conclusion on similarity:

> 'In my judgment, [DGL] has clearly shown relevant similarity. The similarities are apparent. They go far beyond the similarities which would be expected simply from both being based on an impressionistic style or from both being based on a combination of stripes and scattered flowers and leaves.' (See [1998] FSR 803 at 815.)

He identified seven similarities which led him to that conclusion. He described them as follows (at 813):

> '1. Each fabric consists of vertical stripes, with spaces between the stripes equal to the width of the stripe, and in each fabric flowers and leaves are scattered over and between the stripes, so as to give the same general effect. 2. Each is painted in a similar neo-Impressionistic style. Each uses a brush-stroke technique, *i.e.* the use of one brush to create a stripe, showing the brush marks against the texture. 3. In each fabric the stripes are formed by vertical brush strokes, and have rough edges which merge into the background. 4. In each fabric the petals are formed with dryish brushstrokes and are executed in a similar way (somewhat in the form of a comma). 5. In each fabric parts of the colour of the stripes show through some of the petals. 6. In each case the centres of the flower heads are represented by a strong blob, rather than by a realistic representation. 7. In each fabric the leaves are painted in two distinct shades of green, with similar brush strokes, and are scattered over the design.'

He referred also to the differences between the two designs:

> 'The overall impression is very similar, but there are differences. The *Ixia* design is smaller and more delicate and the detail is different. In *Marguerite* the effect of the stripes showing through the petals is not as marked as it is in *Ixia*. The leaves in *Marguerite* are distinctly less impressionistic than those in *Ixia*. The impression of similarity is more marked on a comparison of the pink colourways.'

Having expressed his conclusion on the rival fabrics' similarities and having found that RWT personnel had had an opportunity to copy *Ixia*, the judge turned his attention to RWT's evidence as to the independent provenance of their *Marguerite* design. This evidence was given by Miss Ibbotson, the designer of the *Marguerite* design, and Mrs Williams, a director of RWT who had worked with Miss Ibbotson in producing the *Marguerite* design. Their evidence was that the *Marguerite* flowers had been derived from an artwork design, referred to as 'Open Cherry Blossom', created by Miss Ibbotson in October 1995. Variations had been incorporated into the Open Cherry Blossom flower design which had led to the *Marguerite* flower design. This flower design had then been added to a number of colourways of which Mrs Williams had chosen the four to which I have already referred. Both Miss Ibbotson and Mrs Williams said that at the time the *Marguerite* design was being developed they were not aware of the *Ixia* design. The judge summed up the position as follows (at 818):

> 'The essence therefore of the defence is that (a) neither Mrs Williams nor Miss Ibbotson knew of the *Ixia* design when the *Marguerite* design was

a produced and executed; (b) any similarities between *Ixia* and *Marguerite* are coincidental; and (c) the *Marguerite* design evolved from the floral part of the *Open Cherry Blossom* design being copied onto the acetate for use on muslin, or to show how *Open Cherry Blossom* would work with white flowers.'

But the judge rejected the evidence of Miss Ibbotson and Mrs Williams. He b described Miss Ibbotson (at 819) as 'a very unsatisfactory witness' and said: '... she and Mrs Williams, far from being helpful and frank, were content to deny the obvious.' They had given evidence that the origin of *Marguerite* was an acetate floral design that, in October 1995, had been copied from Open Cherry Blossom in order to enable the floral motif on Open Cherry Blossom to be used for printing white flowers on to muslin.

c The judge had been troubled about this evidence, both because of differences between the flowers on the acetate design and the Open Cherry Blossom flowers and also because the flowers on the acetate had certain characteristics which appeared on the *Ixia* flowers but not on the Open Cherry Blossom flowers. He expressed the conclusion (at 820) that: '... the explanation was designed to d provide a false provenance for the floral part of the *Marguerite* design, and to distance it from the creation of the striped artwork.'

The judge rejected, therefore, the evidence that Miss Ibbotson and Mrs Williams had given of the provenance of the *Marguerite* design. He rejected also Mrs Williams' evidence that she had been unaware of the *Ixia* design. He said:

e 'In my judgment the effect of the (1) many and obvious similarities; (2) the opportunity to copy; (3) the complementary nature of the acetate and the striped artwork; and (4) the false provenance given to the acetate, is that [DGL] has convincingly discharged the burden of proving that [RWT] copied *Ixia*.'

The judge's finding of copying, accepted before the Court of Appeal and before f your Lordships, and the manner in which that finding was arrived at, are, in my opinion, of fundamental importance in reviewing the reversal by the Court of Appeal of his decision. The finding of copying cannot be accurately described as a finding of the copying of a part of *Ixia*. In the passage cited above the judge said that DGL had proved that RWT 'copied *Ixia*'. He did not find that the *Ixia* stripes had been copied, or that the *Ixia* flowers or leaves had been copied or that the g colours of the ingredients of the design had been copied, or that any specific feature of *Ixia* had been copied. He simply found that the *Ixia* design had been copied. The *Ixia* design had incorporated features that, by themselves, were not original. There was nothing original about vertical stripes. Helen Burke had based her vertical stripes on fabrics appearing in various pictures painted by h Matisse. But she had brought flowers, leaves and vertical stripes together in a design that was accepted to be an original artistic work. The judge, rejecting the evidence of Miss Ibbotson and Mrs Williams, found that the acetate, with the flowers, stalks and leaves, and the vertical stripe work of the *Marguerite* design had been created together for the purpose of producing the *Marguerite* design as a copy j of the *Ixia* design. So, in a case of this sort what part does the concept of substantiality have to play?

Substantiality

Section 16(3) of the 1988 Act says that copying a copyright work is a copyright infringement if the copying is of 'the work as a whole or any substantial part of it'. Section 16(3) may come into play in two quite different types of case. One

type of case is, obviously, where an identifiable part of the whole, but not the whole, has been copied. For example, only a section of a picture may have been copied, or only a sentence or two, or even only a phrase, from a poem or a book, or only a bar or two of a piece of music, may have been copied (see the examples given at pp 88–89 (para 2–102) of Laddie, Prescott and Vitoria *The Modern Law of Copyright and Designs* (2nd edn, 1995) (which, for convenience, I will refer to as '*Laddie*'). In cases of that sort, the question whether the copying of the part constitutes an infringement depends on the qualitative importance of the part that has been copied, assessed in relation to the copyright work as a whole. In *Ladbroke (Football) Ltd v William Hill (Football) UK Ltd* [1964] 1 All ER 465 at 469, [1964] 1 WLR 273 at 276 Lord Reid said: '... the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken.'

The present case is not a case of that type. The judge did not identify any particular part of *Ixia* and hold that that part had been copied. His finding of copying related to *Ixia* as a whole.

The other type of case in which a question of substantiality may become relevant is where the copying has not been an exact copying of the copyright work but a copying with modifications. This type of copying is referred to in *Laddie* as 'altered copying'. A paradigm of this type of case would be a translation of a literary work into some other language, or the dramatisation of a novel. The translation, or the play or film, might not have a single word in common with the original. But, assuming copyright existed in the original, the 'copy' might well, and in the case of a word by word translation certainly would, constitute an infringement of copyright.

The present case is an 'altered copying' case. Helen Burke put together a number of artistic ideas derived from various sources in order to produce her *Ixia* design, an original artistic design as it is accepted to be. Miss Ibbotson and Mrs Williams, as the judge found, copied the *Ixia* design in order to produce their *Marguerite* design. But they did so with modifications. The *Marguerite* design is not an exact copy of *Ixia*. Nor is any specific part of the *Marguerite* design an exact copy of any corresponding part of the *Ixia* design. It is an altered copy.

The question, then, where an altered copy has been produced, is what the test should be in order to determine whether the production constitutes a copyright infringement. If the alterations are sufficiently extensive it may be that the copying does not constitute an infringement at all. The test proposed in *Laddie* (pp 92–93 (para 2–108)) to determine whether an altered copy constitutes an infringement is: 'Has the infringer incorporated a substantial part of the independent skill, labour etc contributed by the original author in creating the copyright work ...?'

My Lords, I think this is a useful test, based as it is on an underlying principle of copyright law, namely, that a copier is not at liberty to appropriate the benefit of another's skill and labour.

My noble and learned friend Lord Millett has made the point that once copying has been established, the question of substantiality depends on the relationship between what has been copied on the one hand and the original work on the other, similarity no longer being relevant. My Lords, I respectfully agree that that would be so in the first type of case. But in an altered copying case, particularly where the finding of copying is dependant, in the absence of direct evidence, upon the inferences to be drawn from the extent and nature of the similarities between the two works, the similarities will usually be determinative not only of

the issue of copying but also of the issue of substantiality. And even where there is direct evidence of copying, as, for example, where it is admitted that the copier has produced his 'copy' with the original at his elbow, the differences between the original and the 'copy' may be so extensive as to bar a finding of infringement. It is not a breach of copyright to borrow an idea, whether of an artistic, literary or musical nature, and to translate that idea into a new work. In 'altered copying' cases, the difficulty is the drawing of the line between what is a permissible borrowing of an idea and what is an impermissible piracy of the artistic, literary or musical creation of another. In drawing this line, the extent and nature of the similarities between the altered copy and the original work must, it seems to me, play a critical and often determinative role. In particular, this must be so where there is no direct evidence of copying and the finding of copying is dependant on the inferences to be drawn from the similarities. In the 'Little Spanish Town' case, *Francis Day & Hunter Ltd v Bron (t/a Delmar Publishing Co)* [1963] 2 All ER 16 at 19, [1963] Ch 587 at 610, Willmer LJ said:

> '... I do not think it could be doubted that there was material on which to base the inference that the composer of "Why" deliberately copied from "Spanish Town". Were that the right inference, I am satisfied that the degree of similarity would be sufficient to constitute an infringement of the plaintiffs' copyright.'

And Diplock LJ said:

> '... it is well established that to constitute infringement of copyright in any literary, dramatic or musical work there must be present two elements: First, there must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or adaptation of the latter; secondly, the copyright work must be the source from which the infringing work is derived.' (See [1963] 2 All ER 16 at 27, [1963] Ch 587 at 623.)

The same principles apply to artistic copyright as to literary, dramatic or musical copyright. Both Willmer and Diplock LJJ treated similarity as being relevant to the substantiality issue. *Laddie* cites the 'Little Spanish Town' case as an example of altered copying (pp 93–94 (para 2–109)).

In the present case, the similarities between *Ixia* and *Marguerite*, as found by the judge, play, in my judgment a determinative role. If the similarities between *Ixia* and *Marguerite* were so extensive and of such a nature as to justify a finding that, in the absence of acceptable evidence of an independent provenance for *Marguerite*, *Marguerite* was copied from *Ixia*, it must, in my opinion, follow that the *Marguerite* design incorporated a substantial part of the *Ixia* design. It must follow also that, in designing the *Marguerite* design, the designers incorporated a substantial part of the skill and labour of Helen Burke. The judge's finding of copying made it, in my opinion, unnecessary for him to go on to ask whether the copying was of a substantial part. But both the judge and the Court of Appeal engaged in that inquiry.

The judge did so in order to deal with arguments that had been addressed to him by Mr Geoffrey Hobbs QC, counsel for RWT at the trial. Mr Hobbs, as I read the judge's description of his argument, was arguing that the *Marguerite* white flowers had not been copied from *Ixia* but had been derived, via the acetate, from the Open Cherry Blossom design, and that, accordingly, the white

flowers should be set to one side when considering whether the *Marguerite* design had copied a substantial part of the *Ixia* design. Counsel pointed out, correctly, that the *Ixia* vertical stripes were not original but had been derived from Matisse and that the *Marguerite* vertical stripes differed geometrically and in colour from the *Ixia* stripes. It followed, counsel submitted, that the copying of whatever was original in the *Ixia* design could not be said to be a substantial part of that design.

The judge, in rejecting that argument, said ([1998] FSR 803 at 828): 'In my judgment there has been copying of a substantial part.' He went on to emphasise that it was 'the whole work' that had to be looked at 'to determine whether the alleged infringing material [had] adopted the essential features and substance of the original'. He said:

> 'The right approach is to look at the end result of the acetate, the striped artwork, the modifications made by Mrs Williams (especially making the stripes less harsh) and her selection of colourways, and the printed fabric. That end result is an infringement of the painting on which *Ixia* was based.'

In my opinion, the judge's approach in comparing *Ixia* ('the whole work') with *Marguerite* ('the end result') was correct. And having made the comparison he expressed his conclusion that: 'It is the *design* which was copied and has been reproduced.' (My emphasis.) So, what had been copied was the design, and the design was a substantial part. In dealing in this way with the 'substantial part' argument that had been addressed to him by counsel, the judge was re-affirming his conclusion that the *Ixia* design had been copied.

The Court of Appeal's approach to the 'substantial part' issue

In para 12 of his judgment ([2000] FSR 121 at 127), Morritt LJ recorded that counsel for RWT had accepted that he could not challenge the judge's findings on copying and that the similarities between the two fabrics described by the judge did exist. He recorded counsel's argument that 'notwithstanding such copying and notwithstanding such similarities' DGL's claim should fail 'because there was no copying of the whole of the painting of Ixia and such copying as there was of part of the painting of Ixia did not extend to a substantial part'. This submission was not, in my view, consistent with the judge's findings of copying. Moreover, I think, with respect to counsel, that it introduced a confusion. Counsel was arguing the case as if it were one in which only a part of *Ixia* had been copied. But that was not what the judge had held.

This approach led the court into attempting a dissection of the rival designs in an attempt to identify the part or parts of *Ixia* that had been copied. It led Morritt LJ (at 132 (para 25)) to formulate as the question of fact to be determined: 'Did the production of Marguerite involve the indirect copying of a substantial part of the painting for Ixia?'

Morritt LJ (at 133 (para 29)) referred to 'those features of the painting of Ixia which the judge considered to have been copied into Marguerite'. He summarised them as:

> 'a) the combination of the flowers and the stripes, b) the way in which the flowers and stripes are related to each other, c) the way in which the flowers and stripes were painted, d) the resist effect.'

This was a fair and accurate summary of the respects in which the judge had found there to be similarities between the two designs. They were the similarities that, with other indicia, had led him to the conclusion that the designers of

Marguerite had copied the *Ixia* design. But the judge had not expressed his finding of copying as being limited to those features. Morritt LJ then went on to consider in turn each of the features and to ask himself whether a copying of that feature constituted an infringement. He concluded in each case that it did not. As to the combination of the flowers and stripes, he regarded that as the copying of an idea, rather than the copying of the expression of an idea. As to the relationship between the flowers and the stripes, he said that counsel for DGL had accepted that the layout or disposition of the flowers in *Marguerite* was not an infringement of copyright in that it had been derived from an independent source. He said, also, that the flowers in *Marguerite* were not copies of those in *Ixia*. As to the concession, I think there may have been some misunderstanding. Certainly before your Lordships no such concession has been made. Moreover the judge had rejected RWT's evidence as to the provenance of the *Marguerite* flowers and had made a finding of copying that extended to the design as a whole. As to the way in which the flowers and stripes were painted, ie the brushwork, Morritt LJ agreed that comparable painting techniques had been used, but said (at 134 (para 33)) that 'the visual result is not the same'. And as to the 'resist' effect, ie the technique by which an impression is given that an undercolour is showing through, here again, Morritt LJ discerned visual differences between the rival designs. He expressed his conclusion in para 35:

> 'Accordingly, having sought to analyse the similarities between the two works, I find that Marguerite adopted the same idea and in three respects, the brushwork on the stripes, the formation of the petals and the resist effect used the same techniques as were used in Ixia. But though the same techniques were used in those respects their use produced different visual effects and the subject matters of their use, the stripes and the flowers, were not copied from Ixia into Marguerite. This analysis supports the outcome of my visual comparison but does not coincide with the judge's conclusion.'

And, in para 37 (at 135): 'The designers of Marguerite certainly copied the idea of Ixia, they also adopted the same techniques but they did not copy a substantial part of the expression of the idea.'

Auld and Clarke LJJ agreed, and, consequently, the appeal was allowed.

Conclusion

In my opinion, there are two respects in which the Court of Appeal's approach went wrong. First, the conclusions seem to me to contradict the judge's finding of copying. More important, however, the approach whereby the constituent features of the rival designs were isolated from the whole and compared with one another was, in my judgment, in a case where copying had been found established and the finding was not under challenge, wrong in principle. The *Marguerite* design was an altered copy. The question whether the copying constituted an infringement did raise a question of substantiality, but a question that had to be determined by comparing *Marguerite* as a whole with *Ixia* as a whole. Did *Marguerite*, incorporate a substantial part of the skill and labour expended by the designer of *Ixia* in producing *Ixia*?

The judge had found that it did. He could not otherwise have made his finding of copying. There had been no direct evidence of copying and the judge's finding had been based on the extensive similarities between *Ixia* and *Marguerite*. These similarities, coupled with the opportunity to copy and in the absence of any acceptable evidence from RWT as to an independent provenance for *Marguerite*,

had led the judge to conclude, on a balance of probabilities, that *Marguerite* had been copied from *Ixia*. If the similarities between the two works were sufficient to justify the inference that one had been copied from the other, there was, in my judgment, no further part for the concept of substantiality to play. The thrust of Morritt LJ's judgment in the present case suggests that he disagreed with the basis on which the judge had arrived at his finding of copying. If the judge's finding of copying had been challenged in the Court of Appeal on the ground that the similarities between *Ixia* and *Marguerite* were not sufficiently substantial to justify the inference that *Marguerite* had been copied from *Ixia*, the challenge would, I think, have been sympathetically received. And if asked whether the similarities on which the judge had based his finding of copying showed that *Marguerite* had incorporated a substantial part of Helen Burke's skill and labour in designing *Ixia*, I think that the Court of Appeal, in disagreement with the judge, would have said that it did not.

But the finding of copying was not challenged, and, in any event, findings on such matters are particularly the province of the trial judge. In *Biogen Inc v Medeva plc* (1996) 38 BMLR 149 at 166 my noble and learned friend, Lord Hoffmann, commented:

> 'Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation.'

The same caution should, in my view, be employed in relation to evaluations about similarities and substantiality. (See also the remarks of Buxton LJ in *Norowzian v Arks Ltd (No 2)* [1999] IP & T 223 at 230–231.)

For these reasons, and those given by my noble and learned friend, Lord Bingham of Cornhill, whose speech I have the advantage of reading in draft, I would allow the appeal.

Appeal allowed.

Dilys Tausz Barrister.

R v Secretary of State for the Home Department, ex parte Turgut

COURT OF APPEAL, CIVIL DIVISION

SIMON BROWN, SCHIEMANN AND THORPE LJJ

14, 15 DECEMBER 1999, 28 JANUARY 2000

Immigration – Illegal entrant – Application for exceptional leave to remain – Judicial review – Illegal entrant alleging real risk of being subjected to torture or inhuman or degrading treatment or punishment on return to country of origin – Secretary of State rejecting contention and refusing to grant exceptional leave to remain – Illegal entrant challenging Secretary of State's decision in judicial review proceedings on grounds of irrationality – Whether judicial review court having primary fact-finding role on such a challenge – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 3.

T, a Turkish Kurd draft evader, entered the United Kingdom illegally and claimed asylum. That claim was rejected by the Secretary of State and, on appeal, by the special adjudicator who found T entirely lacking in credibility. After the Immigration Appeal Tribunal had refused him leave to appeal, T applied to the Secretary of State for exceptional leave to remain, contending that there were substantial grounds for believing that there was a real risk that he would, on return to Turkey, be subjected to torture or inhuman or degrading treatment or punishment contrary to art 3[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the convention). The Secretary of State rejected that contention and accordingly refused to grant exceptional leave to remain. Although he reconsidered the risk on four further occasions, the Secretary of State reached the same conclusion each time. In subsequent judicial review proceedings, T challenged those decisions on grounds of irrationality, contending that anybody in his situation faced a real risk of being subjected on return to art 3 ill-treatment. On the substantive challenge, heard by the Court of Appeal, the issue arose of whether the court should assume the primary fact-finding role on such a challenge or whether it was confined to exercising an essentially supervisory jurisdiction.

Held – Where the Secretary of State's decision in a case under art 3 of the convention was challenged on the grounds of irrationality, the court's role was not that of primary fact-finder. Rather, its obligation was to subject the decision to rigorous examination by considering for itself the underlying factual material in order to see whether or not it compelled a different conclusion to that reached by the Secretary of State. The challenge would succeed only if it did. However, on such a challenge the court would not pay any special deference to the Secretary of State's conclusion on the facts. The right not to be exposed to a real risk of art 3 ill-treatment was absolute and fundamental, not a qualified right requiring a balance to be struck with some competing need. Moreover, the court was hardly less well placed than the Secretary of State himself to evaluate the risk once the relevant material was placed before it. Further, the court had to recognise at least

a Article 3 is set out at p 722 *a*, post

the possibility that the Secretary of State had tended, even if unconsciously, to depreciate the evidence of risk and, throughout the protracted decision-making process, might have tended also to rationalise the further material adduced so as to maintain his pre-existing stance rather than reassess the position with an open mind. In such circumstances, the area of judgment within which the court should defer to the Secretary of State as the person primarily entrusted with the decision on removal was a decidedly narrow one. In the instant case, however, the Secretary of State's decision had been reasonable, and accordingly the application would be dismissed (see p 724 *f g*, p 728 *j* to p 729 *a e* to *j*, p 734 *e f* and p 736 *g*, post); *Soering v UK* (1989) 11 EHRR 439, *Vilvarajah v UK* (1991) 14 EHRR 248, *D v UK* (1997) 24 EHRR 423 and *Smith v UK* (1999) 29 EHRR 493 considered.

Per curiam. Where, on an application for permission to apply for judicial review, the Secretary of State is given permission to adduce evidence that he has made a new decision in the light of the evidence filed by the applicant, but that decision is to the same effect as the first one, it will generally be convenient to substitute the new decision for the first decision as the decision challenged in the proceedings. The applicant may apply for permission to amend his application for permission so as to substitute the new decision and such an application will generally be granted. The same principles apply in situations where the Secretary of State makes further decisions on the basis of new evidence which has come to light during the time required to enable one party to answer his opponent's evidence. They also apply, once permission to apply for judicial review has been given, to the admission of evidence before the trial judge, whether that court is the High Court or the Court of Appeal, the latter having granted permission to move and reserved the trial of the matter to itself. However, if the trial takes place before the High Court and either party seeks to appeal, different principles apply to the admission of new evidence by the Court of Appeal. At that stage, it will not usually be appropriate to attempt to substitute a new decision for the old and to litigate the legality of that new decision, and the normal rules governing the reception of evidence on appeals will usually apply. However, in exercising its discretion, the Court of Appeal will always bear in mind that the evidence is not strictly limited to that which was, or should have been, before the Secretary of State at the time of the decision (see p 734 *g* and p 735 *h* to p 736 *g*, post).

Notes

For the prohibition on torture, inhuman or degrading treatment or punishment, see 8(2) *Halsbury's Laws* (4th edn reissue) para 124.

For the European Convention for the Protection of Human Rights and Fundamental Freedoms, art 3 (as set out in Sch 1 to the Human Rights Act 1998), see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 522.

Cases referred to in judgments

Brind v Secretary of State for the Home Dept [1991] 1 All ER 720 sub nom *R v Secretary of State for the Home Dept, ex p Brind* [1991] 1 AC 696, [1991] 2 WLR 588, HL.

Bugdaycay v Secretary of State for the Home Dept [1987] 1 All ER 940, [1987] AC 514, [1987] 2 WLR 606, HL.

Chahal v UK (1996) 1 BHRC 405, ECt HR.

Cruz-Varas v Sweden (1991) 14 EHRR 1, ECt HR.

D v UK (1997) 24 EHRR 423, ECt HR.

Klass v Germany (1978) 2 EHRR 214, ECt HR.

Leander v Sweden (1987) 9 EHRR 433, ECt HR.

R v DPP, ex p Kebilene [1999] 4 All ER 801, [1999] 3 WLR 972, HL.
R v Ministry of Defence, ex p Smith [1996] 1 All ER 257, [1996] QB 517, [1996] 2 WLR 305, CA.
R v Secretary of State for the Home Dept, ex p Launder [1997] 3 All ER 961, [1997] 1 WLR 839, HL.
Selmouni v France (1999) 7 BHRC 1, ECt HR.
Smith v UK (1999) 29 EHRR 493, ECt HR.
Soering v UK (1989) 11 EHRR 439, ECt HR.
Vilvarajah v UK (1991) 14 EHRR 248, ECt HR.

Application for judicial review

Abdullah Turgut applied for judicial review of the decisions of the respondent, the Secretary of State for the Home Department, on 13 March 1998, 23 October 1998, 11 January 1999, 17 August 1999 and 13 December 1999 refusing his application for exceptional leave to remain in the United Kingdom. The Court of Appeal granted leave to move for judicial review on 27 October 1998, and reserved the hearing of the substantive challenge to itself. The facts are set out in the judgment of Simon Brown LJ.

Andrew Nicol QC and *Mark Henderson* (instructed by *Howe & Co*) for the applicant.
Nigel Pleming QC and *Mark Bishop* (instructed by the *Treasury Solicitor*) for the respondent.
Michael Fordham (instructed by the *Treasury Solicitor*) as amicus curiae.

Cur adv vult

28 January 2000. The following judgments were delivered.

SIMON BROWN LJ. The applicant is an unmarried 30-year-old Turkish Kurd who in March 1993 entered this country illegally, he says by concealment in the back of a lorry. On 20 April 1993 he claimed asylum, a claim which was rejected by the Secretary of State on 19 January 1995 and rejected again by the special adjudicator on appeal on 20 March 1997. The special adjudicator found him 'entirely lacking in credibility', his evidence 'littered with discrepancies', and that there was 'no serious possibility that the events related by the appellant' had happened. That the applicant is a draft evader from Turkish military service is not in doubt. As for the rest, the probability appears to be that he entered Germany in December 1987, applied unsuccessfully for asylum there, but nevertheless managed to remain in that country for most if not all of the years prior to his arrival in the United Kingdom in 1993. The applicant's asylum claim in this country has now run its course: the Immigration Appeal Tribunal refused him leave to appeal against the special adjudicator's determination and against that refusal there was no challenge.

That, however, merely sets the scene for the present challenge, a challenge which was rejected by Carnwarth J on 22 May 1998 but which on 27 October 1998 the Court of Appeal (Lord Woolf MR, Henry and Clarke LJJ) permitted, and indeed, retained for itself. What is now impugned is the Secretary of State's refusal to grant the applicant exceptional leave to remain, the alternative course to removing him back to Turkey as the illegal entrant he undoubtedly is. His claim to exceptional leave rests on art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950;

TS 71 (1953); Cmd 8969) (the convention)—'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'—the Secretary of State having for some years past publicly undertaken not to expel someone where substantial grounds are shown for believing there to be a real risk that on return that person would face treatment proscribed by art 3 (which for brevity's sake I shall henceforth call art 3 ill-treatment).

The very fact that the applicant has been found so hopelessly wanting in credibility is what turns this challenge into the test case which both parties now recognise it to be. It has to be put, and is put, on the unvarnished basis that any young male Turkish Kurd draft evader who is returned to Turkey as a failed asylum seeker without travel documents, will, by virtue of those facts alone, face a real risk of being subjected on return to art 3 ill-treatment. Although precise statistics are not available, it seems clear that many thousands of such claims for exceptional leave will turn upon its outcome; the 60-odd challenges stayed in the Crown Office List pending its resolution represent but the tip of an iceberg.

Two issues of fundamental importance are raised before us. (1) Is it for this court to assume upon such a challenge the primary fact-finding role? Must we, in other words, decide for ourselves whether on all the material before us we for our part regard the applicant (and those in like case) as subject to the risk in question? Or are we exercising what still remains essentially a supervisory jurisdiction, heightened though our responsibilities would undoubtedly be in the context of so fundamental a human right as that at stake here? (2) On whatever be the correct approach, how does the court assess the material before it? Can this applicant properly now be returned to Turkey?

Before turning to these issues, I should deal with one or two preliminary matters. First, as all agree, the material date for the assessment of risk is the time of the court's consideration of the case—see *Chahal v UK* (1996) 1 BHRC 405 at 427 (para 97) where the court said this:

> 'In determining whether it is has been substantiated that there is a real risk that the applicant, if expelled to India, would be subjected to treatment contrary to art 3, the Court will assess all the material placed before it and, if necessary, material obtained of its own motion ... Furthermore, since the material point in time for the assessment of risk is the date of the Court's consideration of the case ... it will be necessary to take account of evidence which has come to light since the Commission's review.'

Second, for that reason, the Secretary of State has of necessity more than once had to reconsider his assessment of risk in this case so that there are now before us no fewer than five successive decisions refusing the applicant exceptional leave to remain. These were taken respectively on 13 March 1998, 23 October 1998 (four days before the Court of Appeal granted leave to move), 11 January 1999, 17 August 1999 and 13 December 1999. In the result, the court's papers have grown ever more voluminous. More and more reports have been assembled, more and more enquiries made. The bundles before us now number no fewer than 1,500 pages. Whatever approach falls to be adopted, the court's burden is a heavy one.

Let me next clarify by reference to the Strasbourg jurisprudence just what sort of ill-treatment art 3 is directed to. This I can conveniently do by reference to two cases in particular. First, *Soering v UK* (1989) 11 EHRR 439 at 472 (para 100) where the court said this:

'As is established in the Court's case law, ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.' (This formulation was repeated in *Cruz-Varas v Sweden* (1991) 14 EHRR 1 at 37.)

Second, *Selmouni v France* (1999) 7 BHRC 1 at 24–25:

'95. The court reiterates that art 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment ... art 3 makes no provision for exceptions and no derogation from it is permissible under art 15(2) even in the event of public emergency threatening the life of the nation ...

96. In order to determine whether a particular form of ill-treatment should be qualified as torture, the court must have regard to the distinction, embodied in art 3, between this notion and that of inhuman or degrading treatment. As the European Court has previously found, it appears that it was the intention that the convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering ...

99. The acts complained of [in *Selmouni*'s case] were such as to arouse in the applicant feelings of fear, anguish, and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The court therefore finds elements which are sufficiently serious as to render such treatment inhuman and degrading ... In any event, the court reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in art 3 ...

101. The court has previously examined cases in which it concluded that there had been treatment which could only be described as torture ... However, having regard to the fact that the convention is a "living instrument which must be interpreted in the light of present-day conditions", the court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future ... It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.'

Issue 1—the court's approach

Critical to the Secretary of State's successive decisions has been his assessment of risk. Each time he has reconsidered this case, he has concluded that no substantial grounds exist for believing that the applicant would be at real risk of art 3 ill-treatment if returned to Turkey. These decisions are challenged on the ground of irrationality—the contention being that such a conclusion was not one

properly open to the Secretary of State on the facts—and the conventional approach to such a challenge is that set out in Sir Thomas Bingham MR's judgment in *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257 at 263, [1996] QB 517 at 554:

> 'Mr David Pannick QC [for the applicant] submitted that the court should adopt the following approach to the issue of irrationality: "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above." This submission is in my judgment an accurate distillation of the principles laid down by the House of Lords in *Bugdaycay v Secretary of State for the Home Dept* [1987] 1 All ER 940, [1987] AC 514 and *Brind v Secretary of State for the Home Dept* [1991] 1 All ER 720, [1991] 1 AC 696.'

The Master of the Rolls added:

> 'It is now accepted that this issue [the impact of the Ministry's ban on homosexuals in the armed services on the applicant's rights under art 8 of the convention] is justiciable. This does not of course mean that the court is thrust into the position of the primary decision-maker. It is not the constitutional role of the court to regulate the conditions of service in the armed forces of the Crown, nor has it the expertise to do so. But it has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty to "do right to all manner of people".' (See [1996] 1 All ER 257 at 264–265, [1996] QB 517 at 554 at 556.)

On this approach (which for convenience I shall call the *Smith* approach) it is clear that the court's role, even in a case involving fundamental human rights, remains essentially supervisory. It must, of course, as Lord Bridge observed in *Bugdaycay v Secretary of State for the Home Dept* [1987] 1 All ER 940, [1987] AC 514, review the impugned decision (certainly in an art 3 case) with 'the most anxious scrutiny'. But it must not adopt the role of primary decision-maker.

Mr Nicol QC submits, however, that to adopt the *Smith* approach here would fail to satisfy the United Kingdom's obligation under art 13 of the convention, the obligation to provide 'an effective remedy' for those whose rights and freedoms are violated. The common law, he therefore argues, should recognise—and if necessary develop the court's supervisory jurisdiction to accommodate—the deeper role the court must now play.

Let me put aside for the moment the obvious difficulties involved in acceding to Mr Nicol's invitation to develop the common law in such a way as to anticipate the coming into force of the Human Rights Act 1998 in October 2000. The critical initial question arising is whether such development is in fact needed for the fulfilment of the United Kingdom's art 13 obligation in a case like the present. Let me, therefore, take a little time to examine the Strasbourg case law on this question: the adequacy or otherwise of the *Smith* approach as a means of providing

an effective remedy and thus satisfying the United Kingdom's art 13 obligation in an art 3 case.

The starting point is *Soering*'s case, the case of a West German national who had unsuccessfully challenged the Home Secretary's decision to extradite him to the USA to face trial in Virginia for capital murder, a trial which could expose him to the so-called 'death row phenomenon'. Soering's complaint to Strasbourg succeeded under art 3 but failed under art 13. For present purposes I need cite only para 121 of the court's judgment (11 EHRR 439 at 481):

> 'In judicial review proceedings the court may rule the exercise of executive discretion unlawful on the ground that it is tainted with illegality, irrationality or procedural impropriety. In an extradition case the test of "irrationality," on the basis of the so-called "WEDNESBURY principles," would be that no reasonable Secretary of State could have made an order for surrender in the circumstances. According to the United Kingdom Government, a court would have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take. Although the Convention is not considered to be part of United Kingdom law, the Court is satisfied that the English courts can review the "reasonableness" of an extradition decision in the light of the kind of factors relied on by Mr. Soering before the Convention institutions in the context of Article 3.'

Soering's case was followed and applied in *Vilvarajah v UK* (1991) 14 EHRR 248, the case of five Tamils who were refused asylum in the United Kingdom and returned to Sri Lanka but who following return continued to suffer ill-treatment. Their complaints to Strasbourg were in the event rejected under both arts 3 and 13. Mr Nicol, however, relies on one passage in the European Court of Human Rights' judgment with regard to art 3 (at 289):

> '108. The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.'

As to art 13 the court concluded (at 292):

> '125. It is not in dispute that the English courts are able in asylum cases to review the Secretary of State's refusal to grant asylum with reference to the same principles of judicial review as considered in the SOERING case and to quash a decision in similar circumstances and that they have done so in decided cases. Indeed the courts have stressed their special responsibility to subject administrative decisions in this area to the most anxious scrutiny where an applicant's life or liberty may be at risk. Moreover, the practice is that an asylum seeker will not be removed from the U.K. until proceedings are complete once he has obtained leave to apply for judicial review.
>
> 126. While it is true that there are limitations on the powers of the courts in judicial review proceedings the Court is of the opinion that these powers, exercisable as they are by the highest tribunals in the land, do provide an effective degree of control over the decisions of the administrative

authorities in asylum cases and are sufficient to satisfy the requirements of Article 13.' a

I come next to *Chahal v UK* (1996) 1 BHRC 405, a case heavily relied upon by Mr Nicol. Chahal was a Sikh separatist leader who was refused asylum and whom the Secretary of State proposed to deport to India as a threat to national security here. Following the failure of his judicial review challenge, Chahal succeeded in Strasbourg under both arts 3 and 13. I have already cited para 97 of the court's judgment as to the material date for the assessment of risk in an art 3 case. I should, however, at this stage cite also the two preceding paragraphs (at 427): b

'95. Under the convention system, the establishment and verification of the facts is primarily a matter for the Commission ... Accordingly, it is only in exceptional circumstances that the Court will use its power in this area ... c

96. However, the Court is not bound by the Commission's findings of fact and is free to make its own assessment. Indeed, in cases such as the present the Court's examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one, in view of the absolute character of art 3 and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe ...' d

Note the echo here of para 108 of the judgment in *Vilvarajah's* case.

With regard to art 13 it is necessary to cite a longer passage from *Chahal's* case (at 437):

'150. It is true, as the government have pointed out, that in *Klass v Federal Republic of Germany* ((1978) 2 EHRR 214) and *Leander v Sweden* ((1987) 9 EHRR 433), the Court held that art 13 only required a remedy that was "as effective as can be" in circumstances where national security considerations did not permit the divulging of certain sensitive information. However, it must be borne in mind that these cases concerned complaints under arts 8 and 10 of the convention and that their examination required the Court to have regard to the national security claims which had been advanced by the government. The requirements of a remedy which is "as effective as can be" is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of art 3, where the issues concerning national security are immaterial. e f g

151. In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to art 3, the notion of an effective remedy under art 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to art 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling state. h

152. Such scrutiny needed not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective ... j

153. In the present case, neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations. On the contrary, the courts' approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security ... It follows from the above

considerations that these cannot be considered effective remedies in respect of Mr Chahal's art 3 complaint for the purposes of art 13 of the Convention.'

Taking the cases chronologically (as I think is helpful), I pass next to a decision much relied upon by Mr Pleming QC for the respondent—*D v UK* (1997) 24 EHRR 423. D was an AIDS sufferer whom the Secretary of State proposed to return to St Kitts as a refused applicant for leave to enter the United Kingdom. D's complaint (like Soering's) succeeded under art 3 but not under art 13. Only the latter is presently relevant and I cite just two paragraphs from the court's judgment (at 453):

'70. In its VILVARAJAH AND OTHERS judgment and its SOERING judgment the Court considered judicial review proceedings to be an effective remedy in relation to the complaints raised under Article 3 in the contexts of deportation and extradition. It was satisfied that English courts could effectively control the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate. It was also accepted that a court in the exercise of its powers of judicial review would have power to quash a decision to expel or deport an individual to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take ...

72. The applicant maintained that the effectiveness of the remedy invoked first before the High Court and subsequently before the Court of Appeal was undermined on account of their failure to conduct an independent scrutiny of the facts in order to determine whether they disclosed a real risk that he would be exposed to inhuman and degrading treatment. He relied on the reasoning in the CHAHAL *v.* UNITED KINGDOM judgment. However the Court notes that in that case the domestic courts were precluded from reviewing the factual basis underlying the national security considerations invoked by the Home Secretary to justify the expulsion of Mr Chahal. No such considerations arise in the case at issue.'

I come finally to the recent judgment of the European Court of Human Rights in *Smith v UK* (1999) 29 EHRR 493. As is well known, this complaint succeeded under art 8. More importantly for present purposes, however, it succeeded also under art 13. Paragraph 138 of the court's judgment was central to much of the argument before us (at 543–544):

'In such circumstances, the Court considers it clear that, even assuming that the essential complaints of the applicants before this Court were before and considered by the domestic courts, the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention. The present applications can be contrasted with the cases of SOERING and VILVARAJAH cited above. In those cases, the Court found that the test applied by the domestic courts in applications for judicial review

> of decisions by the Secretary of State in extradition and expulsion matters coincided with the Court's own approach under Article 3 of the Convention.'

The first limb of para 138 seems to me comparatively easy to understand. Its opening words—'in such circumstances'—refer to various passages in the judgments both of the Divisional Court and the Court of Appeal which, as the European Court of Human Rights put it in para 137 of their judgment, 'emphasised that, notwithstanding any human rights context, the threshold of irrationality which an applicant was required to surmount was a high one'. That perhaps is best illustrated by reference to para 38 where the European Court of Human Rights make this comment on the Master of the Rolls' judgment (at 510):

> 'He observed that to dismiss a person from his or her employment on the grounds of a private sexual preference, and to interrogate him or her about private sexual behaviour, would not appear to show respect for that person's private and family life and that there might be room for argument as to whether the policy answered a "pressing social need" and, in particular, was proportionate to the legitimate aim pursued. However, he held that these were not questions to which answers could be properly or usefully proffered by the Court of Appeal but rather were questions for the European Court of Human Rights, to which court the applicants might have to pursue their claim.'

In effect the European Court of Human Rights were saying in the first part of para 138: it is all very well to say that 'the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable'; if, however, the domestic court is prepared to regard a policy as justifiable whether or not it answers a pressing social need or is proportionate to the aims pursued, then this approach (the *Smith* approach) accords insufficient weight to interference with human rights. It is plain that by October 2000, the threshold of irrationality will have to be lowered in cases of that sort.

It is the second limb of para 138 of the judgment, however, that is most directly pertinent to the present challenge. And the meaning of that is rather more difficult to discern.

Mr Nicol's argument runs essentially as follows. 'The Court's own approach under Article 3 of the Convention' (see the concluding words of para 138) is, he says, plain. It is that set out in *Vilvarajah v UK* (1991) 14 EHRR 248 at 289 (para 108) and in *Chahal v UK* (1996) 1 BHRC 405 at 427 (paras 95–97): the European Court of Human Rights will rigorously examine all the material before it and make its own assessment of risk as at the date of the hearing. That, therefore, must be the approach of the domestic court too: only thus will it have 'coincided with' the European Court of Human Rights' approach (as para 138 states that it does) and so explain why the court regards judicial review as an 'effective remedy' in art 3 cases (save, of course, in *Chahal*'s case where the national security aspect of the case precluded the domestic courts from forming their own view upon it), but not in a case like the *Smith v UK* case itself.

Plausible though this argument appears, in my judgment it reads too much into para 138. As the cited passages from the court's judgments show, the European Court of Human Rights know full well the nature of the judicial review process and cannot be thought to suppose that the reviewing court ever adopts the role of primary fact-finder. It is one thing to say that an administrative

decision to deport will be rigorously examined and subjected to the most anxious scrutiny: quite another to say that the court will form its own independent view of the facts which will then necessarily prevail over whatever view has been formed by the Secretary of State.

Where, therefore, the court in *Soering*'s case, *Vilvarajah*'s case and *D*'s case speak of the domestic court in judicial review having the power to quash a decision 'where it was established that there was a serious risk of inhuman or degrading treatment', that can only mean 'where it was established that on any reasonable view of the facts there was a serious risk of inhuman or degrading treatment', ie where it was established that no rational Secretary of State could have reached a different conclusion upon the material in the case.

This analysis of the Strasbourg jurisprudence, moreover, seems to me to gain support from the applicant's own argument in *Smith v UK*. The European Court of Human Rights note in para 132 of their judgment (29 EHRR 493 at 541–542):

> '... the applicants pointed to the comments of the High Court and of the Court of Appeal as the best evidence that those courts lacked jurisdiction to deal with the substance of the applicant's Convention complaints. In this context, the SOERING and VILVARAJAH cases cited above could be distinguished because the test applied in judicial review proceedings concerning proposed extraditions and expulsions happened to coincide with the Convention test.'

I therefore conclude that the domestic court's obligation on an irrationality challenge in an art 3 case is to subject the Secretary of State's decision to rigorous examination, and this it does by considering the underlying factual material for itself to see whether or not it compels a different conclusion to that arrived at by the Secretary of State. Only if it does will the challenge succeed.

All that said, however, this is not an area in which the court will pay any especial deference to the Secretary of State's conclusion on the facts. In the first place, the human right involved here—the right not to be exposed to a real risk of art 3 ill-treatment—is both absolute and fundamental: it is not a qualified right requiring a balance to be struck with some competing social need. Secondly, the court here is hardly less well placed than the Secretary of State himself to evaluate the risk once the relevant material is placed before it. Thirdly, whilst I would reject the applicant's contention that the Secretary of State has knowingly misrepresented the evidence or shut his eyes to the true position, we must, I think, recognise at least the possibility that he has (even if unconsciously) tended to depreciate the evidence of risk and, throughout the protracted decision-making process, may have tended also to rationalise the further material adduced so as to maintain his pre-existing stance rather than reassess the position with an open mind. In circumstances such as these, what has been called the 'discretionary area of judgment'—the area of judgment within which the court should defer to the Secretary of State as the person primarily entrusted with the decision on the applicant's removal (see Lord Hope of Craighead's speech in *R v DPP, ex p Kebilene* [1999] 4 All ER 801 at 843–844, [1999] 3 WLR 972 at 993–994)—is a decidedly narrow one.

Issue 2—the court's assessment of the factual material

Having regard to the massive amount of material now accumulated before the court, the composition of this part of the judgment presents daunting problems indeed. There is simply no time (nor space within a judgment of manageable

length) to deal in detail with all the many strands of both sides' cases on the facts. Ultimately I have thought it best—and I hope appropriate given the court's true task on this challenge—merely to summarise in broad terms the essential nature of the material before us, to indicate the difficulties that exist in arriving at a confident judgment on the question of risk, and to state my own conclusion on the challenge.

There is, as it seems to me, one report above all others in the papers which provides a convenient point of reference for the factual dispute: it is recent, thorough, independent and authoritative. I refer to the January 1999 report of Professor Sir Nigel Rodley, acting as the special rapporteur of the United Nations Commission on Human Rights, following a ten-day visit which he made to Turkey in November 1998. Let me quote just part of his conclusions:

> '102. As to the incidence of torture and similar ill-treatment, there was a wide disparity of views among those whom the Special Rapporteur met. Numerous non-governmental sources insisted that the situation had not improved at all. For them, torture was widespread and systematic, any recent changes in the law being merely "cosmetic". In this connection, the Special Rapporteur notes that the word "systematic" in this context was used in at least three meanings: first, to indicate that the practice was approved of and tolerated, if not expected, at the highest political level; second, in the sense that it was a pervasive technique of law enforcement agencies for the purpose of investigation, securing confessions and intimidation, regardless of approval or disapproval at the higher levels of the public service or by the Government's political leadership; and, third, to indicate that it consisted of techniques applied, in any individual case, in a deliberate manner to break the will of detainees.
>
> 103. The authorities propounded the view that the situation had much improved in the previous few years (thus implicitly acknowledging that it was graver before), especially since the introduction of shorter periods of custody without access to legal advice or without being brought before a court. For these interlocutors, the phenomenon was now confined to isolated cases that, in any event, enjoyed no official sanction.
>
> 104. In the view of the Special Rapporteur, the reality conforms to neither of the paradigms. He has no doubt, based upon extensive information reaching him over the years, that up to and including the first half of the 1990s, torture was practised systematically in all the senses mentioned above and on a widespread scale. Authoritative findings of the Committee against Torture and the Council of Europe's European Committee for the Prevention of Torture, have also buttressed this view. However, he believes that the past two years have witnessed notable improvements.
>
> 105. First, by and large, the new periods of incommunicado detention are being respected, thus restricting the amount of time available for the infliction of ill-treatment and the amount of time for visible signs of ill-treatment to heal. However, there is sufficient information indicating a more than occasional practice by some law enforcement officials of detaining and torturing or ill-treating suspects without bringing them immediately into custody.
>
> 106. Second, possibly connected with the above, there has been a substantial reduction in the brutality of the methods used in some places. Allegations of the use of *falaka* (beating on the soles of the feet), "Palestinian hanging" (hands tied behind the back and the body suspended by the tied

hands), electric shocks and rape have abated substantially in some parts of the country, notably Ankara and Diyarbakir. On the other hand, blindfolding, the use of hosing with cold water, "straight hanging" (suspension by the raised arms from a crossbar), rough physical treatment, sexual abuses and threats of rape, the use of grossly insulting language and the making of threats to the life and physical integrity of detainees or their families still seem rife in many parts of the country. All of these torments are aggravated by the prolonged period of incommunicado detention still available in respect of anyone held on suspicion of involvement in (broadly defined) terrorist offences or in connection with ordinary offences involving, or thought to involve, more than two perpetrators; this includes but is not limited to drug-related offences. On the other hand, the worst of the practices described above still occur in some places.

107. The improvements here described are sufficiently significant to lead the Special Rapporteur to conclude that the continuing problems cannot be attributed to a formal policy of the Government. Indeed, he is disposed to consider the frequently reiterated official commitment to attaining European and international standards in law enforcement and the administration of justice as a reflection of an authentic political preference. In this connection, he welcomes the information provided by the Government after the mission that it has agreed to the publication in January 1999 of the report of the European Committee for the Prevention of Torture. In other words, he does not view the practices as systematic in the first of the three senses described above. They may well, nevertheless, deserve that categorization in its second sense in numerous places around the country, especially if the less extreme, but still serious forms of torture or ill-treatment referred to in the previous paragraph are taken into consideration. As far as the third use of "systematic" is concerned, the Special Rapporteur considers this use too conducive to misunderstanding to apply it, since any incident involving sustained infliction of ill-treatment could fall within its scope. On the other hand, the geographic spread of the allegations, the range of potential victims, as well as the number of testimonies received before and during the mission, compel a finding that the practices referred to in the previous paragraph, in whatever specific combination, remain widespread.'

Mr Nicol not surprisingly places great weight on this report, pointing out that even the two 'notable improvements' identified by the special rapporteur as having occurred over the previous two years have still left in place the 'widespread' practice of 'the less extreme but still serious forms of torture or ill-treatment' described in the second part of para 106 (described indeed as 'rife in many parts of the country').

There are, however, certain features of the report which inevitably tend to undermine other parts of Mr Nicol's evidence, notably (a) reports of earlier years (for example Amnesty International's 1996 report which at one point says: 'No one who finds themselves in police custody in Turkey is safe from torture.'), because plainly the situation in Turkey is an improving one, and (b) statements made by Turkish non-governmental sources (one of the two paradigms expressly rejected by the special rapporteur as unreliable) such as—to take one of the many instances in the documents before us—Ms Aslan's statement (she being a lawyer and committee member of IHD, one of the main Turkish human rights associations) in a letter to the applicant's solicitors:

'The report you prepared is generally correct, however it is limited. First of all, if a person is returned to Turkey without valid travel documents, the comment on that subject should be clear and definite. Whatever way the person left the country, or for whatever reason, if their asylum application failed and they are returned to Turkey (mainly those of Kurdish origin) as soon as they arrive at the airport, the police will detain them immediately. These people are taken to the airport police station where they are then abused, beaten and sworn at. The police later contact the authorities in the area that the person was previously living in. Whenever the person is returned to their residential area they are detained by the anti-terrorist branch and indiscriminately all those persons are then tortured, ill-treated and subjected to inhuman treatment. These people are systematically tortured. The torture and ill-treatment should be described. Every treatment which contradicts humanity and human nature should be regarded as torture. The words which are made against the person's honour and personality are a form of torture. They were beaten, stripped naked, sworn at, given electric shock and relatives were sworn at etc. are all against human nature and human beings should not be treated like this. I would like to impress on you that all those persons returned to Turkey will indiscriminately be treated like this.'

Those points notwithstanding, one is left with feelings of inevitable disquiet about the general situation in Turkey and these, indeed, appear to be shared to some degree by the Secretary of State himself (certainly with regard to the recent past). The Home Office's latest Country Assessment for Turkey dated 4 September 1999 (a document of 47 pages excluding annexes) quotes a Council of Europe report of 1991 stating:

'Torture has very deep emotional and traditional roots in Turkey. It is used as a measure of discipline, to intimidate detainees and as an interrogation method. It forms part of a mentality of the way in which a civil servant respects his fellow citizens. No doubt many Turks consider it as part of the criminal sanction. In many Turkish families it is common that a husband beats his wife, a father his children. Why should not the police do the same with criminals?'

This too is quoted from a special rapporteur's report of December 1997:

'According to the information, torture was practised against most persons interrogated by the Anti-Terror Branch of the police and gendarmerie, as well as against many persons detained by the police in ordinary criminal cases. Torture was reportedly administered to "extract confessions", to obtain information, to intimidate detainees into becoming police informants, or as informal or summary punishment for petty offences or suspected sympathy for illegal organisations.'

The assessment further recognises that returned asylum seekers without documents will be subjected to 'an in depth interrogation by the Turkish border police', and that draft evaders like this applicant 'would be arrested when detected' and sentenced to imprisonment (probably for a term between six months and three years) before being required eventually to perform their military service.

It is the Secretary of State's case, however, that, generally speaking, none of this is likely to result in art 3 ill-treatment. 'Everything depends on the individual

and his activities in Turkey and abroad.' There are, Mr Pleming submits, certain features about this applicant which suggest that he would not be amongst those at particular risk of such ill-treatment. He has had no connection with the PKK. He is not wanted by the Turkish authorities for political crimes, for example with regard to Kurdish separatism. He has no criminal or political record in Turkey. He has never in the past been subjected to ill-treatment in Turkey.

Included in the applicant's evidence before us is a list of 70 individuals whom it is asserted over a ten-year period were returned to Turkey from various European countries and then maltreated by the Turkish authorities. Analyse these cases as one will (and the Secretary of State has clearly done his best to do so), it seems to me impossible to draw any very clear conclusions from them save only that *some* returnees are undoubtedly at risk of appalling ill-treatment (our papers indeed include hideous photographs of a branded back). The real problem, of course, is in assessing the extent of this risk. As the Secretary of State points out, the 70 cases reflect only 0·2% of the total numbers recorded as having been returned to Turkey over that period, just over 1% of the returned asylum seekers, and it is plain that many more were in fact returned than are recorded in these statistics. There is on the other hand, I have no doubt, massive under-reporting of individual cases of ill-treatment. No one can effectively monitor the position of all returnees and it is hardly surprising that many who are ill-treated do not choose to report the fact. But that, although a countervailing factor, again leaves the true extent of each individual returnee's risk a matter of conjecture.

With these sorts of difficulty in mind the Secretary of State in May 1999 wrote to the immigration authorities of a number of European Union countries seeking their assistance in determining the level of risk involved in returning people to Turkey. The letters asked whether any country has received evidence of ill-treatment in respect of any returnee to Turkey in similar circumstances (the applicant being described as 'a Kurdish draft evader who has no national documentation') and enclosed a detailed annexe setting out 'key questions' with regard to the addressee's own knowledge and experience of the treatment of returnees. To take just one example of the responses to a particular question, the German authority replied in July 1999:

> '2. Is there a greater risk of ill-treatment if the rejected asylum seeker falls into any or all of the following categories: a) Being of Kurdish origin does not in itself constitute a higher risk of inhuman treatment (Annex 1, Annex 3, Annex 4). b) Undocumented (i.e. travelling on an EU letter or similar). A returnee who is not in possession of valid Turkish travel documents is likely to be kept in custody for an in-depth interrogation (which is to be distinguished from the routine identity check on arrival). As a rule, the questions refer to personal data, date of and reasons for departing Turkey, possible criminal record in Germany and contacts with illegal Turkish organizations. In some cases further inquiries will be made via other offices (e.g. prosecutor's office, registrar's office at the last Turkish residence of the returnee) in order to find out if the returnee is liable to prosecution for a criminal offence. These inquiries can take from several hours up to several days, during which time the returnee will be kept in custody. Currently available information indicate that undocumented returnees are generally not being maltreated while being kept in custody. However, ill-treatment cannot be ruled out in cases where returnees are suspected separatists (Annex 2, p.8, 9). c) Liable to prosecution for draft evasion. Draft evasion

is punishable by imprisonment according to the Military Penal Code (Annex 5). Hence, a draft evader would be arrested on arrival. In general, draft evaders, including those of Kurdish origin, are not being ill-treated (Annex 2, p.2).'

Once again, the Secretary of State seems to me to have faithfully analysed all the responses but still been left with real difficulties of risk assessment. Moreover, we should perhaps not overlook the fact that, despite the wide concern felt internationally about Turkey's human rights record, the great majority of countries still continue to extradite to Turkey. That is true of Germany, Finland, Austria, Denmark, Norway, France, Switzerland and Sweden. Although the Dutch authorities suspended extraditions in July 1999 after the death of a rejected asylum seeker, on 10 December 1999 they resumed their policy of returning people. Belgium now make no returns simply because of administrative difficulties. The only countries whose policy is not to extradite refused asylum seekers are Greece and Italy. Were this court to uphold the present challenge, it would in effect be condemning the practice followed by most European Union countries as an unlawful violation of their Convention obligations. Although plainly we must not shrink from such a judgment if the material before us requires it, it is not one to be arrived at lightly. Why, one wonders, if the position is as Mr Nicol submits, have not the European Court of Human Rights themselves pronounced upon such a case? There have been many thousands to choose from. Again, however, the fact that Strasbourg has not yet received (or at any rate heard) any such complaint does not exonerate this court from its duty to decide the present application.

I come at last to my conclusion. It is not one I have found it easy to reach. It can now, however, be stated very shortly. Despite the great wealth of material available to show that grave human rights abuses still regrettably occur in Turkey, and despite the lingering sense of unease which one must inevitably feel at the return of those like this applicant to Turkey, I am unable to hold that the Secretary of State was bound to find the risk of this particular applicant being ill-treated to be a real one. Clearly there exists a conflict of opinion as to the degree of risk faced generally by returnees to Turkey. I cannot say that the Secretary of State has not conscientiously appraised the question. Whether I myself would necessarily have made the same judgment is immaterial. His judgment, I conclude, was reasonable. It is therefore unassailable. I would dismiss the application.

I add only this. Since writing this judgment I have seen the draft judgment prepared by Schiemann LJ—I entirely agree with all that he says on the procedural aspect of this case.

SCHIEMANN LJ.

I agree with the judgment of Simon Brown LJ. In particular, I agree with him for the reasons which he gives that the courts under our law, even in art 3 cases, are not the primary fact-finders. That undoubtedly is the traditional approach to judicial review. Recently Parliament has enacted the Human Rights Act 1998 after much debate. That Act comes into force October 2000. In those circumstances I would not consider it appropriate, even if it is open to us, to develop the law in this area in the meantime.

Adopting that approach, I also have anxiously considered the material which is in front of us. On the balance of the evidence it seems probable that, upon return to Turkey without any papers: (1) he would be detained and interrogated at

length; (2) it would be established that he had left the country, did not have any papers, was a Kurd, and had left in order to evade military service; (3) he would be imprisoned in a military prison and (4) he would thereafter have to do his military service.

I incline to the view that if the Secretary of State had originally concluded that nobody facing expulsion to Turkey faced a real risk of treatment contrary to art 3 such a conclusion would have been perverse. But there has undoubtedly been an improvement and the risk of ill-treatment differs from category of person to category of person. The crucial question upon which the Secretary of State had to make up his mind was whether substantial grounds had been shown for believing that Mr Turgut, if expelled to Turkey, would face a real risk of being subjected to treatment contrary to art 3. I share my Lord's view that the Secretary of State was not perverse in concluding that he would not, albeit that I consider that he would not have been perverse had he come to the opposite conclusion. In those circumstances there are no grounds for intervention by this court.

I add a postscript about a procedural matter of general interest. One of the things which troubled members of the court in the preliminary stages of this case was the fact that in this case, which is typical of many others, the Secretary of State, the applicant and the court have been faced with a stream of evidence and counter-evidence with the result that, as my Lord records, the total evidence now comes to more than 1,500 pages. I wish to record my indebtedness both to the advocates for the parties who carefully took us to the salient passages and to Michael Fordham who appeared as an amicus curiae at the invitation of the Master of the Rolls to help us clarify what should be the approach of this court in such cases. In his admirable written submissions Mr Fordham collated and summarised the received learning on this topic and his summary met with no adverse criticism from anyone. The position is as follows.

The guiding principle is that the Secretary of State has undertaken not to send someone from here to a country where there are substantial grounds for believing that he would be at real risk of facing treatment proscribed by art 3. If an applicant for permission to move for judicial review claims that the Secretary of State's decision is vitiated by some form of illegality he will file evidence to that effect. The court will not shut out evidence which is relevant to the issues. Indeed, it may order disclosure of evidence necessary for disposing fairly of the application. The evidence is not strictly limited to evidence which was or should have been before the Secretary of State at the time of the decision. This was the unanimous view of the House of Lords in *R v Secretary of State for the Home Dept, ex p Launder* [1997] 3 All ER 961 at 982–983, [1997] 1 WLR 839 at 860–861.

The application for permission to apply for judicial review will come first to the High Court and, if refused, may then be renewed before the Court of Appeal. The approach of each of these courts to the reception of evidence on such an application will be the same. What quite often happens is, that although the application for permission is in theory ex parte, the Secretary of State asks permission to put before the court evidence seeking to explain and justify his original decision. Such permission is frequently given. Sometimes the Secretary of State will seek permission to adduce evidence to the effect that he has considered the evidence filed by the applicant and that he has made a new, second, decision in the light of that evidence. Where that new decision is in favour of the applicant the case is usually disposed of by consent. Where however the second decision is to the same effect as the first decision and the applicant

challenges the legality of the second decision the question then arises as to what is the proper approach of the court. Further litigation on the first decision will generally be pointless. In general it will be convenient to substitute the second decision for the first decision as being the decision challenged in the proceedings. The applicant may apply for permission to amend his application for permission so as to substitute the new decision and generally the court will grant such an application.

Sometimes, as in the present case, it happens that fairness requires that a significant amount of time will be required to enable one party to answer the evidence of his opponent. Since his situation or the situation in the country of intended deportation may well be changing, this may cast a new light on matters. In those circumstances it can happen, and did happen in the present case, that new evidence comes to light and, on that evidence being considered by the Secretary of State, he makes a third decision and indeed a fourth and fifth decision. The principles which guide the approach of the court to these further decisions will be the same as those set out above.

Once permission to apply for judicial review has been given, the principles in relation to the admission of evidence before the court of trial are the same as indicated above. That is so whether the court of trial is, as is usual, the High Court or whether, as happened in the present case, it is the Court of Appeal—this court having granted permission to move and reserved the trial of the matter to itself. This court will not usually reserve the trial of the matter to itself since such a trial in principle is a matter for the High Court which has more judicial resources available to examine the evidence.

If the trial takes place before the High Court and either party seeks to appeal, the principles governing the admission by the Court of Appeal of new evidence are different. At that stage it will not usually be appropriate for an attempt to be made before this court to substitute a new decision for the old and to litigate the legality of that new decision before this court. That is because in principle this court is a court of appeal not a court of trial. The normal rules governing the reception of evidence on appeals will normally apply. However, this court will in exercising its discretion bear in mind the passage in *Ex p Launder* to which I have already referred.

THORPE LJ. I have had the advantage of reading both judgments in draft and I am in complete agreement with my Lords.

Application dismissed.

Dilys Tausz Barrister.

Re Thompson and another (tariff recommendations)

COURT OF APPEAL, CRIMINAL DIVISION
LORD WOOLF CJ
26 OCTOBER 2000

Sentence – Young offender – Murder – Young offenders sentenced to be detained during Her Majesty's pleasure – Recommendations as to tariff.

In the first decision under *Practice Note (juveniles: murder tariff)* [2000] 4 All ER 831, [2000] 1 WLR 1655, the Lord Chief Justice has made tariff recommendations in respect of Robert Thompson and Jon Venables, the two boys convicted in 1993 of the murder of James Bulger (see p 742 *a* to *d*, post).

Notes

For detention during Her Majesty's pleasure, see 11(2) *Halsbury's Laws* (4th edn reissue) para 1269.

Case referred to in statement

R v Secretary of State for the Home Department, ex p Venables, R v Secretary of State for the Home Department, ex p Thompson [1997] 3 All ER 97, [1998] AC 407, [1997] 3 WLR 23, HL.

Tariff recommendations

On 12 June 1997, the House of Lords ([1997] 3 All ER 97, [1998] AC 407) affirmed a decision of the Court of Appeal (Lord Woolf MR, Hobhouse and Morritt LJJ) on 30 July 1996 ([1997] 1 All ER 327, [1998] AC 407) which itself affirmed a decision of the Divisional Court (Pill LJ and Newman J) on 2 May 1996 ((1996) Times, 7 May), quashing the tariffs of 15 years imposed by the then Secretary of State for the Home Department on Robert Thompson and Jon Venables, the two boys convicted in 1993 of the murder of the two-year old James Bulger, and ordered to be detained during Her Majesty's pleasure. In subsequent proceedings brought by Thompson, the European Court of Human Rights held on 16 December 1999 (*T v United Kingdom* [2000] 2 All ER 1024n, (1999) BHRC 659) that the fixing of his tariff by the Secretary of State had constituted a breach of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (as set out in Sch 1 to the Human Rights Act 1998). Following that decision, the present Secretary of State made a statement to Parliament on 13 March 2000, announcing that legislation would be laid before it providing for the tariff in cases involving defendants under the age of 18 to be set by the trial judge in open court. He further announced that until the legislation was implemented he would set tariffs, both in existing and new cases, in accordance with the recommendation of the Lord Chief Justice. On 27 July 2000 Lord Woolf CJ made a statement at the sitting of the court (*Practice Note (juveniles: murder tariff)* [2000] 4 All ER 831, [2000] 1 WLR 1655) setting out the practice that he would adopt, and the principles that he would apply, in setting such tariffs. In the first case under that statement, Lord Woolf CJ was required to make a recommendation on the tariffs to be imposed

on Thompson and Venables. Thompson was represented by Lloyd Lee Dures, Liverpool, and Venables by Bhatt Murphy. The facts are set out in the statement.

LORD WOOLF CJ. On 27 July 2000 I made a practice statement ([2000] 4 All ER 831, [2000] 1 WLR 1655) as to life sentences for murder. In the practice statement I set out the course that I would adopt when making recommendations to the Home Secretary as to the tariffs for juveniles sentenced to be detained during Her Majesty's pleasure. The recommendations are made at the request of the Home Secretary in accordance with his statement to the House of Commons on 13 March 2000. The Home Secretary has agreed that he will follow my recommendations in these cases.

This is my decision as to tariffs in the cases of Jon Venables and Robert Thompson. They were ordered to be detained during Her Majesty's pleasure, after being convicted of murder on 24 November 1993.

In reaching my decision I have had regard to all the information available to me, and in particular the following considerations.

1. The murder took place on 12 February 1993. Jon Venables and Robert Thompson were then ten and a half years of age, having been born, in the case of Jon Venables on 13 August 1982 and in the case of Robert Thompson on 23 August 1982.

2. The facts of the murder were exceptionally horrific. They were summarised by the trial judge, Morland J, in the following terms when sentencing Jon Venables and Robert Thompson:

> '... the killing of James Bulger was an act of unparalleled evil and barbarity. This child of two was taken from his mother on a journey of over two miles and then, on a railway line, was battered to death without mercy and then his body was placed across the railway line so that his body would be run over by a train in an attempt to conceal his murder. In my judgment your conduct was both cunning and very wicked.'

Subsequently, in the boys' absence, the judge added: 'How it came about that two mentally normal boys aged ten of average intelligence committed this terrible crime is very hard to comprehend ...'

I accept that this very experienced judge in these words accurately described the crime. The crime had many aggravating features, including the age of the victim, the period over which the violence stretched and its degrading nature, and what was done with the body of the victim.

3. In his speech in the House of Lords on an appeal relating to a former Home Secretary's decision as to the detention of Jon Venables and Robert Thompson, Lord Steyn said: 'The inexpressible grief of the family of the murdered boy will never cease. The family, the local community and society generally are morally outraged.' (See *R v Secretary of State for the Home Department, ex p Venables, R v Secretary of State for the Home Department, ex p Thompson* [1997] 3 All ER 97 at 140, [1998] AC 407 at 518.)

The statements which I have received from James Bulger's parents make it clear that Lord Steyn was accurately summarising the effect of the murder on them. The mother was 26 at the time her son was killed. She says, and I accept, 'not a day goes by without her thinking of the events of 12 February 1993'. Her marriage broke up in the summer of 1994 and she has since remarried. She, however, believes that if James had not been killed, she would in all probability still be married to James' father. Prior to the break up of her first marriage she

had a further son and since her remarriage she has had two more sons. She is now naturally very concerned for the safety of these children and she says she will not allow them out of her sight.

The impact of James' death has been similarly traumatic for Mr Bulger. I have been provided with a clinical psychological report relating to Mr Bulger. The psychologist was of the opinion that Mr Bulger was suffering from post-traumatic stress disorder as a result of the murder of his son for which he requires treatment. This has adversely affected his ability to obtain employment. Members of his family, his brother and mother, are seriously traumatised. They would, according to the report, also benefit from assessment and treatment.

I have found it of real value to have information as to the impact of the death on the family. None the less, I make it clear for the benefit of other cases that I will have to consider that my invitation to receive representations from victims is limited to the effect of crimes upon the victim's family. It is not an invitation for the family to indicate their views as to what they would regard as an appropriate tariff. The effect of the crime on the parents is relevant to the period by way of punishment and deterrence which should elapse before the parole board decides a different question, that is, when the offenders can be safely released back into the community on licence.

4. The trial judge, Morland J, was unable to distinguish between the culpability of the boys. He came to the conclusion that eight years would be an appropriate tariff period. He regarded this period as being 'very, very many years' for children who were then 11 years of age. He added that in eight years' time they would be young men. He indicated that, if an adult had committed the crime, he would have concluded that the tariff should have been 18 years. He clearly had in mind that the tariff period for children must be much lower than that for adults. The trial judge also recognised that very great care would have to be taken before either boy was allowed back into the community. He said much psychotherapeutic, psychological and educational investigation and assistance would be required before this happened. He considered that there was a very real risk of revenge attacks upon them from others. This risk is confirmed by the information before me.

5. The then Lord Chief Justice, Lord Taylor of Gosforth, recognised that the trial judge was in a better position than he was to assess the two boys and their crime, but he came to the conclusion that the minimum period for punishment and deterrence should be ten years.

6. The Home Secretary concluded that the tariff period should be 15 years. His decision was the subject of an appeal to the House of Lords (see *Ex p Venables*). The House of Lords was concerned with whether the Home Secretary had based his decision on appropriate considerations. The House of Lords decided that the Home Secretary had not taken into account the correct considerations. The House of Lords decided that a sentence of detention during Her Majesty's pleasure had to be considered from time-to-time to assess whether the continued detention of the boys was justified. Lord Browne-Wilkinson and Lord Hope of Craighead made it clear that it was necessary to take into account the requirements of s 44(1) of the Children and Young Persons Act 1933 (as amended), which provides:

> 'Every court in dealing with a child or young person who is brought before it, either as ... an offender or otherwise, shall have regard to the welfare of the child or young person ...'

7. In considering the appropriateness of the periods recommended by the trial judge and Lord Taylor CJ, and then fixed by the Home Secretary, it has to be borne in mind that they are equivalent to a sentence of an adult to imprisonment for at least twice the period of the tariff. This is because if an adult is sentenced to a period of 16, 20 or 30 years' imprisonment, he would be considered for release on parole once at least half that period had expired, namely after 8, 10 or 15 years. I have also had to take into account that the judge and Lord Taylor CJ did not have the advantage of knowing how Jon Venables and Robert Thompson have developed while in custody, which is a matter to which I have to have regard.

8. The reports to which the trial judge referred have been obtained. The reports show clearly that the two boys have made striking progress in the secure units where they have been detained. The extent of this progress reflects very great credit on all those who have been responsible for their care. The reports draw a vivid picture of two boys who have significantly improved over the years. For example, in a report of February 2000 a consultant adolescent forensic psychiatrist, accustomed to working with child murderers, says of Jon Venables:

> 'He has made exceptional progress as a child adolescent serving HMP with personal development, acknowledgement of the enormity of his offence, understanding of his actions as a child, and in his "normal" adolescent development in "abnormal circumstances".'

A similar report in the case of Robert Thompson also written in February 2000 states:

> 'Robert has made exceptional progress in his current placement with regard to maturity, education and insight gained in therapy. Robert accepts responsibility for the grave acts he committed in the offence and shows great remorse for the pain and suffering he caused.'

9. Jon Venables has no doubt benefited from the continued interest of his parents and Robert Thompson has benefited from the similar interest of his mother.

10. Jon Venables and Robert Thompson have been detained in separate secure units. They are different personalities with different backgrounds. However, the assessment of the respective psychiatrists and the staff of the units at which they are detained are very similar when they describe the way these two young men have responded to their punishment. Significantly, the assessments generally agree that both of these young men are genuinely extremely remorseful about the crime which they committed, and the effect which it must have had on James' family. In addition, neither has shown any aggression or propensity for violence during his period of detention. They have worked hard in pursuing their education and, given their circumstances, have considerable achievements to their credit. All those who have reported on them regard the risk of their reoffending as being low.

11. The progress which they have made does not mean that it is going to be easy for them to be rehabilitated into the community. They are bound to have been affected by having grown up in secure institutions. They have had limited contact with the outside world during the last seven years. It is therefore important that the programme necessary to prepare for their return to the community is commenced as soon as appropriate.

12. The one overriding mitigating feature of the offence is the age of the two boys when the crime was committed. However grave their crime, the fact

remains that if that crime had been committed a few months earlier, when they were under ten, the boys could not have been tried or punished by the courts. In addition, account has to be taken of the fact that the last seven years, the period of their adolescence, has been passed in custody.

13. They are both now 18 years of age. Being 18 they would be due to be transferred to young offender institutions. The reports make clear that the transfer would be likely to undo much of the good work to which I have referred. Having been living in an unnaturally protected environment, they are unprepared for the very different circumstances in which they would be detained in a young offender institution. They are unlikely to be able to cope, at least at first, with the corrosive atmosphere with which they could be faced if transferred. There is also the danger of their being exposed to drugs, of which they are at present free.

14. These considerations are relevant. In his speech in the House of Lords, to which I have already referred, Lord Browne-Wilkinson made it clear that in exercising discretion as to the duration of detention, I am required to take into account as one of the relevant factors, 'the desirability of reintegrating the child into society'. Lord Browne-Wilkinson added:

> 'The extent to which this is possible must depend, in the case of a young child at least, on the way in which the child is maturing through his formative years. If the child is making exceptional progress and it is clear that his welfare would be improved by release from detention, that is one of the factors [which I] must take into account and balance against the other relevant factors of retribution, deterrence and risk. The child's welfare is not paramount: but it is *one* of the factors which must be taken into account.' (See [1997] 3 All ER 97 at 123, [1998] AC 407 at 499–500; Lord Browne-Wilkinson's emphasis.)

15. Quite apart from the welfare of these two young men there is a public interest in ensuring that what has been achieved in their upbringing is not wasted. Society has invested considerable energy and skilled care in their upbringing. A great deal of money must have been expended upon them. This commitment should be built upon.

16. Naturally, whenever these two young men come to be released from detention, that will be far too early so far as the victim's family are concerned. The parents are entitled to point out that James had no second chance. He was entirely innocent but he will not have the opportunity of growing up and maturing in the way his killers have. As any parent would, I understand and sympathise fully with the family's position. However, there are other considerations to be placed in the balance. The two boys have developed and behaved during their detention in a way in which the trial judge and Lord Taylor CJ could not be aware. The material which is before me, including the reports from very eminent doctors, demonstrates that further detention would not serve any constructive purpose.

17. Their release will not end their punishment. Having become responsible young men, they will have to live with, and will be marked by, what they did when children of ten. Their crime is not one which is expunged by the Rehabilitation Act 1974. They will be on licence and liable to be recalled to custody for the rest of their lives if they do not comply with the terms of their licence. It is to be hoped that this does not prevent them leading full and useful lives. So far as this is possible it is in the interest of the public that they should now do so.

18. If I had been called on to set their tariff after they had been sentenced, I would probably have selected ten years as being appropriate, as did Lord Taylor CJ. Today it is clear, as was not clear then, that it is necessary when fixing the tariff to take into account the welfare of the children concerned. In addition, when reviewing a tariff in the case of children I am required to take into account the progress which they have made since they have been in detention. In the case of both these young men the information before me makes it clear that they have done all that is open to them to redeem themselves. While their crime remains horrendous, they are entitled to credit for this. Because of their behaviour they are entitled to a reduction in the tariff to eight years, which happens to be the figure determined by the trial judge.

19. An eight-year tariff would expire on 21 February 2001. I have already pointed out that it would not be in their or the public's interest for these two young men to be transferred to a young offender institution. In all probability, if the tariff period expired today it is likely that it would be after February 2001 before the parole board could decide whether they should be released and, if so, for the necessary arrangements to be made to enable this to happen. I therefore set a tariff which will expire today. This will enable the very difficult task of deciding *if* and how these young men should return to society to begin. I emphasise that the final decision as to whether they should be released and conditions for release are the responsibility of the board and nothing I have said is to interfere with the board's discretion.

One matter to which I should finally refer is the delay which has occurred in my giving this decision. As I have made clear, I regard it as being helpful to have representations from the victim's family in a case of this sort. The representations are normally to be channelled to me through the Director of Public Prosecutions. In this case, the lawyer acting on the part of Mr Bulger has found it necessary to request a number of extensions of time in which to make those representations. Bearing in mind the nature of the representations I was seeking, I found the inability to provide those representations difficult to understand. However, I granted extension after extension because I did not think it right that Mr Bulger should be disadvantaged. However, it would have been wrong to defer giving my decision any longer and I gave him a final deadline of 24 October 2000 (last Tuesday). This deadline was met. I would emphasise that in the other cases which I will be required to consider I will not be able to be so indulgent. If lawyers have other commitments which prevent them serving their clients' interests, it is their responsibility to make arrangements so that others can meet those interests.

Recommendation accordingly.

Kate O'Hanlon Barrister.

Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd and others

[2001] UKHL/1

HOUSE OF LORDS

LORD STEYN, LORD HOFFMANN, LORD CLYDE, LORD HOBHOUSE OF WOODBOROUGH AND LORD SCOTT OF FOSCOTE

9–12 OCTOBER 2000, 18 JANUARY 2001

Marine insurance – Contract of marine insurance – Disclosure – Duty to disclose – Duty of utmost good faith – Scope of pre-contract duty to disclose – Whether shipowners under a continuing duty of utmost good faith to disclose information material to the claim after commencement of litigation – Marine Insurance Act 1906, s 17.

Marine insurance – Loss – Indemnity – Constructive total loss attributable to unseaworthiness – Insurer's liability excluded when ship sent to sea in unseaworthy state with privity of the assured – Meaning of privity – Degree of knowledge necessary – 'Blind-eye' knowledge – Whether gross negligence sufficient to establish 'blind-eye' knowledge – Marine Insurance Act 1906, s 39(5).

The claimant shipowners owned a vessel, the Star Sea, which was insured against marine perils, including fire, on time policies. As a result of a fire, the vessel became a constructive total loss and a claim was made against the defendant representative underwriters. Two accident reports made by the shipowners' expert into the causes of fires on sister vessels of the Star Sea were not disclosed to the insurers. At trial, the insurers contended that in failing to disclose the reports, the owners had breached the duty of utmost good faith contained in s 17[a] of the Marine Insurance Act 1906. Section 17 provided that if utmost good faith was not observed by either party, the contract might be avoided by the other party. The judge held that the s 17 duty owed by the assured came to an end once court proceedings had been commenced. He also found that the Star Sea was unseaworthy and that although the owners did not know of the unseaworthiness of the vessel, there was 'blind-eye' knowledge for the purposes of s 39(5)[b] of the 1906 Act, which provided that there was no implied warranty in a time policy that the ship should be seaworthy at any stage, but where, with the privity of the assured, the ship was sent to sea in an unworthy state, the insurers were not liable for any loss attributable to unseaworthiness. It was common ground that an imputation of 'blind-eye' knowledge required an amalgam of suspicion that certain facts might exist and a decision to refrain from taking any step to confirm their existence. The Court of Appeal held, inter alia, that at the claim stage, and after the claim had been made, the s 17 duty required no more than that the claim should not be made, or persisted in, fraudulently and disagreed with the judge's findings that the Star Sea had been sent to sea in an unseaworthy condition with the privity of the assured. On the insurers' appeal to the House of Lords, it fell to be decided (i) whether the owners were under a continuing duty of the utmost good faith to disclose to the insurers any information material to the claim and

a Section 17 is set out at [18], post

b Section 39(5) is set out at [15], post

which might affect their decision to pay or defend the claim, whether that duty continued notwithstanding that litigation had started and whether the duty had been broken by the owners' failure to disclose certain facts material to their defence under s 39(5), thereby entitling the insurers to avoid the contract ab initio with retrospective effect under s 17; and (ii) as to what state of mind on the part of the assured, short of actual knowledge, had to be shown for a finding that the assured was privy to the unseaworthiness of the vessel for the purposes of the defence under s 39(5).

Held – The appeal would be dismissed for the following reasons—

(1) The right under s 17 to avoid a contract of marine insurance for lack of utmost good faith by the other party differed from a contractual obligation of good faith in that it applied retrospectively and enabled the aggrieved party to rescind the contract ab initio. It was appropriate that where the want of good faith had preceded and had been material to the making of the contract, that any adjustment of the parties' financial position took place under the law of restitution rather than under the law of contract; however, where the want of good faith occurred later, it was anomalous and disproportionate that it should be so categorised and entitle the aggrieved party to such an outcome. A lack of good faith material to the making of the contract or to some variation of it should be distinguished from a lack of good faith during the performance of the contract which might prejudice the other party or destroy the continuing contractual relationship. Lack of good faith in the former case would derive from pre-existing requirements of the law which were not created by the contract, and the remedy was the right to elect to avoid the contract. Lack of good faith in the latter case could derive from express or implied terms of the contract and the appropriate remedies were those provided by the law of contract. It was not right to reason from the existence of an extensive pre-contract duty positively to disclose all material facts to the conclusion that there was a similarly extensive obligation to disclose all facts which the insurers had an interest in knowing and which might affect their conduct. In the instant case, although an assured who made a fraudulent claim might not recover a lesser claim which might properly have been made, the insurers had failed to show that the claim had been made fraudulently: it was not enough that the owners had, without fraudulent intent, failed to disclose all the documents which the insurers might have wished to have seen in order to provide them with some evidential support for their alleged defence under s 39(5). Furthermore (per Lord Steyn, Lord Hoffmann, Lord Clyde and Lord Hobhouse), the obligation of good faith and disclosure did not continue to apply unqualified once the parties to a policy of marine insurance were in hostile litigation before the courts. Before litigation started, the parties' relationship was purely contractual, subject to the application of the general law, but important changes in the parties' relationship occurred when litigation started. The relationship and their rights were thereafter governed by rules of procedure and order of the court. There was no longer the need for the remedy of avoidance under s 17 as other more appropriate remedies were available, such as orders for disclosure of documents and facts. Once the parties were in litigation, it was the procedural rules which governed the extent of the disclosure, and not s 17, although s 17 might influence the court in the exercise of its discretion. Accordingly, the utmost good faith defence failed (see [1], [2], [6]–[8], [51], [52], [57], [62], [71], [72], [75], [77], [95] and [111], post); *Black King Shipping Corp v Massie, The Litsion Pride* [1985] 1 Lloyd's Rep 437 disapproved; *Piermay Shipping Co SA v Chester, The Michael* [1979] 2 Lloyd's Rep 1 considered.

(2) Gross negligence would not suffice to establish an assured's 'blind-eye knowledge' of the unseaworthiness of an assured's vessel. The illuminating question was why the assured had not inquired: if the judge was satisfied that it was because the assured did not want to know for certain that the vessel was unseaworthy, a finding that he was privy to the unseaworthiness of the vessel would be made out. If, on the other hand, the assured did not inquire because he was lazy or grossly negligent or believed that there was nothing wrong, privity would not have been made out. The test for the establishment of privity was the subjective one of whether the assured had direct knowledge of the unseaworthiness or an actual state of mind which the law treated as equivalent to such knowledge. If an assured deliberately refrained from examining the vessel in order not to gain direct knowledge of what he had reason to believe was her unseaworthy state, he was privy to the ship putting to sea in that unseaworthy state. In the instant case, the evidence did not sustain the judge's finding of privity and the defence under s 39(5) was not made out (see [1]–[3], [25], [26], [36] and [115]–[120], post); *Cia Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes* [1976] 3 All ER 243 applied.

Notes

For seaworthiness in time policies, and for the requirement of the utmost good faith, see 25 *Halsbury's Laws* (4th edn reissue) paras 74 and 349 respectively.

For the Marine Insurance Act 1906, s 17, 39, see 22 *Halsbury's Statutes* (4th edn) (2000 reissue) 26, 37.

Cases referred to in opinions

Bank of Boston Connecticut v European Grain and Shipping Ltd, The Dominique [1989] 1 All ER 545, [1989] AC 1056, [1989] 2 WLR 440, HL.

Bank of Nova Scotia v Hellenic War Risks Mutual Insurance Association (Bermuda) Ltd, The Good Luck [1988] 1 Lloyd's Rep 514; *rvsd* [1989] 3 All ER 628, [1990] 1 QB 818, [1990] 2 WLR 547, CA; *rvsd* [1991] 3 All ER 1, [1992] 1 AC 233, [1991] 2 WLR 1279, HL.

Banque Financière de la Cité SA v Westgate Insurance Co Ltd [1990] 2 All ER 947, [1991] 2 AC 249, [1990] 3 WLR 364, HL; *affg on other grounds* [1989] 2 All ER 952, sub nom *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665, [1989] 3 WLR 25, CA; *rvsg* [1987] 2 All ER 923, [1990] 1 QB 665, [1987] 2 WLR 1300.

Bates v Hewitt (1867) LR 2 QB 595.

Bell v Lever Bros Ltd [1932] AC 161, [1931] All ER Rep 1, HL.

Beresford v Royal Insurance Co Ltd [1937] 2 All ER 243, [1937] 2 KB 197, CA; *affd* [1938] 2 All ER 602, [1938] AC 586, HL.

Black King Shipping Corp v Massie, The Litsion Pride [1985] 1 Lloyd's Rep 437.

Boulton v Houlder Bros & Co [1904] 1 KB 784, CA.

Britton v Royal Insurance Co (1866) 4 F & F 905, 176 ER 843, NP.

Cantiere Meccanico Brindisino v Janson [1912] 3 KB 452, CA.

Carter v Boehm (1776) 3 Burr 1905, [1558–1774] All ER Rep 183, 97 ER 1162.

Chandris v Argo Insurance Co Ltd [1963] 2 Lloyd's Rep 65.

Cia Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes [1976] 3 All ER 243, [1977] QB 49, [1976] 3 WLR 265, CA.

Cia Naviera Vasconada v British and Foreign Marine Insurance Co Ltd, The Gloria (1935) 54 Ll L Rep 35.

Cie Financière et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55, CA.

Commercial Union Assurance Co v Niger Co Ltd, Niger Co Ltd v Guardian Assurance Co (1922) 13 Ll L Rep 75, HL; *affg* (1921) 6 Ll L Rep 239, CA.

Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1984] 1 Lloyd's Rep 476, CA.

Cory v Patton (1872) LR 7 QB 304.

Dalglish v Jarvie (1850) 2 Mac & G 231, 42 ER 89.

Galloway v Guardian Royal Exchange (UK) Ltd [1999] Lloyd's Rep IR 209, CA.

Goldschmidt v Marryat (1809) 1 Camp 559, 170 ER 1057, NP.

Goulstone v Royal Insurance Co (1858) 1 F & F 276, 175 ER 725.

Graham Joint Stock Shipping Co Ltd v Motor Union Insurance Co Ltd [1922] 1 KB 563, [1921] All ER Rep 394, CA.

Henderson v Underwriting and Agency Association Ltd [1891] 1 QB 557.

Iron Trades Mutual Insurance Co Ltd v Cia de Seguros Imperio (31 July 1990, unreported), QBD.

Jones v Gordon (1877) 2 App Cas 616, HL.

Lek v Mathews (1927) 29 Ll L Rep 141, HL.

Leon v Casey [1932] 2 KB 576, [1932] All ER Rep 484, CA.

Liberian Insurance Agency Inc v Mosse [1977] 2 Lloyd's Rep 560.

Lishman v Northern Maritime Insurance Co (1875) LR 10 CP 179, Ex Ch.

London Assurance v Mansel (1879) 11 Ch D 363.

Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) SA 419, SA SC.

New Hampshire Insurance Co v MGN Ltd, Maxwell Communication Corp plc v New Hampshire Insurance Co [1997] LRLR 24, QBD and CA.

NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd (1985) 4 NSWLR 107, NSW SC.

Orakpo v Barclays Insurance Services [1995] LRLR 443, CA.

Overseas Commodities Ltd v Style [1958] 1 Lloyd's Rep 546.

Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1994] 3 All ER 581, [1995] 1 AC 501, [1994] 3 WLR 677, HL.

Pawson v Watson (1778) 2 Cowp 785, 98 ER 1361.

Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd, Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat [1986] 1 All ER 908, [1988] QB 216, [1987] 2 WLR 512; *rvsd in part* [1987] 2 All ER 152, [1988] QB 216, [1987] 2 WLR 512, CA.

Piermay Shipping Co SA v Chester, The Michael [1979] 2 Lloyd's Rep 1, CA.

Polurrian SS Co v Young (1913) 84 LJKB 1025, 19 Com Cas 143; *affd* [1915] 1 KB 922, CA.

Probatina Shipping Co Ltd v Sun Insurance Office Ltd [1974] 2 All ER 478, [1974] QB 635, [1974] 2 WLR 666, QBD and CA.

Rego v Connectitcut Insurance Placement Facility (1991) 593 A 2d 491, Conn SC.

Reid & Co v Employers' Accident and Livestock Insurance Co (1889) 1 F (Ct of Sess) 1031, CS.

Royal Boskalis Westminster NV v Mountain [1997] LRLR 523, QBD and CA.

Sailing Ship Blairmore Co Ltd v Macredie [1898] AC 593, HL.

Standard Oil Co of New York v Clan Line Steamers Ltd [1924] AC 100, [1923] All ER Rep 73, HL.

Standard Steamship Owners' P & I Association (Bermuda) Ltd v Oceanfast Shipping Ltd (6 March 1996, unreported), QBD.

Thomas v Tyne and Wear SS Freight Insurance Association [1917] 1 KB 938.

Twizell v Allen (1839) 5 M & W 337, 151 ER 143.

Village Main Reef Gold Mining Co Ltd v Stearns (1900) 5 Com Cas 246.

Appeal

The appellant insurers, Uni-Polaris Shipping Co Ltd and La Réunion Européene, appealed with leave of the Appeal Committee of the House of Lords given on 27 October 1997 from the order of the Court of Appeal (Leggatt LJ, Henry and Waller LJJ) ([1997] 1 Lloyd's Rep 360) on 10 March 1997 dismissing their appeal from the decision of Tuckey J ([1995] 1 Lloyd's Rep 650) on 16 November 1994 allowing a claim by the respondent shipowners, Manifest Shipping Co Ltd, for payment of sums due under a contract of marine insurance, by which the insurers had agreed to provide insurance cover on the vessel the Star Sea, in respect of the constructive total loss of the vessel by, inter alia, fire. The facts are set out in the opinion of Lord Hobhouse of Woodborough.

Gordon Pollock QC and *David Foxton* (instructed by *Ince & Co*) for the insurers.

Jonathan Sumption QC, *Stephen Hofmeyr QC* and *Rebecca Sabben-Clare* (instructed by *Hill Taylor Dickinson*) for the shipowners.

Their Lordships took time for consideration.

18 January 2001. The following opinions were delivered.

LORD STEYN. My Lords,

[1] I have had the advantage of reading the speeches of Lord Clyde, Lord Hobhouse of Woodborough and Lord Scott of Foscote. For the reasons they give I would also dismiss the appeal.

LORD HOFFMANN. My Lords,

[2] I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Hobhouse of Woodborough and Lord Scott of Foscote and for the reasons which they give I would dismiss the appeal.

LORD CLYDE. My Lords,

[3] Section 39(5) of the Marine Insurance Act 1906 concerns the case where 'with the privity of the assured, the ship is sent to sea in an unseaworthy state'. The underwriters argue that the assured had 'blind-eye knowledge' of the two particular respects in which the ship was unseaworthy. Blind-eye knowledge in my judgment requires a conscious reason for blinding the eye. There must be at least a suspicion of a truth about which you do not want to know and which you refuse to investigate. The argument on that approach then fails on the facts. I am not able to spell out of the judgment of Tuckey J (see [1995] 1 Lloyd's Rep 651) any finding that the insured, or particularly any of those whose states of mind may be attributed to that of the insured, suspected any incompetence on the part of the master of the Star Sea, let alone any suspicion of his incompetence in the particular respect which mattered. That is sufficient to dispose of this part of the case; but in any event there is no finding of a suspicion on the part of the insured of the defective state of the dampers which contributed to the loss.

[4] As regards the other chapter in the case, I consider that it also fails on the facts. Even if the appellants were correct in requiring fair dealing and disclosure at the stage of the litigation I am not persuaded that the evidence supports the proposition that there was in fact any 'culpable non-disclosure', as it was termed, on the part of the insured. As regards the obligations in law of an insured at the stage of a disputed claim, I take the view that there is no duty upon the insured

to make a full disclosure of his own case to the other side in a litigation. I see no practical justification for such an obligation at that stage. Unlike the initial stage when the insurer may rely very substantially upon the openness of the insured in order to decide whether or not to agree to provide insurance cover, and if so at what level of premium, the insurer has open to him means of discovery of any facts which he requires to know for his defence to the claim. Moreover, I have found no precedent to support the appellants' proposition; if anything the authority at least of *MacGillivray on Insurance Law* (9th edn, 1997) para 19-59 points in the opposite direction. The idea of a requirement for full disclosure superseding the procedural controls for discovery in litigation is curious and unattractive, and one which would require to be soundly based in authority or principle.

[5] What has caused me greater difficulty is the broad provision in s 17 which appears to be unlimited in its scope. The expression 'utmost good faith' appears to derive from the idea of uberrimae fidei, words which indeed appear in the sidenote, but whose origin I have not been able to trace. The concept of uberrima fides does not appear to have derived from civil law and it has been regarded as unnecessary in civilian systems (see Professor T B Smith *A Short Commentary on the Law of Scotland* (1962) p 836, quoting M A Millner 'Fraudulent Non-Disclosure' (1957) 76 SALJ 177 at 188–189). Indeed, more recently the suggestion has been advanced in the Court of Appeal in South Africa that the concept should be jettisoned (see *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 at 433). *Blackstone's Commentaries* (2 Bl Com (4th edn, 1876) ch 30, pp 412–413) states that the very essence of contracts of marine insurance 'consists in observing the purest good faith and integrity', but in *Carter v Boehm* (1766), 3 Burr 1905 at 1910, [1558–1774] All ER Rep 183 at 185 Lord Mansfield refers simply to 'good faith'.

[6] On the face of it the comprehensive degree of disclosure which the phrase implies and the absence of any limitation upon the period over which the obligation is to extend gives some support to the appellants' contention. But if the view which I have preferred is correct and the highest degree of openness is not required at the stage of a disputed claim, then the superficial meaning of s 17 cannot be correct. One solution is to impose a limit upon the period of the relationship between the parties to which the statutory provision is meant to apply so that it would only apply to pre-contract negotiations. That can be supported by the fact that the section is placed in a group of provisions dealing with disclosure and representation. The special provisions which immediately follow s 17 may embellish the general rule which applies at the period of formation, but not be exhaustive of it. But that solution now appears to be past praying for. In these circumstances the alternative remains available of adopting a flexible construction of the concept of utmost good faith. The latter course was the one which the respondent has adopted and which I would accept.

[7] Since even after the contract is entered into the relationship between the parties should in any event be coloured by considerations of good faith, the point is in some respects academic. But once it is recognised that in a contract of insurance, and indeed in certain other contracts, an element of good faith is to be observed, and that that element may impose certain duties particularly of disclosure between one party and the other, duties which may vary in their content and substance according to the circumstances, then a question may arise as to the utility of the concept of an utmost good faith or an uberrima fides. In my view the idea of good faith in the context of insurance contracts reflects the

degrees of openness required of the parties in the various stages of their relationship. It is not an absolute. The substance of the obligation which is entailed can vary according to the context in which the matter comes to be judged. It is reasonable to expect a very high degree of openness at the stage of the formation of the contract, but there is no justification for requiring that degree necessarily to continue once the contract has been made.

[8] I agree that the appeal should be dismissed.

LORD HOBHOUSE OF WOODBOROUGH. My Lords,

[9] On 8 November 1989, brokers acting for the Kollakis group of companies renewed with underwriters the marine hull and machinery cover on the 40 or so vessels in their fleet for a further year. One of the vessels was the Cypriot motor vessel Star Sea, built in 1974 and having a gross tonnage 6925 tons. She was a dry cargo vessel having her engine-room and accommodation amidships and four refrigerated holds suitable for carrying bananas and this was the trade in which she was primarily employed. The trade is seasonal and it was usual for the Kollakis group to lay up their reefer vessels during the late summer and autumn. The Star Sea was laid up in the Piraeus during which time annual maintenance and repairs were done by local contractors. She sailed on her first voyage following lay-up on 28 November 1989 manned by a Maldivian crew with Greek officers. Before she sailed she was inspected by a class surveyor and her cargo ship safety certificate, covering among other things fire safety, was renewed. The renewed insurance cover had attached on 25 November. Her insured value was $US3·2m. The insurance was governed by English law and no specific clauses in the policies have been relied on by either side on this appeal. The provisions of the Marine Insurance Act 1906 (the Act) apply. Loss by fire is a peril insured against.

[10] Between November 1989 and May 1990, no incident occurred relevant to this appeal. There was a minor engine-room fire in March but this was simply dealt with using fire extinguishers. In January there was also a question of the efficiency of the emergency fire pump drawing water from the forepeak. A temporary fire pump was provided which satisfied the local surveyor but the suction in the forepeak was left in a condition where it would not draw unless the tank was filled; it was normally empty when the vessel was laden. However, nothing now turns on these matters; they did not contribute to what was subsequently to occur.

[11] On 27 May 1990 the Star Sea sailed from Corinto, Nicaragua bound for Zeebrugge laden with a cargo of bananas, mangoes and coffee. Two days out, on the morning of 29 May, a fire was accidentally started in the engine-room workshop where the third engineer was using an oxyacetylene torch and it flashed back to the oxygen gas bottles. Attempts to use extinguishers on the fire were defeated by smoke. After about two and a half hours the master decided to use the CO_2 system. The actions then taken were not effective to put out the fire and it continued to burn although for a while the crew thought it had been extinguished.

[12] The vessel had sent out distress calls and these were responded to. The first vessel to arrive departed during the afternoon because the crew thought that the fire was out and that they did not need further assistance. During the early evening it became only too obvious that this was not so. The fire spread to the accommodation. A tug arrived during the early hours of the following day and the fire was unsuccessfully fought for the next day using the tug's monitors. The vessel was towed into Balboa arriving on 1 June with the fire still burning. At

Balboa the fire was eventually extinguished but the damage was so extensive that the vessel had become a constructive total loss.

[13] Notice of abandonment was given to underwriters on 12 June. It was not accepted. On 10 July the underwriters agreed to put the assured in the same position as if a writ had been issued. The writ in the action indorsed with points of claim was issued on 3 August and served a month later. The writ named two representative underwriters as defendants.

[14] At the trial of the action before Tuckey J (see [1995] 1 Lloyd's Rep 651), various issues of fact and law were raised by the defendants in response to the claim. Only two are now of relevance.

[15] The first is the defence that arises under s 39(5) of the Act. For voyage policies there is an implied warranty (s 39(1)) that at the commencement of the voyage the ship shall be seaworthy, ie reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured (s 39(4)). Such a warranty must be exactly complied with, whether it be material to the risk or not, and if not complied with the insurer is discharged from liability as from the date of the breach of warranty (s 33(3)). The policy in question here is a time policy, not a voyage policy. Section 39(5) provides:

> 'In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.'

[16] There are therefore three elements in this defence. First, there must have been unseaworthiness at the time the vessel was sent to sea. Secondly, the unseaworthiness must have been causative of the relevant loss (see *Thomas v Tyne and Wear SS Freight Insurance Association* [1917] 1 KB 938). Thirdly, the assured must have been privy to sending the ship to sea in that condition. At the trial it was accepted that this defence could only defeat the claim for the constructive total loss. The vessel had become a constructive total loss under the policy because the fire had not been put out until it had caused such extensive damage to the vessel that the cost of repairing the damage would have exceeded her insured value. But some damage would have been caused by the fire in any event. It was accepted that the occurrence of the original fire was not attributable to any unseaworthiness; accordingly this defence would not bar a recovery for the lesser (but nevertheless substantial) partial loss.

[17] Tuckey J found that the vessel had been unseaworthy in two respects which had concurrently caused the vessel to be so severely damaged that she became a constructive total loss. He also found that the assured had been privy to the vessel putting to sea unseaworthy in those respects. Therefore he held that the defence was made out in so far as the constructive total loss claim was concerned.

[18] The second defence was said to arise under s 17 of the Act:

> '*Insurance is uberrimae fidei.* A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.'

The case of the defendants was that the assured was under a continuing duty of the utmost good faith to disclose to them any information material to the claim and which might affect their decision to pay or defend the claim. The defendants argued that this duty continued notwithstanding that litigation had started and

had been broken by the assured's (and their lawyer's) failure to disclose certain facts material to the defence under s 39(5). Accordingly, the defendants said, they were entitled to avoid the whole contract ab initio (with retrospective effect) and therefore had a complete defence to the whole of the claim, both the constructive total loss and the partial loss.

[19] Tuckey J held that this defence failed both in law and on the facts. He therefore gave judgment for the assured limited to the partial loss (giving, on his assessment, a recovery of some $US1·7m).

[20] Both sides appealed to the Court of Appeal. The Court of Appeal (Leggatt, Henry and Waller LJJ) (see [1997] 1 Lloyd's Rep 360) in a judgment of the court delivered by Leggatt LJ dismissed the appeal of the defendants but allowed the appeal of the assured, reversing certain of the judge's findings of fact in relation to the first defence. The Court of Appeal therefore entered judgment for the assured in respect of their claim for a constructive total loss. It is from this decision that the defendants have with the leave of your Lordships' House brought this appeal. The defendants submit that both defences should have succeeded. Since the utmost good faith defence (s 17) arises in connection with the privity defence (s 39(5)), I will take the privity defence first.

Section 39(5): the relevant unseaworthiness

[21] The judge found that the vessel was unseaworthy in a number of respects when she set sail from Corinto. These reflected the age of the vessel and a low standard of maintenance. But he found that the failure to put out the fire on the morning of May 29 was attributable to only two of them. The vessel was equipped with a CO_2 fire extinguishing system. This system worked on the principle of discharging a large quantity of CO_2 gas into the engine-room so as to suffocate and thereby extinguish the fire by depriving it of free oxygen. For the system to be effective a number of conditions have to be observed. It should be used as soon as possible, before the fire has spread to other spaces. The engine-room must first have been sealed closing all the vents and other apertures through which CO_2 might escape or oxygen enter thus prejudicing the suffocation of the fire. The full amount of CO_2 should be discharged at one time into the engine-room so as to flood it with the gas and maximise the suffocating effect. The attempt at around noon on 29 May to put out the fire using CO_2 was not successful because the attempt had been left until some two hours after the fire had started, the engine-room could not be sealed as the funnel dampers were in a defective condition and could not be fully closed, and only half of the CO_2 was used for the attempt. The CO_2 was kept in a special store outside the engine-room holding four banks of bottles. The contents of the bottles could be discharged directly into the engine-room by pulling a lever. The wires leading from the lever to two of the banks were broken. The system for discharging the bottles had not been properly maintained. When the lever was pulled only two of the banks were discharged. Had the need to discharge all four banks at the same time been appreciated the other two banks could have been discharged by different means but this need was not appreciated and it was not done at that time.

[22] The judge found that the failure to use the CO_2 earlier and the failure to use all four banks of bottles at once was attributable to the incompetence of the master in that he was ignorant of what was required for the successful use of the CO_2 system. He held that this disabling lack of knowledge on the part of the master amounted to unseaworthiness (see *Standard Oil Co of New York v Clan Line Steamers Ltd* [1924] AC 100, [1923] All ER Rep 73). The judge found that the

defective condition of the funnel dampers which made it impossible to shut them fully also amounted to unseaworthiness. On the hearing of the appeal these findings were not challenged. The defendants also conceded that, for the purposes of making good the defence under s 39(5), it was necessary for them to establish that the assured was privy to both of these aspects of unseaworthiness. Thus it was conceded that, if the defendants fail to show privity in respect of the master's incompetence, the defendants' defence under s 39(5) fails regardless of what may have been the position about the condition of the dampers (see the Court of Appeal judgment, [1997] 1 Lloyd's Rep 360 at 378). The concession was repeated before your Lordships. Whether or not this concession was correctly made has therefore not been the subject of argument before your Lordships: for the purposes of this case, I proceed on the basis of the concession.

Privity: the law

[23] It was accepted that the assured (however defined) did not have actual direct knowledge of the relevant unseaworthiness. But it was argued that the assured had a state of mind which was equivalent to knowledge, so-called 'blind-eye knowledge'. This was the type of knowledge which the judge held had been proved (see [1995] 1 Lloyd's Rep 651 at 664).

[24] The expression was used by Lord Denning MR in *Cia Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes* [1976] 3 All ER 243 at 251, [1977] QB 49 at 68 in relation to a defence of privity under s 39(5) which had been raised in answer to a claim under a policy of marine insurance:

> 'To disentitle the shipowner, he must, I think, have knowledge not only of the facts constituting the unseaworthiness, but also knowledge that those facts rendered the ship unseaworthy, that is not reasonably fit to encounter the ordinary perils of the sea. And when I speak of knowledge, I mean not only positive knowledge, but also the sort of knowledge expressed in the phrase "turning a blind eye". If a man, suspicious of the truth, turns a blind eye to it, and refrains from enquiry—so that he should not know it for certain—then he is to be regarded as knowing the truth. This "turning a blind eye" is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it.'

Geoffrey Lane LJ in the same case stressed that privity meant knowledge and consent and was not equivalent to negligence (see [1976] 3 All ER 243 at 262, [1977] QB 49 at 81). But he added the word 'believed':

> 'I add the word "believed" to cover the man who deliberately turns a blind eye to what he believes to be true in order to avoid obtaining certain knowledge of the truth.'

Roskill LJ discussed the point ([1976] 3 All ER 243 at 257–258, [1977] QB 49 at 76). He was prepared to accept the expression 'conscious realisation'. He agreed with what Lord Denning MR had said. He added:

> 'If the facts amounting to unseaworthiness are there staring the assured in the face so that he must, had he thought of it, have realised their implication upon the seaworthiness of his ship, he cannot escape from being held privy to that unseaworthiness by blindly or blandly ignoring those facts or by refraining from asking relevant questions regarding them in the hope that by

his lack of enquiry he will not know for certain that which any enquiry must have made plain beyond possibility of doubt.'

[25] All these formulations reject the suggestion that even gross negligence will suffice. The use of the word 'suspicion' and 'belief' are indicative of the strength of the suspicion that is required. But perhaps the most helpful guide is to be found in what was said by Roskill and Geoffrey Lane LJJ about the reason for refraining from inquiry: 'in the hope that by his lack of inquiry he will not know for certain'; 'in order to avoid obtaining certain knowledge of the truth'. It is probable that Lord Denning MR was saying the same thing when he used the phrase 'so that he should not know it for certain'. The illuminating question therefore becomes, 'why did he not inquire?'. If the judge is satisfied that it was because he did not want to know for certain, then a finding of privity should be made. If, on the other hand, he did not inquire because he was too lazy or he was grossly negligent or believed that there was nothing wrong, then privity has not been made out. An ambiguity has arisen from the use by Roskill LJ of the phrase 'had he thought of it'. This suggests that the test may be objective. If so, that is not correct. The test is subjective: did the assured have direct knowledge of the unseaworthiness or an actual state of mind which the law treats as equivalent to such knowledge?

[26] This conclusion is in line with what Branson J had said 40 years earlier in *Cia Naviera Vascongada v British and Foreign Marine Insurance Co Ltd, The Gloria* (1935) 54 Ll L Rep 35 at 58:

> 'I think that if it were shown that an owner had reason to believe that his ship was in fact unseaworthy, and deliberately refrained from an examination which would have turned his belief into knowledge, he might properly be held privy to the unseaworthiness of his ship. But the mere omission to take precautions against the possibility of the ship being unseaworthy cannot, I think, make the owner privy to any unseaworthiness which such precaution might have disclosed.'

If the shipowner *deliberately* refrains from examining the ship in order not to gain direct knowledge of what he has reason to believe is her unseaworthy state, he is privy to the ship putting to sea in that unseaworthy state.

[27] The section refers to the privity of the assured; the privity must be of an individual who is to be identified with the assured. The owners of the Star Sea were the Manifest Shipping Co Ltd (the plaintiffs in the action), a Cypriot company beneficially owned by the Kollakis family. The management of the vessel was in fact delegated to an English company based in London, Kappa Maritime Ltd. At the material times the directors of Kappa were Captain Stefanos Kollakis and his sons Pantelis and George, who were concerned with commercial and operational matters, and Mr Nicholaidis, the technical director. The registered managers were a Greek company, Charterwell Maritime SA, based in the Piraeus. Its directors were Captain Stefanos and a Mr Faraklas (who was also the sole director of Manifest). The role of Mr Faraklas was in fact subordinate to that of Mr Nicholaidis and the other directors of Kappa. The judge held that Captain Stefanos and his two sons and Mr Faraklas were to be treated as coming within 'the assured' for the purposes of s 37(5); the Court of Appeal considered that Mr Nicholaidis did as well. Nothing however turns on this in the present case and I will proceed on the basis that the state of mind of any of these individuals may have been relevant to the question of privity.

Privity: the facts

[28] The defendants' case on privity was based upon what had happened the previous year to two of the other vessels in the Kollakis fleet. In February 1989 the Centaurus was alongside in Wilmington, Delaware, when there was a fire in the engine-room. The crew initially did nothing to fight the fire and simply summoned the local fire brigade who were not able to put out the fire until some 15 hours later. The vessel was fitted with a CO_2 system but the Korean officers did not use it as they should because they apparently had the extraordinary belief that its use would in some way damage the engines. They left its use until it was too late for it to be effective to extinguish the fire. It also emerged that the engine-room could not be effectively sealed. The vessel was a constructive total loss.

[29] The other vessel was the Kastora. She also had Korean officers and crew. In April 1989 she was at sea in the Caribbean. There was an engine-room fire which again was not put out and allowed to spread so that the vessel became a constructive total loss. On this occasion the crew did use the CO_2 within about half an hour of the start of the fire but it was not effective because the funnel dampers were not closed. The surveyor instructed by Kappa was a Dr Atherton who inspected the vessel twice. The first time was fairly soon after the fire. He then observed that one of the funnel dampers was sticking in a partially open position but thought that this might be due to its having been distorted in the fire (see his first report dated 22 May 1989). In mid-September he inspected the vessel again and reported that 'an examination of the dampers themselves revealed that these were in poor condition and would not have provided an effective seal in the ventilator trunking' (see his second report dated 22 September 1989).

[30] There was no dispute that relevant individuals for the purpose of s 39(5) were aware of these facts. To lose two ships within the space of two months through engine-room fires which should have been capable of being extinguished was remarkable and disturbing. The judge found that the assured's response was 'completely inadequate'. So far as the crews were concerned, Captain Stefanos and the others concerned in the management of the fleet decided that the Korean crews and officers were not good enough. They were influenced in this not only by their experiences with the Centaurus and the Kastora but also with the need to have competent and reliable crews for vessels engaged in the carriage of refrigerated cargoes. They changed over to having entirely Greek-officered vessels. This was the reason why the Star Sea when she came out of lay-up was given Greek officers. The master appointed to the Star Sea had been with the fleet for over 11 years with a good record of service, had been at sea for many years before that and had obtained his master's certificate in 1978. There was no evidence that the managers or any of the relevant persons believed that the captain they had appointed to the Star Sea was anything other than competent and experienced. But it was also the case that they took no steps to check his knowledge of the right way to use the CO_2 system.

[31] So far as the maintenance of the equipment in engine-rooms was concerned, the managers of the fleet did not take any special steps. It appears that they continued to rely upon the same maintenance procedures as before. In respect of the Star Sea, the managers engaged contractors to carry out necessary repairs and maintenance in the engine-room before she returned to service in November 1989. They put her through the required surveys in order to obtain the renewal of her safety certificates. In January 1990 at Zeebrugge, further inspections were carried out. However, neither in relation to the Star Sea nor in relation to other

vessels did the management specifically require or instruct their superintendents to check the state of the dampers and other engine-room sealing components.

[32] As is shown by the judge's findings as to the state of seaworthiness of Star Sea when she sailed from Corinto, the managers were at fault. The steps that they had taken to prevent any repetition of the disastrous engine-room fires were inadequate, as he put it, 'completely inadequate'. The judge declined to find that there was any actual knowledge on the part of the relevant persons. He continued ([1995] 1 Lloyd's Rep 651 at 664):

> 'However, I do find that there was blind eye knowledge on the part of the assured. The inadequate response to the earlier fires and the state of the *Star Sea* on May 27, [1990], demonstrate in my judgment that the assured did not want to know about her unseaworthiness in the relevant respects. What it comes down to specifically is this. With the message staring them in the face, that the CO_2 systems on *Centaurus* and *Kastora* had not been used so as to prevent those ships from becoming constructive total losses, the assured took no effective steps to ensure that this would not happen again. The incompetence of the master and the state of the safety equipment for sealing the engineroom, essential to the effectiveness of the CO_2 system on *Star Sea* show only too clearly how ineffective those steps were and how inadequately equipped she was to fight a fire effectively. The assured did not want to know about the competence of the master to use the CO_2 system effectively. It is not easy to find a reason for this, since it would not have involved much time or money to ensure that the master was competent. The assured did not want to know about the state of the safety equipment. One reason for this is not difficult to find: money. This was an elderly vessel for which, as I find, there was a tight budget for repairs. A good deal of time and money had been spent on repairing in lay-up and maintaining at sea the reefer machinery which was, of course, essential to its revenue earning ability.'

[33] Thus he does use the phrases drawn from the previous cases—'the assured did not want to know', 'staring them in the face'—but it is all postulated upon the inadequacy of the response to the earlier fires, not upon any belief that would relate to the Star Sea herself. Whatever might be said about a tendency to skimp on repairs, nothing at all (as the judge himself points out) was to be gained by failing to check the master's state of knowledge of using CO_2 and taking the simple steps, with no adverse costs implications, necessary to put any deficiency right. This is the point which was taken up by the Court of Appeal. Leggatt LJ said ([1997] 1 Lloyd's Rep 360 at 377): '... an allegation that they ought to have known [is] not an allegation that they suspected or realized but did not make further enquiries.' He reviewed the evidence and continued ([1997] 1 Lloyd's Rep 360 at 378):

> 'Accordingly, on the evidence, it was simply not open to the Judge to make a finding that any of the individuals "suspected" or "believed" that the master was incompetent, lacking the basic knowledge on how to utilise CO_2. The Judge, it is right to say, himself recognized that it was not easy to find a reason why, in making a decision to change the crew, anyone should do so to persons it was "suspected" or "believed" would render the ship unseaworthy. Negligence there may have been in failing to ensure that the master was instructed, but "suspicion" in the minds of any of the relevant individuals that an incompetent master might be being used was simply not established.'

[34] The Court of Appeal therefore reversed the finding of the judge. This sufficed (on the concession which had been made) to defeat the defence under s 39(5). They accordingly did not need to deal in detail with the question of privity in relation to the dampers. They pointed out, correctly, that the judge had not made a finding that any of the relevant individuals had suspected or believed that the Star Sea might be unseaworthy because of defects in the dampers. A finding of negligence to a very high degree did not suffice for a finding of privity.

[35] There may have been two sources of the difference between the Court of Appeal and the judge on this part of the case. The one was the confusion which has arisen from one of the phrases used by Roskill LJ in *The Eurysthenes* upon which I have already commented so as to have led to the use of an objective and not a subjective test. The other is the related point that evidence may provide support for making an inference that a person had a certain state of mind but may also be consistent with different states of mind. Thus the inadequate response to the previous casualties was evidence consistent with a number of states of mind of those concerned with the management of the fleet and does not without more establish that there was privity in relation to any individual vessel.

[36] I agree that the Court of Appeal were right to reverse the judge's findings of fact and to allow the owners' appeal. The evidence did not on the correct view of the law sustain the finding of privity. The defence under s 39(5) therefore fails.

The s 17 defence: the facts

[37] The facts relied upon by the defendants arose from the facts concerning the dampers on the Kastora as reported by Dr Atherton to the owners. His first report in May 1989 had noted that they had not been closed but did not criticise their maintenance; his second in September 1989 did. The reports went to Mr Nicholaidis who told the judge that he did not pick up this addition in the second report. Tuckey J disbelieved him and found further that Mr Nicholaidis had told Mr Faraklas that the dampers on the Kastora needed to be overhauled and repaired. In the present litigation the owners did not disclose Dr Atherton's reports, treating them as privileged. Further, they did not disclose that he had, on his second visit to that vessel, found the dampers in a defective condition. They served a factual witness statement from Dr Atherton which did not refer to that fact. The witness statements of the Kollakis brothers also did not refer to Dr Atherton's second report. The defendants also relied upon a brokers' letter written in conjunction with negotiations for the settlement of the action which they said was similarly misleading in relation to the Kastora casualty. The defendants thus alleged that there had been a failure to observe the utmost good faith in that there had been a failure to disclose material information and misleading statements had been made.Their allegations involved also the owners' solicitors who were conducting the litigation on the owners' behalf and included allegations that what was done was done deliberately and that the untruths were reckless.

[38] The judge rejected the substance of all these allegations. The various statements were not untrue and should not have misled. The brokers' letter was open to criticism but it was not dishonest, nor was it written recklessly. The judge however did disbelieve what Mr Nicholaidis had said in his witness statement and in his oral evidence. Mr Nicholaidis was not responsible for the conduct of the litigation or the prosecution of the claim. The solicitors had treated the first Atherton report as privileged, as indeed it was. They had been unaware of the existence of the second Atherton report until the second day of the trial as it had been temporarily mislaid amongst the papers for litigation relating to the Kastora

casualty with which the solicitors were not concerned. The judge did not make a finding of fraud against the owners.

[39] The Court of Appeal upheld the judge's findings. In relation to the question of fraud, the case advanced by the defendants was that the decision to claim privilege for the Atherton reports was deliberate in the appreciation that its disclosure would weaken the owners' case. But, as the Court of Appeal pointed out, it was accepted that the reports were protected by legal privilege and it was believed by the solicitors that the owners were not under an obligation to disclose privileged documents unless and until they should choose to put them in evidence or call a witness who would be going to refer to them. Thus actual fraud was not alleged and it was at no stage alleged that the claim was being put forward fraudulently without an honest belief that it was a claim that the owners were entitled to make. Therefore, if a finding of fraud was necessary for the defendants to succeed on their defence under s 17, they would fail. Neither the judge nor the Court of Appeal made such a finding against the owners.

[40] Before your Lordships the defendants contended that there was a positive duty of fair dealing and disclosure any breach of which would amount, in effect, to constructive fraud giving rise to the s 17 remedy of an entitlement to avoid the contract. But the defendants also had to contend that the duty extended up to and included the pursuit of any claim in litigation since this was the stage at which the matters upon which they relied had occurred. Thus, the defendants argued that it was a breach of that duty for the assured to claim privilege for a document which might assist the insurer to resist the claim.

Section 17: the legal problems

[41] Section 17 raises many questions. But only two of them are critical to the decision of the present appeal: the fraudulent claim question and the litigation question. It is, however, necessary to discuss them in the context of a consideration of the problematic character of s 17 which is overlaid by the historical and pragmatic development of the relevant concept both before and since 1906.

[42] The history of the concept of good faith in relation to the law of insurance is reviewed in the speech of Lord Mustill in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581, [1995] 1 AC 501 and in a valuable and well-researched article (also containing a penetrating discussion of the conceptual difficulties) by Mr Howard N Bennett 'Mapping the doctrine of utmost good faith in insurance contract law' [1999] Lloyd's MCLQ 165. The acknowledged origin is Lord Mansfield CJ's judgment in *Carter v Boehm* (1766) 3 Burr 1905, [1558–1774] All ER Rep 183. As Lord Mustill points out, Lord Mansfield was at the time attempting to introduce into English commercial law a general principle of good faith, an attempt which was ultimately unsuccessful and only survived for limited classes of transactions, one of which was insurance. His judgment in *Carter v Boehm* was an application of his general principle to the making of a contract of insurance. It was based upon the inequality of information as between the proposer and the underwriter and the character of insurance as a contract upon a 'speculation'. He equated non-disclosure to fraud. He said ((1766) 3 Burr 1905 at 1909, [1558–1774] All ER Rep 183 at 184):

> 'The keeping back [in] such circumstances is a *fraud*, and therefore the policy is *void*. Although the suppression should happen through *mistake*, without any fraudulent intention; yet still the under-writer is *deceived*, and the policy is void ...'

It thus was not actual fraud as known to the common law but a form of mistake of which the other party was not allowed to take advantage. Twelve years later in *Pawson v Watson* (1778) 2 Cowp 785 at 788, 98 ER 1361 at 1362 he emphasised that the avoidance of the contract was as the result of a rule of law:

> 'But as, by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract. Therefore, if there is fraud in a representation, it will avoid the policy, as a fraud, but not as a part of the agreement.'

[43] Echoes of his more universal approach could still be found nearly a century later in a judgment of Lord Cockburn CJ in *Bates v Hewitt* (1867) LR 2 QB 595 at 606–607:

> 'If we were to sanction such [non-disclosure], especially in these days, when parties frequently forget the old rules of mercantile faith and honour which used to distinguish this country from any other, we should be lending ourselves to innovations of a dangerous and monstrous character, which I think we ought not to do.'

[44] It was probably the need to distinguish those transactions to which Lord Mansfield's principle still applied which led to the coining of the phrases 'utmost' good faith and 'uberrimae fidei', phrases not used by Lord Mansfield and which only seem to have become current in the nineteenth century. Storey used the expression 'greatest good faith', Wharton 'the most abundant good faith'; a Scottish law dictionary (Traynor) used 'the most full and copious' good faith; some English judges referred to 'perfect' good faith (see *Britton v Royal Insurance Co* (1866) 4 F & F 905, 176 ER 843 per Willes J) and to 'full and perfect faith' (see *Bates v Hewitt* (1867) LR 2 QB 595 at 607 per Cockburn CJ). But 'utmost' became the most commonly used epithet and its place was assured by its use in the 1906 Act. The connotation appears to be the most extensive, rather than the greatest, good faith. The Latin phrase was likewise a later introduction. It has been suggested that its use may have been inspired by the use of similar language in Book IV of the *Codex of Justinian* (4.37.3) in relation to the contract of partnership. The best view seems to be that it had been unknown to Roman law and had no equivalent in Roman law (see *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 at 432 per Joubert JA). The first recorded use of the phrase in the law reports was by Lord Commissioner Rolfe (later Lord Cranworth LC) in *Dalglish v Jarvie* (1850) 2 Mac & G 231 at 243, 42 ER 89 at 94 in connection with the duty of disclosure to the court which arises when an ex parte application is made for an injunction; the phrase was, however, already current by that date as the judgment shows.

[45] Lord Mansfield's universal proposition did not survive. The commercial and mercantile law of England developed in a different direction preferring the benefits of simplicity and certainty which flow from requiring those engaging in commerce to look after their own interests.

> 'Ordinarily the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract. The principle of caveat emptor applies outside contracts of sale. There are certain contracts expressed by the law to be contracts of the utmost good faith, where material facts must be disclosed; if not, the contract is voidable. Apart from special fiduciary relationships, contracts for partnership and contracts

of insurance are the leading instances. In such cases the duty does not arise out of contract; the duty of a person proposing an insurance arises before a contract is made, so of an intending partner.' (See *Bell v Lever Bros Ltd* [1932] AC 161 at 227, [1931] All ER Rep 1 at 32 per Lord Atkin.)

[46] In relation to insurance Lord Mansfield was specifically addressing 'concealments which avoid a policy'. This concept of avoidance most obviously applies to the making of the contract and derives, as he said in *Pawson v Watson* and as confirmed by Lord Atkin, from the application of a rule of law not from the parties' agreement. Later developments have applied the requirement of disclosure to matters occurring after the making of the contract of insurance, namely the affidavit of ship's papers and the making of fraudulent claims; I will have to discuss these further. But, apart from some dicta, this has still been as a matter of the application of a principle of law and not through an implied contractual term. Nor was there any case prior to the Act where the principle was used otherwise than as providing a basis for resisting liability; no case was cited where the principle gave a remedy in damages, as would the tort of deceit or the breach of a contractual term. Whether there was a remedy in damages for a failure to observe good faith was finally and authoritatively considered by the Court of Appeal in *Banque Financière de la Citè SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952, [1990] 1 QB 665, affirmed by your Lordships' House (see [1990] 2 All ER 947 at 959, [1991] 2 AC 249 at 280). In order to answer the question, both Steyn J at first instance (see [1987] 2 All ER 923 at 942 ff, [1990] 1 QB 665 at 699 ff) and the Court of Appeal (see [1989] 2 All ER 952 at 990, [1990] 1 QB 665 at 773 ff) examined the basis of the requirement that good faith be observed. Having concluded on the authorities that the correct view was that the requirement arose from a principle of law, having the character I have described, the Court of Appeal held that there was no right to damages.

[47] The arguments of counsel in the present case disclosed a certain amount of common ground between them. The principle of *utmost good faith* is not confined to marine insurance; it is applicable to all forms of insurance (see *London Assurance v Mansel* (1879) 11 Ch D 363, *Cantiere Meccanico Brindisino v Janson* [1912] 3 KB 452) and is mutual as s 17 itself affirms by using the phrase 'if the utmost good faith be not observed by *either* party' and as was expressly stated by Lord Mansfield in *Carter v Boehm*.

[48] Secondly, both counsel submitted that the utmost good faith is a principle of fair dealing which does not come to an end when the contract has been made. A different inference might have been drawn both from the language of s 17 and from its place in the Act—beneath the heading 'Disclosure and Representations' and above ss 18 to 21 which expressly relate to matters arising before the making of the contract. But there is a weight of dicta that the principle has a continuing relevance to the parties' conduct after the contract has been made. Why indeed, it may be asked, should not the parties continue to deal with one another on the basis of good faith after as well as before the making of the contract? In his book *The Marine Insurance Act 1906* (1st edn, 1907), Sir MacKenzie Chalmers added this note to s 17: 'Note: The general principle is stated in this section because the special sections which follow are not exhaustive.' There are many judicial statements that the duty of good faith can continue after the contract has been entered into. The citations which I make during the course of this speech will demonstrate this. To take just one example for the moment, in *Overseas Commodities v Style* [1958] 1 Lloyd's Rep 546 at 559, McNair J referred to the obligation of good

faith towards underwriters being an obligation which rests upon the assured 'throughout the currency of the policy'. However, as will also become apparent from the citation, the content of the obligation to observe good faith has a different application and content in different situations. The duty of disclosure as defined by ss 18 to 20 only applies until the contract is made.

[49] Thirdly, both counsel accept and assert that the conclusion of the Court of Appeal in the *Banque Financière* case is good law and that there is no remedy in damages for any want of good faith. Counsel also drew this conclusion from the second half of s 17—'may be avoided by the other party'. The sole remedy, they submitted, was avoidance. It follows from this that the principle relied upon by the defendants is not an implied term but is a principle of law which is sufficient to support a right to avoid the contract of insurance retrospectively.

[50] Having a contractual obligation of good faith in the performance of the contract presents no conceptual difficulty in itself. Such an obligation can arise from an implied or inferred contractual term. It is commonly the subject of an express term in certain types of contract such as partnership contracts. Once parties are in a contractual relationship, the source of their obligations the one to the other is the contract (although the contract is not necessarily exclusive and the relationship which comes into existence may of itself give rise to other liabilities, for example liabilities in tort). The primary remedy for breach of contract is damages. But the consequences of breach of contract are not confined to this. The contractual significance of the breach may go further. It may also amount to a breach of a contractual condition which will excuse or suspend the other party's obligation to continue to perform the contract. It may be a repudiatory breach, or evidence a renunciation, which entitles the other party to terminate the contract and sue for damages. However, any such release only applies prospectively and does not affect already accrued rights (see *Bank of Boston Connecticut v European Grain and Shipping Ltd, The Dominique* [1989] 1 All ER 545, [1989] AC 1056). Ordinarily, the right to the indemnity accrues as soon as the loss has been suffered (see *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65).

[51] The right to avoid referred to in s 17 is different. It applies retrospectively. It enables the aggrieved party to rescind the contract ab initio. Thus he totally nullifies the contract. Everything done under the contract is liable to be undone. If any adjustment of the parties' financial positions is to take place, it is done under the law of restitution not under the law of contract. This is appropriate where the cause, the want of good faith, has preceded and been material to the making of the contract. But, where the want of good faith first occurs later, it becomes anomalous and disproportionate that it should be so categorised and entitle the aggrieved party to such an outcome. But this will be the effect of accepting the defendants' argument. The result is effectively penal. Where a fully enforceable contract has been entered into insuring the assured, say, for a period of a year, the premium has been paid, a claim for a loss covered by the insurance has arisen and been paid, but later, towards the end of the period, the assured fails in some respect fully to discharge his duty of complete good faith, the insurer is able not only to treat himself as discharged from further liability but can also undo all that has perfectly properly gone before. This cannot be reconciled with principle. No principle of this breadth is supported by any authority whether before or after the Act. It would be possible to draft a contractual term which would have such an effect but it would be an improbable term for the parties to agree to and difficult if not impossible to justify as an implied term. The failure

may well be wholly immaterial to anything that has gone before or will happen subsequently.

[52] A coherent scheme can be achieved by distinguishing a lack of good faith which is material to the making of the contract itself (or some variation of it) and a lack of good faith during the performance of the contract which may prejudice the other party or cause him loss or destroy the continuing contractual relationship. The former derives from requirements of the law which pre-exist the contract and are not created by it although they only become material because a contract has been entered into. The remedy is the right to elect to avoid the contract. The latter can derive from express or implied terms of the contract; it would be a contractual obligation arising from the contract and the remedies are the contractual remedies provided by the law of contract. This is no doubt why judges have on a number of occasions been led to attribute the post-contract application of the principle of good faith to an implied term.

[53] The principle relied on by the defendants is a duty of good faith requiring the disclosure of information to the insurer. They submit that the obligation as stated in s 17 continues throughout the relationship with the same content and consequences. Thus, they argue that any non-disclosure at any stage should be treated as a breach of the duty of good faith: it has the same essential content and gives rise to the same remedy—the right to avoid.

[54] In the pre-contract situation it is possible to provide criteria for deciding what information should be disclosed and what need not be. The criterion is materiality to the acceptance of the risk proposed and the assessment of the premium. This is spelled out in the 1906 Act and was the subject of the *Pine Top* case. But when it comes to post-contract disclosure the criterion becomes more elusive: to what does the information have to be material? Some instructive responses have been given. Where the contract is being varied, facts must be disclosed which are material to the *additional* risk being accepted by the variation. It is not necessary to disclose facts occurring, or discovered, since the original risk was accepted material to the acceptance and rating of that risk. Logic would suggest that such new information might be valuable to the underwriter. It might affect how hard a bargain he would drive in exchange for agreeing to the variation; it might be relevant to his reinsurance decisions. But it need not be disclosed. In *Lishman v Northern Maritime Insurance Co* (1875) LR 10 CP 179 at 182 Blackburn J said:

> '... concealment of material facts known to the assured before effecting the insurance will avoid the policy, the principle being that with regard to insurance the utmost good faith must be observed. Suppose the policy were actually executed, and the parties agreed to add a memorandum afterwards, altering the terms: if the alteration were such as to make the contract more burdensome to the underwriters, and a fact known at that time to the assured were concealed which was material to the alteration, I should say the policy would be vitiated. But if the fact were quite immaterial to the alteration, and only material to the underwriter as being a fact which shewed that he had made a bad bargain originally, and such as might tempt him, if it were possible, to get out of it, I should say that there would be no obligation to disclose it.'

[55] Blackburn J is adopting a similar approach to that which he adopted in the leading case of *Cory v Patton* (1872) LR 7 QB 304 which concerned whether there was a duty to disclose adverse facts discovered between the time that the underwriter

had accepted the risk by initialling the slip binding in honour only, and the issue of the legally binding policy. Blackburn J said that the underwriter cannot depart 'from terms thus agreed on [in the slip] without a breach of faith'; and the assured need not disclose to the underwriter 'information which ought to have no effect on him, but would expose him to a temptation to break his contract... he is not bound to lead his neighbour into temptation' (see LR 7 QB 304 at 308–309). The duty of good faith is even-handed and is not to be used by the opposite party as an opportunity for himself acting in bad faith.

[56] The decision in *Cory v Patton* was indorsed by the 1906 Act. What Blackburn J said in *Lishman's* case was followed in many subsequent cases, for example *Commercial Union Assurance Co v Niger Co Ltd, Niger Co Ltd v Guardian Assurance Co* (1922) 13 Ll L Rep 75 esp at 76–67 per Lord Buckmaster, *Iron Trades Mutual Insurance Co Ltd v Cia De Seguros Imperio* (31 July 1990, unreported), QBD (Comm Ct); *Bank of Nova Scotia v Hellenic War Risks Mutual Insurance Association (Bermuda Ltd), The Good Luck* [1988] 1 Lloyd's Rep 514. In the *Niger* case an additional argument was advanced. The policy in that case was one which covered the assured for a number of years but it included a cancellation clause which allowed the insurance company to cancel the policy. The risk turned out to be more onerous than had been expected because there was a tendency for considerable quantities of goods to accumulate in the up-river warehouse from which they were to be dispatched. The insurance company sought to avoid the policy or resist a claim because this post-contract development of which the assured was aware had not then been disclosed by the assured to the insurance company. Obviously the development was of interest to the insurance company and might have led it to exercise its right of cancellation. But the Court of Appeal (see (1921) 6 Ll L Rep 239 esp at 245 per Bankes LJ) and the House of Lords held that such facts need not be disclosed; see also *New Hampshire Insurance Co v MGN Ltd, Maxwell Communication Corp plc v New Hampshire Insurance Co* [1997] LRLR 24. A similar decision has been reached in Australia (see *NSW Medical Defence Union v Transport Industries Insurance Co* (1985) 4 NSWLR 107).

[57] These authorities show that there is a clear distinction to be made between the pre-contract duty of disclosure and any duty of disclosure which may exist after the contract has been made. It is not right to reason, as the defendants submitted that your Lordships should, from the existence of an extensive duty pre-contract positively to disclose all material facts to the conclusion that post-contract there is a similarly extensive obligation to disclose all facts which the insurer has an interest in knowing and which might affect his conduct. The courts have consistently set their face against allowing the assured's duty of good faith to be used by the insurer as an instrument for enabling the insurer himself to act in bad faith. An inevitable consequence in the post-contract situation is that the remedy of avoidance of the contract is in practical terms wholly one-sided. It is a remedy of value to the insurer and, if the defendants' argument is accepted, of disproportionate benefit to him; it enables him to escape retrospectively the liability to indemnify which he has previously and (on this hypothesis) validly undertaken. Save possibly for some types of reinsurance treaty, it is hard to think of circumstances where an assured will stand to benefit from the avoidance of the policy for something that has occurred after the contract has been entered into; the hypothesis of continuing dealings with each other will normally postulate some claim having been made by the assured under the policy.

Ships' papers

[58] The order for ship's papers was an order made by the common law courts for the disclosure, on affidavit, of all the documentary material which had come into existence in relation to the ship which had suffered the casualty and had any possible relevance to the claim. It was made in actions brought by the assured under contracts of marine assurance and covered wider classes of document than those directly within the possession or power of the plaintiff. The classes of document were set out in the form of order which was by the end of the nineteenth century in a standard form and was formalised in an appendix to the Rules of the Supreme Court (latterly RSC Ord 72, r 10). The sanction was the stay of the action until the order had been complied with. Compliance with the order was onerous and the sanction left the assured with little choice but to comply or to abandon his claim. The order never extended to non-marine insurance. In the last century, although still formally permitted by the Rules of the Supreme Court in all marine insurance actions, the order was as a matter of judicial policy confined to those cases where the underwriter defendants were prepared to state through counsel that they proposed to plead that the vessel had been wilfully cast away with the privity of the assured (ie scuttling): see *Probatina Shipping Co Ltd v Sun Insurance Office Ltd* [1974] 2 All ER 478, [1974] QB 635. Within the last 40 years, the order has become obsolete; it has been recognised that it is largely unnecessary even in scuttling cases and had become an instrument of unjust delay (a view expressed by Greer LJ as early as 1932): see *Leon v Casey* [1932] 2 KB 576 at 588–589, [1932] All ER Rep 484 at 490–491.

[59] There was throughout a paradox involved in the order. It was an order justified on the basis of the assured's duty of good faith towards the underwriter and accordingly to make full disclosure of all matters which might be material to the claim. But it was never made save in marine insurance cases and the attempt to obtain an order in connection with other types of insurance were rebuffed: see *Twizell v Allen* (1839) 5 M & W 337, 151 ER 143 (claim in general average, no common law discovery); *Henderson v Underwriting and Agency Association Ltd* [1891] 1 QB 557 (insurance of goods carried by post Cadiz to Syria); *Village Main Reef Gold Mining Co Ltd v Stearns* (1900) 5 Com Cas 246 (land transit policy). The order was only made by the court in the exercise of its powers and was not as such a contractual right of the insurer. Neither failure to give that discovery without an order nor failure to comply with the order have ever been treated as providing a ground for the insurer to avoid the policy; it merely was the precursor of seeking from the court an order for such discovery or resisting the lifting of the stay. Yet it was repeatedly said by judges that the order was made because of a continuing duty of good faith and disclosure owed by the assured to the insurer; for example, Mathew LJ in *Boulton v Houlder Bros & Co* [1904] 1 KB 784 at 791 792:

> 'It is an essential condition of a policy of insurance that the underwriters shall be treated with good faith, not merely in reference to the inception of the risk, but in the steps taken to carry out the contract. That being the meaning of the contract, effect is given to it by means of the order for discovery of ship's papers, and the affidavit with relation to them.'

[60] Historically, it seems probable that the original reason for advancing this justification was the need to establish a jurisdiction in the common law courts to make an order for discovery: see *Goldschmidt v Marryat* (1809) 1 Camp 559, 170 ER 1057; *Twizell v Allen*; *Graham Joint Stock Shipping Co Ltd v Motor Union Insurance Co Ltd* [1922] 1 KB 563, [1921] All ER Rep 394. But it must be recognised that

these statements of justification continued to be repeated by judges (myself included) long after that need had ceased. But it must also be recognised that, whatever the continuing duty was, it was of a different character to that which exists pre-contract. Its extent was different. Its enforcement was in the discretion of the court and required an order from the court. Its breach did not give rise to the right to avoid the contract: so, whatever it was, it was not the obligation referred to in s 17 nor was it the subject matter of Lord Mansfield's judgment in *Carter v Boehm*. Similarly, it can be taken to support the argument of the owners in the present case that the s 17 obligation does not extend into litigation.

Fraudulent claims

[61] This question arises upon policies which up to the time of the making of the claim are to be assumed to be valid and enforceable. No right to avoid the contract had arisen. On ordinary contractual principles it would be expected that any question as to what are the parties' rights in relation to anything which has occurred since the contract was made would be answered by construing the contract in accordance with its terms, both express and implied by law. Indeed, it is commonplace for insurance contracts to include a clause making express provision for when a fraudulent claim has been made. But it is also possible for principles drawn from the general law to apply to an existing contract—on the better view, frustration is an example of this, as is the principle that a party shall not be allowed to take advantage of his own unlawful act. It is such a principle upon which the defendants rely in the present case. As I have previously stated there are contractual remedies for breach of contract and repudiation which act prospectively and upon which the defendants do not rely. The potential is also there for the parties, if they so choose, to provide by their contract for remedies or consequences which would act retrospectively. All this shows that the courts should be cautious before extending to contractual relations principles of law which the parties could themselves have incorporated into their contract if they had so chosen. The courts should likewise be prepared to examine the application of any such principle to the particular class of situation to see to what extent its application would reflect principles of public policy or the overriding needs of justice. Where the application of the proposed principle would simply serve the interests of one party and do so in a disproportionate fashion, it is right to question whether the principle has been correctly formulated or is being correctly applied and it is right to question whether the codifying statute from which the right contended for is said to be drawn is being correctly construed.

[62] Where an insured is found to have made a fraudulent claim upon the insurers, the insurer is obviously not liable for the fraudulent claim. But often there will have been a lesser claim which could properly have been made and which the insured, when found out, seeks to recover. The law is that the insured who has made a fraudulent claim may not recover the claim which could have been honestly made. The principle is well established and has certainly existed since the early nineteenth century (see 25 *Halsbury's Laws* (4th edn) (1994 reissue) para 492; *Welford and Otter-Barry's Law relating to Fire Insurance* (4th edn, 1948) p 289 ff). This result is not dependent upon the inclusion in the contract of a term having that effect or the type of insurance; it is the consequence of a rule of law. Just as the law will not allow an insured to commit a crime and then use it as a basis for recovering an indemnity (see *Beresford v Royal Insurance Co Ltd* [1937] 2 All ER 243, [1937] 2 KB 197), so it will not allow an insured who has made a fraudulent claim to recover. The logic is simple. The fraudulent insured must

not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing.

[63] In *Goulstone v Royal Insurance Co* (1858) 1 F & F 276, 175 ER 725 which concerned a fire policy and a plea that the claim was fraudulently exaggerated, Pollock CB directed the jury that if the claim 'was wilfully false in any substantial respect', they should find for the defendant as the plaintiff had in that case 'forfeited all benefit under the policy' (see 1 F & F 276 at 279, 175 ER 725 at 727). In *Britton v Royal Insurance Co* (1866) 4 F & F 905 909, 176 ER 843 at 844, also a fire insurance case where it was alleged that the insured took advantage of the fire to make a fraudulent claim, Willes J directed the jury:

> 'The law upon such a case is in accordance with justice, and also with sound policy. The law is, that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is the common practice to insert in fire policies conditions that they shall be void in the event of a fraudulent claim; and there was such a condition in the present case. Such a condition is only in accord with legal principle and sound policy. It would be most dangerous to permit parties to practise such frauds, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed. And if there is wilful falsehood and fraud in the claim, the insured forfeits all claim whatever upon the policy. This, therefore, was an independent defence; quite distinct from that of arson ...'

Willes J stressed to the jury that it was of the utmost moment that insurances should be enforced fairly and protected from fraud (see 4 F & F 905 at 911, 176 ER 843 at 845).

[64] These authorities link the defence to the observation of good faith but are specifically based upon the actual fraud of the insured in making the claim. These judgments do not use the language of avoidance of the policy ab initio but refer to the forfeiture of 'all benefit under the policy' or 'all claim' upon it. It seems that the language used at the time in express clauses was similar. The textbooks substantially adopt the same approach: see, for example, most recently Clarke *The Law of Insurance Contracts* (3rd edn, 1997) p 746 ff.

[65] Modern authorities have not, however, always adopted this analysis. In *Orakpo v Barclays Insurance Services* [1995] LRLR 443, the insurance covered damage to a building. The insurance contract was in any event voidable since it had been induced by material misrepresentation but the defendant insurance company had also relied upon the defence that the claim was grossly exaggerated and fraudulent. In the Court of Appeal the defence was apparently argued upon the basis of implied term on the assumption that the continuing duty of good faith should be so analysed. The appellant plaintiff was appearing in person. The Court of Appeal dismissed his appeal holding unanimously that there had been a misrepresentation. But, obiter, there was a difference of opinion on the fraudulent claim defence. Staughton LJ, dissenting, was of the opinion that any breach of an implied term or the duty of good faith would not have been so fundamental as to entitle the insurer to be discharged from liability. The majority, Hoffmann LJ and Sir Roger Parker, held that the insurer would on that ground as well have had a defence to the whole of the claim. The decision of Hoffmann LJ was arrived at applying contractual principles: he was concerned with an implied term ([1995] LRLR 443 at 451):

> 'I think that the insurance company should be able to trust the assured to put forward a claim in good faith. Any fraud in making the claim goes to the root of the contract and entitles the insurer to be discharged. One should naturally not readily infer fraud from the fact that the insured has made a doubtful or even exaggerated claim. In cases where nothing is misrepresented or concealed, and the loss adjuster is in as good a position to form a view of the validity or value of the claim as the insured, it will be a legitimate reason that the assured was merely putting forward a starting figure for negotiation. But in cases in which fraud in the making of the claim has been averred and proved, I think it should discharge the insurer from all liability.'

Sir Roger Parker said ([1995] LRLR 443 at 452):

> 'The appellant submits that the law, in the absence of a specific clause, is that an insured may present a claim which is to his knowledge fraudulent to a very substantial extent, but may yet recover in respect of the part of the claim which cannot be so categorised. To accept this proposition involves holding that, although an insurance contract is one of utmost good faith, an assured may present a positively and substantially fraudulent claim without penalty, save that his claim will to that extent be defeated on the facts ... I can see ... every reason why he should not recover at all.'

Sir Roger also referred to the question whether, in the absence of an express clause providing that the claim *and* the policy should be avoided, the claim only should be forfeit, and a dictum in a Scottish case (*Reid & Co v Employers' Accident and Livestock Insurance Co* (1899) 1 F (Ct of Sess) 1031) which, contrary to *Britton's* case, would hold that only the excess should be disallowed in the absence of an express clause. Sir Roger concluded:

> 'In my judgment this is not so. It appears to me that it is contrary to reason to allow an insurer to avoid a policy for material non-disclosure or misrepresentation on inception, but to say that, if there is subsequently a deliberate attempt by fraud to extract money from the insurer for alleged losses which had never been incurred, it is only the claim which is forfeit.'

[66] These dicta do not assist the defendants in the present case on the critical point whether anything less than actual fraud in the making of the claim brings the principle into play. Counsel have assured your Lordships that in the present case nothing turns upon whether the claim is wholly forfeit or the whole policy is treated as forfeit as well. The authority of *Britton's* case is that the whole claim is forfeit, which was what was material in the *Orakpo* case. As regards the question, academic in the *Orakpo* case and academic in the present case save as a pleading point, whether the making of a fraudulent claim would entitle the insurer to avoid the contract ab initio, that is a point upon which the judgments in the *Orakpo* case cannot be treated as fully authoritative in view of the contractual analysis there adopted. The language of Hoffmann LJ is fully justified on that contractual analysis—'goes to the root of the contract and entitles the insurer to be discharged'. The fraud is fundamentally inconsistent with the bargain and the continuation of the contractual relationship between the insurer and the assured.

[67] The same subject matter is discussed in two later cases to which I should refer. The first is the decision of the Court of Appeal in *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209, a case similar to the *Orakpo* case

involving a householder's insurance, a material misrepresentation in the proposal form and a fraudulent claim. The plaintiff's claim under the policy failed on both grounds. As regards the fraudulent claim defence, the Court of Appeal followed and applied what had been said by Willes J in *Britton's* case. On the point of difference between Staughton LJ and Hoffmann LJ and Sir Roger Parker in the *Orakpo* case, they preferred the view of the latter on the seriousness of any fraud in the making of a claim. Lord Woolf MR referred also to the speech of Viscount Sumner in *Lek v Mathews* (1927) 29 Ll L Rep 141 at 145 stressing the seriousness of any fraudulent claim unless it could be treated as de minimis. 'The policy of the law in this area, it seems to me', said Lord Woolf MR ([1999] Lloyd's Rep IR 209 at 213), 'must be to discourage the making of fraudulent claims'. Millett LJ in a short concurring judgment stressed the seriousness of such fraud and the public interest in discouraging it. In that context he expressed himself in terms similar to those of s 17, stating that the court should consider the fraudulent claim itself and then consider whether 'the making of that claim by the insured is sufficiently serious to justify stigmatising it as a breach of his duty of good faith so as to avoid the policy (see [1999] Lloyd's Rep IR 209 at 214) Whilst this case puts the principle on the basis of a rule of law not an implied term, it did not need to consider, nor is it clear that they were focusing on, the distinction between something which would defeat any claim under the policy and something which avoided the contract ab initio with all that that would entail. The case does not support the submission that something less than a fraudulent claim will suffice to give the insurer a defence.

[68] The other decision is that of Rix J in *Royal Boskalis Westminster NV v Mountain* [1997] LRLR 523, reversed on grounds which do not affect the value of the judgment of Rix J in relation to the principle of good faith (see [1997] LRLR 523 at 591 ff). He powerfully questions whether in relation to claims the right of the insurer to repudiate all liability can extend beyond the making of a fraudulent claim to an innocent failure to disclose. He points out the difficulties which would arise in relation to the test of materiality and remedy. Again, the judgment underlines the relevance of fraud.

[69] Other cases contain dicta which support one or other of the arguments before us but otherwise do not add to the discussion. For example, in the House of Lords in the *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1990] 2 All ER 947 at 960, [1991] 2 AC 249 at 282, Lord Jauncey said:

> 'There is, in general, no obligation to disclose supervening facts which come to the knowledge of either party after the conclusion of the contract (*Lishman v Northern Maritime Insurance Co* (1875) LR 10 CP 179), subject always to such exceptional cases as a ship entering a war zone or an insured failing to disclose all facts relevant to a claim.'

This puts the obligation in wide terms independent of any question of fraud equivalent to those used in s 18 of the 1906 Act. *Britton* 's case although cited was not referred to in any of the judgments not were its implications considered. The relevant question was different, whether a failure to make full disclosure at the time of making the relevant contract could give rise to a claim in damages.

[70] In *Piermay Shipping SA v Chester, The Michael* [1979] 2 Lloyds Rep 1 at 21–22, a barratry case in which the defence was raised of a want of good faith in presenting and persisting in a claim for a loss by perils of the seas, Roskill LJ giving the judgment of the Court of Appeal rejecting the defence said: 'The relevant test must be honest belief.' The insurers had to prove that a fraudulent claim had

been made or maintained by the insured. If it were the law that any non-disclosure would have sufficed to enable the insurers to avoid the contract ab initio, the case would have had to be approached very differently and the result might have been different.

[71] Finally, mention should be made of the judgment of Hirst J in *Black King Shipping Corp v Massie, The Litsion Pride* [1985] 1 Lloyd's Rep 437 which has been used in a number of cases to support a general view of the post-contract duty of good faith. It was an exceptional case in that it involved a war risks policy under which the insured shipowners were entitled to send their ship into a highly dangerous war risk zone in the Persian Gulf against an obligation to pay a heavy additional premium calculated on the length of time spent in the zone. The policy, however did not require the shipowner to declare in advance that the ship was entering the zone but permitted declarations after it had done so. As a result the shipowners had a strong motive only to declare the entry if the vessel suffered a loss and that is what they did. Hirst J held that this practice was not a breach of contract but was done with the fraudulent intent of depriving the insurer of the additional premiums to which it was entitled. He held that the insurer was not liable to pay the claim. There had been a breach of the duty of good faith. The remedy was not confined to electing to avoid the policy; the insurer had elected not to avoid it. The insurer was entitled to rely on the breach as giving it a defence to the claim of the mortgagee of the vessel, the only effective plaintiffs in the action. The particular claim was only fraudulent in so far as the broker had not been truthful in dealing with the insurers at that stage. The reasoning adopted by Hirst J has been criticised both by academic writers and by other judges in later cases. I consider that it should not any longer be treated as a sound statement of the law. In so far as it decouples the obligation of good faith both from s 17 and the remedy of avoidance and from the contractual principles which would apply to a breach of contract it is clearly unsound and cannot survive the Court of Appeal judgment in the *Banque Financière* case upheld by your Lordships' House. In so far as it is based upon the principle of the irrecoverability of fraudulent claims, the decision is questionable upon the facts since the actual claim made was a valid claim for a loss which had occurred and had been caused by a peril insured against when the vessel was covered by a held covered clause. It is not necessary to examine whether there might or might not have been some other basis upon which the case could be decided in favour of the insurer as one feels it clearly ought to have been. But what is clear is that the judgment of Hirst J is not a sound basis for the arguments advanced by the defendants in the present case.

[72] For the defendants to succeed in their defence under this part of the case the defendants have to show that the claim was made fraudulently. They have failed to obtain a finding of fraud. It is not enough that until part of the way through the trial the owners (without fraudulent intent) failed to disclose to the defendants all the documents and information which the defendants would have wished to see in order to provide them with some, albeit inadequate, evidential support for their alleged defence under s 39(5). The defence under s 17 fails. It must be added that, on the facts found, had the defendants' defence succeeded it would have produced a wholly disproportionate result. The defence under s 39(5) failed after a full disclosure and investigation of all the material evidence. The claim was in fact a good one which the owners were, subject to quantum, entitled to recover under the policy. The defendants were liable to pay it. The policy was valid and enforceable. For the defendants successfully to invoke s 17

so as to avoid the policy ab initio and wholly defeat the claim would be totally out of proportion to the failure of which they were complaining. Fraud has a fundamental impact upon the parties' relationship and raises serious public policy considerations. Remediable mistakes do not have the same character.

In litigation

[73] The point here is whether the obligation of good faith and disclosure continues to apply unqualified once the parties are engaged in hostile litigation before the courts. There is no authority directly on this point. It was decided in favour of the owners by both courts below. There are, however, dicta in cases which show that the judges concerned contemplated that the obligation of good faith could continue to apply during litigation. Thus, by way of example, Viscount Sumner in *Lek v Mathews* (1927) 29 Ll L Rep 141 at 145 said in relation to an express clause that he was inclined to think that it would extend to false statements during the course of the trial. It is therefore right to consider what effect the commencement of legal proceedings has upon the relationship of the parties. Similarly, some of the judgments in the ship's papers cases treat the order for ship's papers as an application of the obligation of good faith.

[74] Before the litigation starts the parties' relationship is purely contractual subject to the application of the general law. If one party has a right such as that given by s 17 it derives from the contract itself or from the application of the general law to the contractual relationship. These rights continue unimpaired unless one party has exercised a right of avoidance or termination. The insured has or may have a claim against the insurer. The insurer may have accepted the claim or may have rejected it. The insurer may have done so in a manner which evinces an intention not to be bound by the contract or, more probably, may simply be requiring to be satisfied that there is a valid claim covered by the policy. But the insured will either have or not have a cause of action against the insurer. Indeed, in relation to constructive total loss cases, and the present case is such a case, the English doctrine of ademption makes the date of the issue of the writ the determinative date for deciding upon the validity of the notice of abandonment (see *Sailing Ship Blairmore Co Ltd v Macredie* [1898] AC 593). That is why it is normal for the assured to ask the underwriter to put him in the same position as if a writ had been issued (see *Polurrian SS Co v Young* (1913) 84 LJKB 1025, 19 Com Cas 143).

[75] When a writ is issued the rights of the parties are crystallised. The function of the litigation is to ascertain what those rights are and grant the appropriate remedy. The submission of the defendants in this case is that, notwithstanding this, one party's *conduct of the litigation* can not only change that party's substantive rights but do so retrospectively avoiding the contract ab initio. It cannot be disputed that there are important changes in the parties' relationship that come about when the litigation starts. There is no longer a community of interest. The parties are in dispute and their interests are opposed. Their relationship and rights are now governed by the rules of procedure and the orders which the court makes on the application of one or other party. The battle lines have been drawn and new remedies are available to the parties. The disclosure of documents and facts are provided for with appropriate sanctions; the orders are discretionary within the parameters laid down by the procedural rules. Certain immunities from disclosure are conferred under the rules of privilege. If a party is not happy with his opponent's response to his requests he can seek an order from the court. If a judgment has been obtained by perjured evidence remedies

are available to the aggrieved party. The situation therefore changes significantly. There is no longer the need for the remedy of avoidance under s 17; other more appropriate remedies are available. The same points have been persuasively made by Callahan AJ sitting in the Supreme Court of Connecticut in *Rego v Connecticut Insurance Placement Facility* (1991) 593 A 2d 491 at 497.

[76] I recognise that it is possible for something to be done in the litigation which may amount to a contractual act; the delivery of pleadings and similar documents are a form of communication. Such communication can have a contractual significance which can and will still be given effect to. Thus it is possible by a pleading to repudiate a contract or accept a repudiation as terminating the contract. Similarly, a claim or defence may affect the substantive rights of a landlord and tenant inter se. But the acts and omissions of the assured relied upon by the defendants in the present case are not of that character. They are solely relevant as alleged failures to observe good faith under s 17. The s 17 principle is a principle of law and if its rationale no longer applies and if its operation, the conferment of a right of avoidance, ceases to make commercial or legal sense, then it should be treated as having been exhausted or at the least superseded by the rules of litigation. It will also very often be the case that by the time the litigation has started the cover has expired or its subject matter has ceased to exist so as to make the continuing relationship of insurer and insured no longer current and the observation of good faith only significant to the litigation.

[77] I am therefore strongly of the view that once the parties are in litigation it is the procedural rules which govern the extent of the disclosure which should be given in the litigation, not s 17 as such, though s 17 may influence the court in the exercise of its discretion. The cases upon ship's papers, far from supporting the continuing application of the duty of good faith in truth support the opposite conclusion. As previously discussed, the fact that orders for ship's papers were only made in marine insurance despite the fact that the principle of good faith applies to all insurance and the fact that the order was a matter of discretion not of right shows that it is a procedural remedy not a matter of contract although the principle of good faith clearly influenced the attitude of the court to making such an order. But, most conclusively, the fact that the remedy was to obtain an order from the court and not to avoid the contract shows both the limits of the principle and the change of relationship which comes about when the parties are in hostile litigation.

[78] Therefore this point must be decided against the defendants as well.

Conclusion

[79] I have in the course of this speech referred to some cases from other jurisdictions. It is a striking feature of this branch of the law that other legal systems are increasingly discarding the more extreme features of the English law which allow an insurer to avoid liability on grounds which do not relate to the occurrence of the loss. The most outspoken criticism of the English law of non-disclosure is to be found in the judgment in the South African case to which I have already referred, *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419. There is also evidence that it does not always command complete confidence even in this country (see *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581, [1995] 1 AC 501). Such authorities show that suitable caution should be exercised in making

any extensions to the existing law of non-disclosure and that the courts should be on their guard against the use of the principle of good faith to achieve results which are only questionably capable of being reconciled with the mutual character of the obligation to observe good faith.

[80] My Lords, the judgment of the Court of Appeal should be affirmed and the appeal should be dismissed with costs. Your Lordships were invited by the appellants to make a special order for costs relating to the adjournment of the hearing of this appeal from its previously scheduled date. Having considered the submissions of the parties I do not consider that it would be appropriate to make the special order asked for. In so far as the respondents may seek to recover any additional costs as a result of the adjournment, that will be a matter to be scrutinised on taxation in the usual way.

LORD SCOTT OF FOSCOTE. My Lords,

[81] There are two issues of some general importance that arise in this appeal. The first point arises under s 17 of the Marine Insurance Act 1906:

> 'A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.'

Sections 18, 19 and 20 of the Act spell out in some detail the content of the duty of disclosure owed by the assured to the insurer before the contract is concluded and the yardstick for assessing whether a representation made by the assured to the insurer is material and is true. It might have been possible at one time to treat s 17 as merely an introduction to ss 18, 19 and 20. But if that were ever possible it is so no longer. The duty of utmost good faith has been held to apply where an assured is obliged under an existing policy to give notice of entry into a war risk zone (see *Black King Shipping Corp v Massie, The Litsion Pride* [1985] 1 Lloyd's Rep 437) and to the obligation of an assured to give notice when seeking to take advantage of a 'held covered' clause in an existing policy (see *Overseas Commodities Ltd v Style* [1958] 1 Lloyd's Rep 546; *Liberian Insurance Agency Inc v Mosse* [1977] 2 Lloyd's Rep 560). It has been held, also, to give rights of inspection under reinsurance treaties (see *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd, Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat* [1986] 1 All ER 908, [1988] QB 216). And the s 17 duty has repeatedly been held to be owing in the context of claims. A dishonest claim constitutes a breach by the assured of s 17 and entitles the insurers to avoid the insurance contract.

[82] The present case involves a claim. The respondent on this appeal, Manifest Shipping Co Ltd (Manifest), made a claim under policies of marine insurance in respect of which the appellant insurers have been sued as representative underwriters. The vessel insured was the Star Sea. It was insured against marine perils, including fire, for $US3·2m. As a result of a fire in the engine-room workshop on 29 May 1990, the Star Sea became a constructive total loss. A claim was made and on 3 August 1990 a writ was issued. The writ was served on 4 September 1990. It has not been suggested that the claim was not honestly made nor that the continued prosecution of the claim was or is dishonest. What is complained of is, first, that two accident reports into the causes of a fire on a vessel, the Kastora, which, like the Star Sea, was part of a fleet of over 30 vessels beneficially owned by the Kollakis family, had not been disclosed to the insurers. Both reports had been made by Dr Atherton, the shipowner's expert. As to the

first report, privilege was claimed for it. Privilege would have been claimed for the second report as well, but the second report had been accidentally mislaid and overlooked and was not rediscovered until the second day of the trial. Privilege was eventually, during the trial, waived in respect of both reports. The insurers' complaint, however, is that the claim was formally made and persisted in for a considerable period without disclosure of these reports. The failure to disclose them is categorised as a breach of the s 17 duty of utmost good faith and the insurers claim to be entitled, as a consequence, to avoid the insurance contract. The insurers complain, also, that a Mr Nicholaidis, a director of Kappa Maritime Ltd, an English company that managed the Kollakis fleet, gave certain evidence which the trial judge, Tuckey J disbelieved. Mr Nicholaidis had particular responsibility for technical matters and his giving of the disbelieved evidence is represented as constituting a breach by the assured of its continuing s 17 duty of utmost good faith. The trial judge, Tuckey J, concluded that the s 17 duty owed by the assured came to an end once court proceedings had been commenced. At that point, in his view, court procedures and court sanctions, embodied in Rules of Court and practice directions, would supersede and replace any statutory obligations under s 17. He said ([1995] 1 Lloyd's Rep 651 at 667):

> 'I think, as a matter of principle, that the English Courts should hold that once insurers have rejected a claim, the duty of utmost good faith in relation to that claim comes to an end. There is a logic to this which was well summarized by the Court in Connecticut.'

[83] The judge's reference to the Connecticut court is a reference to the judgment of the Supreme Court of Connecticut in *Rego v Connecticut Insurance Placement Facility* (1991) 593 A 2d 491. Callahan AJ, in whose opinion the other justices concurred, said ((1991) 593 A 2d 491 at 497):

> 'If the insurer denies liability and compels the insured to bring suit, the rights of the parties are fixed as of that time for it is assumed that the insurer, in good faith, then has sound reasons based upon the terms of the policy for denying the claim of the insured. To permit the insurer to await the testimony at trial to create a further ground for escape from its contractual obligation is inconsistent with the function the trial normally serves.'

[84] The Court of Appeal, in the present case, did not indorse Tuckey J's conclusion that the s 17 duty came to an end where court proceedings began, but arrived at the same result via a different route. The Court of Appeal held that at the claim stage, and after the claim had been made, the s 17 duty required no more than that the claim should not be made, or persisted in, fraudulently ([1997] 1 Lloyd's Rep 360 at 371):

> 'When the assured makes his claim, the duty of utmost good faith requires that it should not be made fraudulently; and we are prepared to contemplate that the duty not to present a fraudulent claim subsumes a duty not to prosecute a claim fraudulently in litigation. There is no need to demand more of the assured than that, if the Draconian remedy is to apply.'

[85] So, on this first point, the issues for your Lordships are, first, the duration of the s 17 duty: does it continue beyond the making of the claim and the issue of court proceedings prosecuting the claim? and, second, the content of the duty at the claim stage and thereafter: was the Court of Appeal right in confining the duty to a duty to refrain from the fraudulent presentation or prosecution of a claim

and, more particularly, can the matters on which the insurers rely suffice to constitute a breach of the assured's s 17 duty?

[86] The second important point for decision arises under s 39(5) of the 1906 Act:

> 'In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.'

[87] The policies under which the Star Sea was insured were time policies. Tuckey J, at trial, found that the Star Sea was unseaworthy in two relevant respects. First, he found that the master was incompetent in not knowing the manner in which the vessel's CO_2 fire extinguishing system should properly be used. Secondly, he found that the condition of the port and starboard engine-room dampers was such that when operated they did not provide an effective seal, thereby reducing the efficacy of the CO_2 system. He found that both these matters were causative in enabling the fire to spread and to render the vessel a constructive total loss. But for the combined effect of these failures, the indemnity to which the assured would have been entitled would have been limited to $US1·7m—as opposed to $US3·2m, the insured value of the vessel.

[88] The critical issue was whether the assured knew of the two matters in respect of which unseaworthiness was found. This issue required an examination of the concept of 'privity'. It was not alleged that any of the individuals whose state of mind might be taken to be that of the assured for s 39(5) purposes had actual knowledge that the Star Sea was unseaworthy in either of the two respects found. What was said, however, was that there was 'blind-eye' knowledge. It was common ground that each of the two Kollakis brothers, Mr Pantelis (Lou) Kollakis and Mr George Kollakis, could be treated as the assured for s 39(5) purposes. Tuckey J concluded that, in addition, a Mr Faraklas should be so treated. Mr Faraklas was one of the two directors of Charterwell Maritime SA, a Greek company based in Piraeus and the registered managers of the Star Sea. He was also the sole director of the assured. Tuckey J considered the position of Mr Nicholaidis but concluded he did not qualify for inclusion. On this point, the Court of Appeal disagreed. So there are, in the end, four individuals, namely the Kollakis brothers, Mr Faraklas and Mr Nicholaidis, whose state of mind has to be considered. Tuckey J, addressing himself to the states of mind of the Kollakis brothers and Mr Faraklas, made a finding of 'blind-eye' knowledge on the part of the assured in respect both of the incompetence of the master regarding the CO_2 fire-fighting equipment and of the defective state of the Star Sea's dampers. He reached this conclusion by the following route. There had, within the period of 15 months or so before the Star Sea embarked upon its disastrous voyage, also been a fire leading to a constructive total loss on two other vessels in the Kollakis fleet, namely the Centaurus and the Kastora. The accident reports that followed these fires had revealed a degree of ignorance on the part of the master of each vessel of the proper use to be made of CO_2 fire-fighting equipment and of the possibility (in the case of the Centaurus) and the near certainty (in the case of the Kastora) that the faulty state of the vessel's dampers had prevented, or would have prevented if the CO_2 equipment had been properly used, the effective sealing of the site of the fire. Tuckey J found on the evidence that the accident report relating to the Centaurus had come to the attention of the assured. Two reports on the fire on the Kastora had been made, both by Dr Atherton. Tuckey J

found that the assured, via one or other of the Kollakis brothers or Mr Faraklas, had become aware of the master's excessive delay in ordering the CO_2 fire-fighting equipment to be used and of the defective state of the vessel's dampers.

[89] He then posed the question ([1995] 1 Lloyd's Rep 651 at 663): 'So much for what the assured learned from the two earlier fires. What did they do about it?' and answered the question by saying: 'I am in no doubt that the assured's response to the earlier fires was completely inadequate.' In the following passage the judge expressed his conclusion on the critical issue of privity ([1995] 1 Lloyd's Rep 651 at 664):

> '... I do find that there was blind eye knowledge on the part of the assured. The inadequate response to the earlier fires and the state of the *Star Sea* on May 27, [1990], demonstrate in my judgment that the assured did not want to know about her unseaworthiness in the relevant respects.'

Tuckey J reduced the assured's recovery from the $US3·2m to $US1·7m. He did so on the footing that the Star Sea was, 'with the privity of the assured', sent to sea in May 1990 with a master incompetent in the use of CO_2 fire-fighting equipment and with faulty dampers incapable of sealing off the engine-room. The Court of Appeal disagreed that the requisite privity had been demonstrated. The court concluded that the judge's findings relevant to this issue '[come] down simply to a finding of negligence, albeit negligence in a high degree' (see [1997] 1 Lloyd's Rep 360 at 377). The court, therefore, allowed the assured to recover the full $US3·2m. Accordingly, the question of principle for your Lordships is what, short of actual knowledge, has to be shown for a s 39(5) finding of 'privity' to be made.

[90] Before your Lordships the allegations on the back of which a breach of the s 17 duty is sought to be constructed are levelled against Mr Nicholaidis and against the assured's solicitors, Hill Taylor Dickinson, whose partner, Mr Mallin, had charge of the case. As against Mr Nicholaidis, the allegation is that he dishonestly included in his witness statement a passage which to his knowledge was untrue. As against the solicitors, the allegation is that Mr Mallin resorted to underhand and unconscionable, albeit not dishonest, tactics in suppressing the Atherton reports for as long as possible. Mr Jonathan Sumption QC, for the assured, has taken us through the relevant facts in order to submit that they simply do not sustain the weight that the insurers need them to bear. The importance of the s 17 issue in your Lordships' House relates to law and principle. But charges against Mr Mallin of underhand or unconscionable conduct and against Mr Nicholaidis of dishonesty are, I am sure, of more importance to them than the state of marine insurance law. It would not, in my opinion, be right to decide the s 17 issue in favour of the assured on grounds simply of legal principle. The solicitors and Mr Nicholaidis are entitled, in my opinion, to have your Lordships' view as to whether, on the evidence the serious allegations made against them are sustainable.

[91] In my opinion, the allegations are not sustainable. Let me take first the allegations against Mr Mallin. He was, I will assume, responsible for the decision not to disclose to the insurers the existence of privileged documents, namely the two Atherton reports, until such time as the privilege had been waived. This is not surprising. It was common ground before your Lordships that the reports were privileged. Solicitors do not disclose in litigation documents which are entitled to privilege. They would risk being sued if they did. Mr Gordon Pollock QC,

counsel for the insurers, suggested to your Lordships that Mr Mallin's motive in withholding the first report (the second was missing until the second day of the trial) was to improve the assured's chances of obtaining a favourable settlement before trial. There was, however, no evidence at all to support that suggestion. It had apparently never been put to Mr Mallin that that had been his motive. Mr Pollock explained that his suggestion was based upon an inference that that had been the motive. My Lords, I do not think an imputation of a discreditable motive can be properly so based. Mr Mallin was entitled to have the imputation put to him so that he could deal with it. The inference is neither an obvious one nor an inescapable one. The obvious inference, and the one that in the absence of any other evidence I would myself draw, is that the withholding of a privileged document is no more than the instinctive action of a solicitor experienced in litigation. Mr Pollock drew our attention to the judge's description of passages in Dr Atherton's witness statement as being 'disingenuous' in that no reference was made in the statement to the contents of his two reports (see [1995] 1 Lloyd's Rep 651 at 670–671). Mr Pollock invited us to infer that Mr Mallin had asked Dr Atherton to draft his witness statement omitting any reference to his reports. But this, too, was not put to Mr Mallin. Moreover, Tuckey J expressly exonerated Mr Mallin from criticism arising out of the contents of Mr Atherton's witness statement (see [1995] 1 Lloyd's Rep 651 at 671).

[92] In my opinion, the evidence in the case does not warrant any imputation of underhand or unconscionable behaviour against Mr Mallin. I am prepared to assume, without deciding, that the conduct of solicitors in conducting litigation can be attributed for s 17 purposes to the assured, their client. The insurers' s 17 case, however, in so far as it is based upon the conduct of Mr Mallin in the conduct of the litigation, is based upon conduct that it is accepted was not dishonest and that cannot, for the reasons I have given, be characterised as underhand and unconscionable.

[93] As to Mr Nicholaidis, it is true that Tuckey J preferred other evidence to that given by Mr Nicholaidis. But in doing so he did not say that he thought Mr Nicholaidis had given dishonest evidence. A charge of giving dishonest evidence made against a witness requires, in my opinion, something more than that the judge has not accepted his evidence and has preferred the evidence of someone else. Leggatt LJ in the Court of Appeal used the word 'dishonesty' when referring to Mr Nicholaidis' state of mind (see [1997] 1 Lloyd's Rep 360 at 367). But in the passage in question, Leggatt LJ was addressing the question whether Mr Nicholaidis' knowledge and state of mind could be taken to be that of the assured for s 17 purposes. He held that it could not. He was not, as I read the judgment, adding a finding of the giving of dishonest evidence to the findings about Mr Nicholaidis that Tuckey J had made.

[94] Leggatt LJ went on to say that Mr Nicholaidis' evidence about what he knew of the defective state of the fire dampers on the Kastora—he evidence that had been disbelieved by the judge— could not be attributed to the assured. I respectfully agree with that conclusion. It follows that Mr Nicholaidis evidence and state of mind does not constitute a route whereby a s 17 breach of duty can be brought home to the assured. I now turn to the s 17 point of principle.

[95] It is accepted that the s 17 duty of the utmost good faith continues to apply after the conclusion of the insurance contract. It does not follow, however, that the content is the same after the contract as before. Indeed, it cannot be. Sections 18 to 20 prescribe the contents of the pre–contract duty in terms which are inapplicable thereafter. It is very possible for the duty that pre-contract is

owed by an assured to be broken by an act or omission which would not in ordinary language be described as a breach of good faith at all. Under s 18(1) the assured is deemed to know, and is therefore under an obligation to disclose, 'every circumstance which, in the ordinary course of business, ought to be known by him' (see also s 19(a)). So an honest failure to disclose something of which the assured was in fact unaware may constitute a breach of duty. Consider also the concept of materiality. The duty to disclose extends to 'every material circumstance' known to the assured (s 18(1)) or to the assured's agent (s 19(a)). The test of what is material is an objective one. An honest belief by the assured, or the agent, that a particular circumstance is not material, or an honest oversight of the materiality of a particular circumstance, will not assist the assured if, objectively viewed, the circumstance was material. I need not, perhaps, labour the point that a breach of s 18 or s 19 duty may arise notwithstanding the good faith of the assured. The addition of the adjective 'utmost' does not affect the point.

[96] It seems to me clear, therefore, that the content of the duty of 'utmost good faith' post-contract must be examined afresh and is not coloured by the extent of the duty owed by the assured pre-contract. That this is so is demonstrated also by authority. *Cory v Patton* (1872) LR 7 QB 304 establishes the general proposition that the duty on the assured to disclose a fact material to the risk being undertaken by the insurer does not continue after the insured has become bound by the insurance contract.

[97] *Commercial Union Assurance Co v Niger Co Ltd, Niger Co Ltd v Guardian Assurance Co Ltd* (1922) 13 Ll L Rep 75 concerned a continuing policy terminable by three months' notice. It was held in your Lordships' House that no duty lay on the assured to disclose to the insurers post-contract facts which, if known, might have induced the insurer to exercise its right to terminate the contract. Lord Sumner said (13 Ll L Rep 75 at 82):

> 'The object of disclosure being to inform the underwriter's mind on matters immediately under his consideration, with reference to the taking or refusing of a risk then offered to him, I think it would be going beyond the principle to say that each and every change in an insurance contract creates an occasion on which a general disclosure becomes obligatory, merely because the altered contract is not the unaltered contract, and therefore the alteration is a transaction as the result of which a new contract of insurance comes into existence. This would turn what is an indispensable shield for the underwriter into an engine of oppression against the assured.'

[98] In the same case in the Court of Appeal, Bankes LJ had commented ((1921) 6 Ll L Rep 239 at 245):

> '... if people enter into contracts of insurance for long periods, it would be a wise precaution to insert some provision requiring notice to be given them if the nature of the risk does alter or vary appreciably.'

[99] Plainly enough, neither in the Court of Appeal nor in this House was it regarded as a breach of the s 17 duty for the assured to fail to disclose facts within his knowledge which, if disclosed, might have induced the insurer to terminate the policy.

[100] *Cory v Patton* and the *Niger* case were followed in New South Wales by Rogers J in *NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd* (1985) 4 NSWLR 107. Rogers J held that it was not a breach of the continuing

duty of good faith for an assured to fail to volunteer to the insurer information material to whether the insured would exercise a right to give notice terminating the contract.

[101] Finally on this point I should refer to *New Hampshire Insurance Co v MGN Ltd, Maxwell Communication Corp plc v New Hampshire Insurance Co* [1997] LRLR 24. Counsel for the insurer had submitted that where under a policy there was continuing cover subject to a right on the insurers to cancel on notice, an obligation of disclosure lay on the assured and extended to facts relevant to a decision by the insurer whether or not to cancel. The Court of Appeal rejected this submission. Potter J, at first instance, described it as 'an unwarranted extension of the principle of disclosure' (see [1997] LRLR 24 at 47).

[102] These authorities make clear that the content of the duty of good faith owed by an assured post-contract is not the same as the duty owed in the pre-contract stage. So what is the content of the duty owed at the claim stage? It is, at least, that of honesty in the presentation of a claim.

[103] In *Britton v Royal Insurance Co* (1866) 4 F & F 905 at 909, 176 ER 843 at 844 Willes J told a jury that:

> 'The law is, that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained ... It would be most dangerous to permit parties to practise such frauds, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed.'

[104] Views to the same effect were expressed in *Orakpo v Barclays Bank Insurance Services* [1995] LRLR 443 and in *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209. *Piermay Shipping Co SA v Chester, The Michael* [1979] 2 Lloyd's Rep 1 was a case in which a claim under a policy of marine insurance had been presented honestly. But after the claim had been presented the assured became aware, or had grounds to suspect, that the loss of the insured vessel had been caused not, as had been thought, by perils of the seas, but by scuttling. This information had not been passed on to the insurers. The insurers' reliance on this non-disclosure to avoid the policy failed on the facts. The court was not prepared to find or infer that the claim, honestly presented, had subsequently been dishonestly maintained. Roskill LJ dealt with this issue in the following passage ([1979] 2 Lloyd's Rep 1 at 22):

> 'As to the allegation of subsequently maintaining a fraudulent claim, Piermay and Mr. Pierrakos are not to be found guilty of fraud merely because, with the wisdom of hindsight, they had information which might, if appreciated at its true value, have led them to the truth at an earlier date. A plaintiff in litigation is not maintaining a fraudulent claim merely because during interlocutory proceedings he or his solicitors become aware of evidence which may militate against the correctness of the plaintiff's case and its likelihood of ultimate success. The relevant test must be honest belief.'

[105] *The Michael* is, in my opinion, a very important case for present purposes. It seems to me that in order to succeed on the s 17 issue Mr Pollock must persuade us that it was wrongly decided. It is true, as Mr Pollock pointed out, that the insurer's case in *The Michael* was presented as one of fraud on the part of the assured. It was not argued that a lower degree of culpability would

suffice. There is, however, no hint in Roskill LJ's judgment in *The Michael* that the insurers were trying to jump a hurdle higher than was necessary. a

[106] Mr Pollock, in support of the submission that the s 17 duty attending the presentation and prosecution of a claim might be broken by culpable conduct falling short of fraud, relied on remarks made by Hirst J in *The Litsion Pride* [1985] 1 Lloyd's Rep 437. The Litsion Pride was insured against war risks but, in the event of the vessel sailing to certain specified destinations, the insurers could b exact an additional premium at their discretion. The time was the Gulf War. Bandar Khomeini in the Persian Gulf was, it was agreed, the most dangerous port in the Gulf. A voyage there would be bound to attract an additional premium at a very high rate. The vessel sailed to Bandar Khomeini without notification being given to the insurers. It came under attack and sank. A letter purporting to pre-date the voyage and to give notice of the vessel's destination was concocted c by the assured in order to deceive the insurers into believing that the failure to give notice of the voyage before its commencement was due to an innocent oversight. Hirst J held that the falsely-dated letter was a fraud directly connected to the claim and a breach of the s 17 duty of utmost good faith. I do not think anyone would dissent from that conclusion. But Mr Pollock, counsel for the d insurers before Hirst J, had submitted that a breach of the duty 'might be established for instance by proof of deliberate non-disclosure [or] misrepresentation, albeit negligent or even innocent, by either the owners or the broker' (see [1985] 1 Lloyd's Rep 437 at 507). Mr Kentridge QC, counsel for the assured, had submitted that, once the contract had been concluded, 'the sole duty of the assured was not to act vis-à-vis the underwriter in a fraudulent manner ...' e (see [1985] 1 Lloyd's Rep 437 at 508). But Hirst J did not accept that the post-contract duty was so confined and held that 'the duty in the claims sphere extends to culpable misrepresentation or non-disclosure' (see [1985] 1 Lloyd's Rep 437 at 512). Before us, Mr Pollock has resiled from the contention that, post-contract, merely negligent or innocent misrepresentation or non-disclosure f could constitute a breach of the continuing s 17 duty. But he has maintained his submission that fraud or dishonesty is not essential and that conduct which can fairly be described as unconscionable could suffice.

[107] Two recent cases in which this issue has been considered merit attention. The first is the judgment of Rix J in *Royal Boskalis Westminster NV v Mountain* [1997] LRLR 523. Rix J was troubled by the notion that the g post-contractual duty of good faith could extend beyond fraud to some unspecified degree of culpability (see [1997] LRLR 523 at 597). He found, on the facts of the case, that 'non-fraudulent but culpable and deliberate misrepresentation and non-disclosure have been proved, albeit they were subsequently repented of and remedied' (see [1997] LRLR 523 at 601). He held that the insurers had failed h to establish that the misrepresentations and non-disclosures had been material and that the insurers were not entitled under s 17 to avoid the policy.

[108] Mance J in *Standard Steamship Owners' P & I Association (Bermuda) Ltd v Oceanfast Shipping Ltd* (6 March 1996, unreported), described as 'extravagant ... [the] proposition that mere negligence in the presentation of a claim could lead j to avoidance of the whole contract of insurance'.

[109] In my opinion, the ambit of the post-contract s 17 duty cannot be considered without account also being taken of the difficulties of materiality that troubled Rix J in the *Royal Boskalis* case. Let it be supposed that Mr Pollock is right and that non-disclosure not involving any dishonesty may entitle an insurer to

avoid the policy. Materiality becomes highly relevant. It can only be the non-disclosure of material facts or information that can lead to the Draconian remedy of avoidance. But what is to be the yardstick by which materiality is measured? A decision to disclose or not to disclose would have to be taken at an early stage. Delayed disclosure would expose the assured to similar charges to those being made in the present case where disclosure of the two Kastora reports was made in the course of the trial. The assured will often not know where, in the spectrum that runs from 'interesting' at one end to 'issue determinative' at the other, the facts or information in question should be placed. A similar problem in connection with the discovery of documents led to the rule that 'a document, which, it is not unreasonable to suppose, may tend either to advance the case of the party seeking discovery, or to damage the case of his adversary' should be disclosed (see *Cie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 60). If Mr Pollock is right, what other test of materiality is proposed? None has been suggested. In the present case, let it be supposed that nothing in either of the two reports is determinative of any issue in the claim. None the less, it is submitted that a decision not to give early disclosure of them constitutes a s 17 breach and entitles the insurer to avoid the contract. If that were right, an assured would have to be advised to swamp his insurer with a mass of facts and information which might have some conceivable relevance to an issue in the case. This duty of disclosure could not logically be limited to information contained in documents. It would, if Mr Pollock is right, extend also to information imparted orally. A duty that required such massive disclosure at the claim stage lacks any commercial justification or sense.

[110] These difficulties make clear, in my opinion, that Mr Pollock's submission cannot be accepted. The presentation of a dishonest or fraudulent claim constitutes a breach of duty that entitles the insurer to repudiate any liability for the claim and, prospectively at least, to avoid any liability under the policy. Whether the presentation of such a claim should be regarded as a breach of a continuing duty under s 17 that entitles the insurer to avoid the policy with retrospective effect, enabling any payments made in satisfaction of previous unimpeachable claims to be recovered by the insurer, is more debatable. It is not necessary in the present case to decide that point. Nor is it necessary to decide what the position would be, if a claim that had been honestly begun were dishonestly continued. I have in mind a claim for the loss of goods that, post-claim, were found or otherwise restored to the insured owner. I can see a great deal of force in the argument that the s 17 duty does not apply to conduct in the prosecution of litigation, as to which the Rules of Court that govern litigation constitute the regulatory code. A decision as to that, too, is best left for a case where the point is critical to the result.

[111] I would, however, limit the duty owed by an insured in relation to a claim to a duty of honesty. If the duty derives from s 17, none the less this limitation does not, in my opinion, involve a judicial rewriting of s 17. On the contrary, it would be the creation out of s 17 of a duty that could be broken notwithstanding that the assured had acted throughout in good faith that would constitute a rewriting of the section. Unless the assured has acted in bad faith he cannot, in my opinion, be in breach of a duty of good faith, utmost or otherwise. For these reasons, I agree with Tuckey J and the Court of Appeal in concluding that the insurers' s 17 claim cannot succeed.

The s 39(5) issue

[112] Did the assured have blind-eye knowledge of the unseaworthiness of the Star Sea? It is as well to return to the language of s 39(5). What is required is 'privity' on the assured's part of the unseaworthiness. 'Privity' in its ordinary meaning connotes knowledge. 'Blind-eye' knowledge approximates to knowledge. Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye. It is, I think, common ground—and if it is not, it should be—that an imputation of blind-eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence. Lord Blackburn in *Jones v Gordon* (1877) 2 App Cas 616 at 629 distinguished a person who was 'honestly blundering and careless' from a person who—

> 'refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover.'

Lord Blackburn added: 'I think that is dishonesty.'

[113] In *Cia Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes* [1976] 3 All ER 243 at 251, [1977] QB 49 at 68, Lord Denning MR gave the following description of 'blind-eye' knowledge:

> 'If a man, suspicious of the truth, turns a blind eye to it, and refrains from enquiry—so that he should not know it for certain—then he is to be regarded as knowing the truth.'

[114] Roskill LJ, in the same case, made clear that 'privity' in s 39(5) 'must mean that he is privy to the unseaworthiness and not merely that he has knowledge of facts which may ultimately be proved to amount to unseaworthiness' and then turned to 'blind-eye' knowledge. He said ([1976] 3 All ER 243 at 258, [1977] QB 49 at 76):

> 'If the facts amounting to unseaworthiness are there staring the assured in the face so that he must, had he thought of it, have realised their implication upon the unseaworthiness of his ship, he cannot escape from being held privy to that unseaworthiness by blindly or blandly ignoring those facts or by refraining from asking relevant questions regarding them in the hope that by his lack of enquiry he will not know for certain that which any enquiry must have made plain beyond possibility of doubt.'

I have some difficulty with Roskill LJ's inclusion in the cited passage of the qualification 'had he thought of it'. If the assured had not 'thought of it' he would, presumably, not have realised the implications of the facts. His refraining from inquiry would not then have been attributable to the hope that he would not know for certain. I do not, myself, see how a failure to think about the facts, and hence a failure to realise their implications, can afford the basis for a finding of blind-eye knowledge. I respectfully prefer the formulation by Geoffrey Lane LJ ([1976] 3 All ER 243 at 262, [1977] QB 49 at 81):

> 'Knowledge of what? Again s 39(5) is clear. It says "unseaworthiness", not "facts which in the upshot prove to amount to unseaworthiness". Accordingly

> it seems clear to me that if this matter were res integra, the section would mean that the assured only loses his cover if he has consented to or concurred in the ship going to sea when he knew or believed that it was in an unseaworthy condition. I add the word "believed" to cover the man who deliberately turns a blind eye to what he believes to be true in order to avoid obtaining certain knowledge of the truth.'

Geoffrey Lane LJ's formulation was very similar to that of Branson J in *Cia Naviera Vasconada v British and Foreign Marine Insurance Co Ltd, The Gloria* (1935) 54 Ll L Rep 35 at 58:

> 'I think that if it were shown that an owner had reason to believe that his ship was in fact unseaworthy, and deliberately refrained from an examination which would have turned his belief into knowledge, he might properly be held privy to the unseaworthiness of his ship. But the mere omission to take precautions against the possibility of the ship being unseaworthy cannot, I think, make the owner privy to any unseaworthiness which such precaution might have disclosed.'

Leggatt LJ in the present case, after referring to *The Eurysthenes* and *The Gloria*, concluded ([1997] 1 Lloyd's Rep 360 at 377):

> '... what the defendant underwriters had to establish was a suspicion or realization in the mind of at least one of the relevant individuals that *Star Sea* was unseaworthy in one of the relevant aspects, and a decision not to check whether that was so for fear of having certain knowledge about it.'

[115] Save that, having regard to the judge's findings on causation, and the insurers' concession (referred to by my noble and learned friend Lord Hobhouse of Woodborough), the suspicion or realisation of unseaworthiness had to be of both, and not simply of one, of the relevant aspects, I agree with that formulation. There must be a suspicion of the relevant unseaworthiness, and a decision not to check. Unless there is a decision not to check, not to obtain confirmation of what is suspected, there will, in my opinion, be no privity, no blind-eye knowledge, however seriously negligent the failure to check may be. It is in this respect that, in agreement with Leggatt LJ, I think Tuckey J was in error. He made no finding of a deliberate decision not to inquire on the part of any of the individuals who, for this purpose, could constitute the assured. Such a finding was, in my view, an essential condition of a conclusion of blind-eye knowledge. It is not acceptable, in my opinion, to assume, from the judge's conclusion of blind-eye knowledge that he did find that one or other of the individuals had made a deliberate decision not to inquire.

[116] In summary, blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a warning should be sounded. Suspicion is a word that can be used to describe a state of mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to inquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to

be the basis of a finding of privity. That, in my opinion, is not warranted by s 39(5). a

[117] In the present case, on the facts, I can see no sufficient basis for attributing to any of the four individuals blind-eye knowledge of either of the two respects of unseaworthiness. The incompetence of the masters of the Centaurus and the Kastora did not put the Kollakis brothers, Mr Faraklas or Mr Nicholaidis in a position in which they were bound to inquire into the competence of every b other master in the Kollakis fleet. The master of the Star Sea, although recently appointed to the Star Sea, had been with the fleet for over 11 years and there was no evidence of any previous incompetence on his part. He had held a master's certificate since 1978.

[118] As to the dampers, outside contractors had been hired to overhaul the Star Sea's fire dampers while the vessel was laying-up in Piraeus before c commencing its final voyage. Tuckey J expressed the opinion that:

> 'It was not enough merely to instruct outside contractors to overhaul dampers. The evidence shows that the decision as to what dampers to overhaul was effectively made by the contractors' foreman. In view of the state of the dampers on *Star Sea* after the fire, it is quite clear, I think, that d work should have been done to her dampers in lay-up which was not done.' (See [1995] 1 Lloyd's Rep 651 at 663.)

The judge went on to say that some system should have been in place to ensure that the necessary work had been done.

[119] These findings go to negligence, perhaps gross negligence, but they are, e in my opinion, no basis for a finding of blind-eye knowledge. The judge made no finding against either of the Kollakis brothers or against Mr Faraklas of a suspicion or belief that the dampers were defective. And, as Leggatt LJ in the Court of Appeal pointed out ([1997 1 Lloyd's Rep 360 at 378), 'there is no reason to suppose that the finding would have been made on this aspect fixing Mr. Nicholaidis with f a suspicion or belief where others were not'. I agree that the evidence did not justify a finding that these four individuals, whether viewed individually or collectively, sent the Star Sea on its voyage in an unseaworthy state believing or suspecting that that might be so.

[120] I therefore agree with the Court of Appeal's conclusion that Tuckey J's finding in favour of the insurers on the s 39(5) issue cannot be sustained. For g these reasons and those given by Lord Hobhouse of Woodborough in his opinion, which I have had the advantage of reading in draft, I would dismiss the appeal.

Appeal dismissed.

Dilys Tausz Barrister

Unilever plc v The Procter & Gamble Co

COURT OF APPEAL, CIVIL DIVISION
SIMON BROWN, ROBERT WALKER LJJ AND WILSON J
18, 20, 28 OCTOBER 1999

Evidence – Without prejudice negotiations – Scope of without prejudice rule – Defendant allegedly stating intention to bring patent infringement proceedings at without prejudice meeting with claimant – Claimant using statement to ground proceedings for declaration of non-infringement – Whether defendant's statement protected by without prejudice rule – Patents Act 1977, s 70.

The defendant, P & G, brought proceedings in France for patent infringement against an indirect subsidiary of the claimant, U plc. During the course of a subsequent without prejudice meeting with U plc, P & G allegedly stated that it would soon be taking similar action in the United Kingdom. U plc contended that that statement constituted both an assertion that the sale and marketing of a certain product in the United Kingdom infringed P & G's patent, and a threat to take proceedings in the United Kingdom in respect of the alleged infringement. On the basis of the alleged statement, U plc commenced proceedings for a declaration that the manufacture, sale or marketing of the product in the United Kingdom would not infringe P & G's patent. P & G applied to strike out those proceedings as an abuse of process, contending that the statement was protected from use in the proceedings by the without prejudice rule. In response, U plc contended that that rule was confined to admissions, and did not therefore extend to an assertion of the type allegedly made by P & G. It also contended that no privilege attached to an actionable threat to bring patent proceedings contrary to s 70[a] of the Patents Act 1977. Those contentions were rejected by the judge who duly struck out the proceedings. On appeal, U plc further contended that its action could succeed as a general claim for a declaration and that it did not need to plead P & G's assertion of adverse rights against it in order to obtain a declaration of non-liability under the general jurisdiction.

Held – Although the protection of admissions was the most important practical effect of the without prejudice rule—a rule founded partly in public policy and partly in the agreement of the parties—it would create huge practical difficulties to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications. It would also be contrary to the underlying objective of giving protection to the parties to speak freely about all issues in the litigation, both factual and legal, when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. However, even in situations to which the without prejudice rule undoubtedly applied, the veil imposed by public policy might have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule had been unequivocally abused. In the instant case, it would be an abuse of process for U plc to be allowed to plead anything that was said at the meeting, either as a threat or a claim of right. The circumstances were such that each side was entitled to expect to be able to speak freely, and the meeting was undoubtedly an

a Section 70 is set out at p 787 *j* to p 788 *c*, post

occasion covered by the normal rule based on public policy. The pleading of the threat or claim of right did not come within any recognised exception to that rule, and the expansion of such exceptions should not be encouraged when an important ingredient of the civil justice reforms was to encourage those who were in dispute to engage in frank discussions before they resorted to litigation. As regards U plc's fall-back argument, the court should be wary of granting declarations of non-infringement under the general jurisdiction in view of the existence of the special jurisdiction under the 1977 Act and the detailed requirements which it imposed. Accordingly, the appeal would be dismissed (see p 796 *c* to *f*, p 797 *c* to *e*, p 798 *j* to p 799 *b* and p 800 *d e*, post).

Re Daintrey, ex p Holt [1891–4] All ER Rep 209 distinguished.

Kurtz v Spence (1888) 5 RPC 161 overruled.

Decision of Laddie J [1999] 2 All ER 691 affirmed.

Notes

For without prejudice communications, see 17 *Halsbury's Laws* (4th edn) paras 212–213.

For the Patents Act 1977, s 70, see 33 *Halsbury's Statutes* (4th edn) (1997 reissue) 217.

Cases referred to in judgments

Barclays Bank plc v Homan [1993] BCLC 680, Ch D and CA.

Calderbank v Calderbank [1975] 3 All ER 333, [1976] Fam 93, [1975] 3 WLR 586, CA.

Cavity Trays Ltd v RMC Panel Products Ltd [1996] RPC 361, CA.

Clay, Re, Clay v Booth, Re a Deed of Indemnity [1919] 1 Ch 66, [1918–19] All ER Rep 94, CA.

Cutts v Head [1984] 1 All ER 597, [1984] Ch 290, [1984] 2 WLR 349, CA.

D v National Society for the Prevention of Cruelty to Children [1977] 1 All ER 589, [1978] AC 171, [1977] 2 WLR 201, HL.

D (minors) (conciliation: disclosure of information), Re [1993] 2 All ER 693, [1993] Fam 231, [1993] 2 WLR 721, CA.

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Rush & Tompkins Ltd v Greater London Council [1988] 3 All ER 737, [1989] AC 1280, [1988] 3 WLR 939, HL.

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A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] AC 781, [1911–13] All ER Rep 1120, PC.

Brain v Ingledew Brown Bennison & Garrett (a firm) (No 3) [1997] FSR 511.

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Gouriet v Union of Post Office Workers [1977] 3 All ER 70, [1978] AC 435, HL.

Kitkat v Sharpe (1882) 48 LT 64.

R v Minister of Agriculture, Fisheries and Food, ex p SP Anastasiou (Pissouri) [1994] COD 329.

Appeal

By notice dated 14 April 1999, the claimant, Unilever plc, appealed with leave of Laddie J from his order on 24 February 1999 ([1999] 2 All ER 691, [1999] 1 WLR 1630) striking out, as an abuse of process, proceedings brought by them against the defendant, The Procter & Gamble Co, for a declaration of non-infringement of the latter's European Patent (UK) no 0343069. The facts are set out in the judgment of Robert Walker LJ.

Geoffrey Hobbs QC and *Daniel Alexander* (instructed by *Bird & Bird*) for Unilever.

Simon Thorley QC and *Colin Birss* (instructed by *Simmons & Simmons*) for Procter & Gamble.

Cur adv vult

28 October 1999. The following judgments were delivered.

ROBERT WALKER LJ (giving the first judgment at the invitation of Simon Brown LJ).

Introductory

This is an appeal with the leave of the judge from an order of Laddie J made in the Patents Court on 24 February 1999 ([1999] 2 All ER 691, [1999] 1 WLR 1630). His order struck out as an abuse of process an action by Unilever plc (Unilever), the appellant in this court. The defendant, the respondent in this court, is The Procter & Gamble Co (Procter & Gamble) a company based in Cincinnati, Ohio.

The principal issue raised in the appeal is as to the application of the general rule of evidence on 'without prejudice' communications to a form of proceedings peculiar to patent law and some other fields of intellectual property law, that is (as Unilever contends its action was) an action for threats brought under s 70 of the Patents Act 1977. There are subsidiary issues (which arise partly on the notice of appeal and partly on the respondent's notice) as to whether the action was indeed an action under s 70 and as to the granting of declaratory relief under some other head of jurisdiction.

The facts

The facts can be stated quite shortly. Since Procter & Gamble's strike-out application was based on abuse of process, as well as on failure to disclose a cause of action, there was some affidavit evidence, but no significant factual dispute. Procter & Gamble is the proprietor of European Patent (UK) no 0343069 which was granted in 1993 with designations for Germany, Italy, Spain and the United

Kingdom. The patent is principally for a process ('for the washing of laundry in a machine') rather than for a product but from Unilever's point of view the essential issue is whether or not the manufacture and sale of a product known as Persil Performance Tablets would constitute an infringement of Procter & Gamble's patent.

Opposition proceedings (initiated by a German company, Henkel GmbH) have been taking place in the European Patent Office and in May 1997 Henkel brought an appeal in those proceedings. There have also been proceedings in France brought in May 1998 by Procter & Gamble against a French company which is an indirect subsidiary of Unilever. It is not necessary to give details of the French proceedings, but they led to a high level meeting in Frankfurt, on 20 May 1998, between representatives of Procter & Gamble and Unilever.

The judge described the meeting, and subsequent events, as follows:

> '... The meeting took place in the context of ongoing discussions with a view to settling a number of issues between the two organisations. There is no dispute that both parties agreed to those discussions being conducted on a without prejudice basis. It is said that in the course of the meeting P & G [Procter & Gamble] made a claim of right and threatened Unilever with proceedings for infringement of the patent in suit. 4. On 29 May 1998 Henkel informed Unilever that it had come to an arrangement with P & G. One of the conditions of the arrangement was that Henkel GmbH would withdraw its opposition to the grant of the patent in the EPO [European Patent Office]. Unilever immediately issued the writ in the present action. It is common ground that Unilever's motivation in starting the current proceedings was to attempt to give it locus to intervene in the appeal proceedings before the EPO pursuant to art 105 of the European Patent Convention (the EPC). That article permits a third party to intervene if he proves both that the proprietor of the patent has requested that he ceases alleged infringement of the patent and that he has instituted proceedings for a court ruling that he is not infringing the patent. Unilever filed an application to intervene under art 105 of the EPC. It has been challenged by P & G and the EPO will have to rule on that issue. 5. Unilever could have commenced proceedings against P & G in this country had it complied with the provisions of s 71 of the Patents Act 1977 by applying in writing to P & G for a written acknowledgement of non-infringement. However that would have taken time. Presumably because Unilever thought that the window of opportunity for it to try to come within art 105 was narrow, the s 71 route was not taken. 6. On 5 June 1998 P & G commenced patent infringement proceedings under European Patent (UK) 0343069B in respect of Persil Performance Tablets in the Patents Court. It is not in dispute that the product is dealt with in this country by Lever Bros and not by Unilever plc. So the infringement proceedings are against Lever Bros not against Unilever. 7. On 26 October 1998 P & G launched the notice of motion which is now before the court seeking to strike out Unilever's action for a declaration of non-infringement.' (See [1999] 2 All ER 691 at 693–694, [1999] 1 WLR 1630 at 1632–1633.)

The statement of claim in Unilever's action pleaded that Procter & Gamble had threatened to take proceedings, with the following particulars:

> '(a) In early May, [Procter & Gamble] commenced proceedings in the Tribunal de Grande Instance de Paris, in France against La Société Lever S.A. for infringement of the French equivalent of the Patent. (b) At a meeting held

a in Frankfurt on 20th May 1998 attended by Mr Stephen Williams, General Counsel and Joint Company Secretary of [Unilever] and Mr James Johnson, Senior Vice-President and General Counsel of [Procter & Gamble], Mr Johnson stated that [Procter & Gamble] would be taking similar action in the United Kingdom in the near future. (c) The said statement constituted (i) an assertion that the sale and marketing of Persil Performance Tablets in b the United Kingdom infringes the Patent and (ii) a threat to take proceedings in the United Kingdom in respect of such alleged infringement.'

The judge proceeded on the basis that he should assume the particulars to be true, and that they amounted to a pleading of an actionable threat even though the prayer for relief sought, not an injunction or damages, but only a declaration c (and not a declaration in the terms permitted by s 70(3)(a) of the 1977 Act). The terms of the declaration sought were:

'... that the manufacture, sale and/or marketing of Persil Performance Tablets in the United Kingdom (and any other act of the kind mentioned in section 60 of the Patents Act 1977 done in relation thereto) does not infringe d European Patent (UK) number 0343069 and/or such further or other declaration as shall to the court seem fit.'

One of the subsidiary issues is whether the judge was right in the way in which he characterised the action.

e *Actionable threats*

An action for threats calls for some explanation for the benefit of those who do not regularly practise in the specialised field of intellectual property law. The power conferred on a patentee by the grant of a statutory monopoly was thought by Parliament to call for special safeguards, and the statutory jurisdiction was first introduced by s 32 of the Patents Designs and Trade Marks Act 1883, which was f in the following terms:

'Where any person claiming to be the patentee of an invention, by circulars advertisements or otherwise threatens any other person with any legal proceedings or liability in respect of any alleged manufacture use sale or purchase of the invention, any person or persons aggrieved thereby may g bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats: Provided that this section shall not apply h if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent.'

Later statutes have contained comparable but by no means identical provisions. Section 70 of the 1977 Act, the provision now in force, is in the following terms: j

'(1) Where a person (whether or not the proprietor of, or entitled to any right in, a patent) by circulars, advertisements or otherwise threatens another person with proceedings for any infringement of a patent, a person aggrieved by the threats (whether or not he is the person to whom the threats are made) may, subject to subsection (4) below, bring proceedings in the court against the person making the threats, claiming any relief mentioned in subsection (3) below.

(2) In any such proceedings the plaintiff or pursuer shall, if he proves that the threats were so made and satisfies the court that he is a person aggrieved by them, be entitled to the relief claimed unless—(a) the defendant or defender proves that the acts in respect of which proceedings were threatened constitute or, if done, would constitute an infringement of a patent; and (b) the patent alleged to be infringed is not shown by the plaintiff or pursuer to be invalid in a relevant respect.

(3) The said relief is—(a) a declaration or declarator to the effect that the threats are unjustifiable; (b) an injunction or interdict against the continuance of the threats; and (c) damages in respect of any loss which the plaintiff or pursuer has sustained by the threats.

(4) Proceedings may not be brought under this section for a threat to bring proceedings for an infringement alleged to consist of making or importing a product for disposal or of using a process.

(5) It is hereby declared that a mere notification of the existence of a patent does not constitute a threat of proceedings within the meaning of this section.'

It will be apparent that the proviso to s 32 of the 1883 Act permitted the customary courtesy of a letter before action (even one written in threatening terms) provided that it was promptly followed by a writ. Section 70 of the 1977 Act does not contain the same proviso, but sub-s (5) enables an unobjectionable warning to be given by a discreetly worded letter, at any rate as between chartered patent agents who understand the need for coded messages. Subsection (4) contains an exception for a threat of infringement proceedings of a certain type, that is 'an infringement alleged to consist of making or importing a product for disposal or of using a process'.

In order to understand the effect of s 70(4) of the 1977 Act it is necessary to note that by s 60(1) of that Act the infringement of a patent in respect of a product consists of any of six acts carried out without the consent of the proprietor of the patent, that is, (i) manufacturing it, (ii) disposing of it, (iii) offering to dispose of it, (iv) using it, (v) importing it, and (vi) keeping it (for disposal or otherwise). Infringement of a patent in respect of a process consists of using the process or offering it for use, or doing any of acts (ii) to (vi) above in relation to a product obtained from the patented process. So the broad effect of the exception is that an aggrieved proprietor (or any other person aggrieved) can threaten a manufacturer or an importer of an allegedly infringing product or the user of an allegedly infringing process, but not persons such as small retailers or customers (the persons most likely to be deterred by threats, whether or not well-founded).

However, s 70(4) of the 1977 Act must be construed in accordance with what this court has regarded as its clear terms, so that threats may be made with impunity to a manufacturer or an importer only in respect of acts of manufacture or importation. That was decided in *Cavity Trays Ltd v RMC Panel Products Ltd* [1996] RPC 361, in which Aldous LJ said (at 373):

'Section 70 provides relief against abuse of monopoly ... Subsection (4) is an exception added in the 1977 Act to allow warnings to be given in certain circumstances. In my view the subsection defines the acts of alleged infringement that are excluded and not the type of persons who may be threatened. The division between the type of acts in respect of which warnings are allowed without risk of suit and those which are not, can be said to be

a arbitrary but is sufficient to enable a patentee to give the appropriate warning.'

Neill LJ and Sir John Balcombe gave concurring judgments. Section 70(4) as interpreted in the *Cavity Trays* case is of some relevance as explaining the section's legislative purpose; in addition it is relevant to one of the subsidiary issues in the appeal.

b The judge referred, in the summary of the facts already cited from his judgment, to Unilever's decision (apparently in the interests of saving time) not to take what the judge called 'the s 71 route'. That is a reference to the statutory jurisdiction conferred by s 71 of the 1977 Act to make a declaration that an act or proposed act by the claimant does not or would not constitute an infringement c of a patent, even though the proprietor has not asserted the contrary, if the claimant shows that he has made a written application to the proprietor, with full written particulars, and the proprietor has refused or failed to give the acknowledgement requested. The court's power under s 71 is expressed to be 'without prejudice to the court's jurisdiction to make a declaration ... apart from d this section'. Section 71 of the 1977 Act replaced s 66 of the Patents Act 1949 but did not have any counterpart in earlier legislation. So when the statutory cause of action for groundless threats was first introduced, and for about 65 years afterwards, there was no particular statutory jurisdiction to grant a declaration of non-infringement, and for part of this period the general jurisdiction to grant declaratory relief was less fully developed. At all times it has been only by a e threats action that a claimant could obtain an injunction or damages.

Without prejudice communications: general

In *Rush & Tompkins Ltd v Greater London Council* [1988] 3 All ER 737 at 739–740, [1989] AC 1280 at 1299, Lord Griffiths said:

f 'The "without prejudice rule" is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in *Cutts v Head* ([1984] 1 All ER 597 at 605–606, [1984] Ch 290 at 306): "That the rule rests, at least in g part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that h includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed Clauson J in *Scott Paper Co v Drayton Paper Works Ltd* (1927) 44 RPC 151 at 156, be encouraged freely and frankly to put their cards on the table ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of j negotiations for settlement being brought before the court of trial as admissions on the question of liability." The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence.'

This well-known passage recognises the rule as being based at least in part on public policy. Its other basis or foundation is in the express or implied agreement

of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues.

In the course of counsel's clear and well-researched written and oral submissions a general issue arose as to whether the 'without prejudice' rule should be seen as a rule of very wide scope which does, however, on occasion have to yield to some more powerful principle with which it comes in conflict (such as the need to prevent a litigant deceiving the court with perjured evidence); or whether that wide view represents a failure of proper analysis of the true foundation and purpose of the rule. The most forthright passages in support of the wide view are to be found in *Walker v Wilsher* (1889) 23 QBD 335, in passages from the judgments of Lord Esher MR, Lindley and Bowen LJJ conveniently set out in the judgment of Oliver LJ in *Cutts v Head* [1984] 1 All ER 597 at 603–604, [1984] Ch 290 at 302–304. The clearest statement of the need for analysis is in the judgment of Hoffmann LJ in *Muller v Linsley & Mortimer (a firm)* [1996] PNLR 74 at 77 where he said:

> 'Some of the decisions on the without prejudice rule show a fairly mechanistic approach, but the recent cases, most notably the decisions of this court in *Cutts v. Head* ([1984] 1 All ER 597, [1984] Ch 290) and the House of Lords in *Rush & Tompkins Ltd v. Greater London Council* ([1988] 3 All ER 737, [1989] AC 1280), are firmly based upon an analysis of the rule's underlying rationale. *Cutts v. Head* shows that the rule has two justifications. Firstly, the public policy of encouraging parties to negotiate and settle their disputes out of court and, secondly, an implied agreement arising out of what is commonly understood to be the consequences of offering or agreeing to negotiate without prejudice. In some cases both of these justifications are present; in others, only one or the other. So, in *Cutts v. Head* the rule that one could not rely upon a without prejudice offer on the question of costs after judgment was held not to be based upon any public policy. It did not promote the policy of encouraging settlements because as Oliver L.J. said: "As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement ..." It followed that the only basis for excluding reference to a without prejudice offer on costs was an implied agreement based on general usage and understanding that the party making the offer would not do so. Such an implication could be excluded by a contrary statement as in a *Calderbank* offer [see *Calderbank v Calderbank* [1975] 3 All ER 333, [1976] Fam 93].'

He then considered the *Rush & Tompkins* case at some length and continued (at 79–80):

> 'If one analyses the relationship between the without prejudice rule and the other rules of evidence, it seems to me that the privilege operates as an exception to the general rule on admissions (which can itself be regarded as an exception to the rule against hearsay) that the statement or conduct of a party is always admissible against him to prove any fact which is thereby expressly or impliedly asserted or admitted. The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions, *i.e.* independently of the truth of the facts alleged to have been admitted. Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it

asserts or admits, but simply in the fact that it was made. Thus, when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute. Likewise, a without prejudice letter containing a threat is admissible to prove that the threat was made. A without prejudice letter containing a statement which amounted to an act of bankruptcy is admissible to prove that the statement was made; see (*Re Daintrey, ex p Holt* [1893] 2 QB 116, [1891–4] All ER Rep 209). Without prejudice correspondence is always admissible to explain delay in commencing or prosecuting litigation. Here again, the relevance lies in the fact that the communications took place and not the truth of their contents. Indeed, I think that the only case in which the rule has been held to preclude the use of without prejudice communications, otherwise than as admissions, is in the rule that an offer may not be used on the question of costs; a rule which, as I have said, has been held to rest purely upon convention and not upon public policy. This is not the case in which to attempt a definitive statement of the scope of the purely convention-based rule, not least because, as Fox L.J. pointed out in *Cutts v. Head* ([1984] 1 All ER 597 at 613, [1984] Ch 290 at 316), it depends upon customary usage which is not immutable. But the public policy rationale is, in my judgment, directed solely to admissions. In a case such as this, in which the defendants were not parties to the negotiations, there can be no other basis for the privilege.'

Leggatt and Swinton Thomas LJJ agreed in short concurring judgments.

Without in any way underestimating the need for proper analysis of the rule, I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not 'sacred' (*Hoghton v Hoghton* (1852) 15 Beav 278 at 321, 51 ER 545 at 561), has a wide and compelling effect. That is particularly true where the 'without prejudice' communications in question consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours.

At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats, or as thinking aloud) about future plans and possibilities. As Simon Brown LJ put it in the course of argument, a threat of infringement proceedings may be deeply embedded in negotiations for a compromise solution. Partial disclosure of the minutes of such a meeting may be, as Leggatt LJ put it in *Muller's* case, a concept as implausible as the curate's egg (which was good in parts). As it happens the minutes of the Frankfurt meeting are exhibited in redacted form, in which the redacted parts of the document appear to amount to about 90% of its contents.

Nevertheless, there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances.

(1) As Hoffmann LJ noted in the first passage set out above, when the issue is whether without prejudice communications have resulted in a concluded

compromise agreement, those communications are admissible. *Tomlin v Standard Telephones and Cables Ltd* [1969] 3 All ER 201, [1969] 1 WLR 1378 is an example.

(2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. *Underwood v Cox* (1912) 4 DLR 66, a decision from Ontario, is a striking illustration of this.

(3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel. That was the view of Neuberger J in *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] FSR 178 at 191, and his view on that point was not disapproved by this court on appeal ([1998] FSR 530).

(4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety' (the expression used by Hoffmann LJ in *Forster v Friedland* [1992] CA Transcript 1052). Examples (helpfully collected in Foskett's *Law & Practice of Compromise* (4th edn, 1996) p 153–154 (para 9-32)) are two first-instance decisions, *Finch v Wilson* (8 May 1987, unreported) and *Hawick Jersey International v Caplan* (1988) Times, 11 March. But this court has, in *Forster v Friedland* and *Fazil-Alizadeh v Nikbin* (1993) Times, 19 March, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.

(5) Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence. Lindley LJ in *Walker v Wilsher* (1889) 23 QBD 335 at 338, noted this exception but regarded it as limited to 'the fact that such letters have been written and the dates at which they were written'. But occasionally fuller evidence is needed in order to give the court a fair picture of the rights and wrongs of the delay.

(6) In *Muller*'s case (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffmann LJ treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver.

(7) The exception (or apparent exception) for an offer expressly made 'without prejudice except as to costs' was clearly recognised by this court in *Cutts v Head*, and by the House of Lords in the *Rush & Tompkins* case, as based on an express or implied agreement between the parties. It stands apart from the principle of public policy (a point emphasised by the importance which the new Civil Procedure Rules, Pt 44.3(4), attach to the conduct of the parties in deciding questions of costs). There seems to be no reason in principle why parties to without prejudice negotiations should not expressly or impliedly agree to vary the application of the public policy rule in other respects, either by extending or by limiting its reach. In *Cutts v Head* Fox LJ said:

> '... what meaning is given to the words "without prejudice" is a matter of interpretation which is capable of variation according to usage in the

a profession. It seems to me that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which is immutable ever after ...' (See [1984] 1 All ER 597 at 613, [1984] Ch 290 at 316.)

(8) In matrimonial cases there has developed what is now a distinct privilege extending to communications received in confidence with a view to matrimonial b conciliation: see *Re D (minors) (conciliation: disclosure of information)* [1993] 2 All ER 693 at 697, [1993] Fam 231 at 238, where Sir Thomas Bingham MR thought it not—

> 'fruitful to debate the relationship of this privilege with the more familiar head of "without prejudice" privilege. That its underlying rationale is similar, and that it developed by way of analogy with "without prejudice" privilege, c seems clear. But both Lord Hailsham and Lord Simon in *D v National Society for the Prevention of Cruelty to Children* ([1977] 1 All ER 589 at 602, 610, [1978] AC 171 at 226, 236) regarded it as having developed into a new category of privilege based on the public interest in the stability of marriage.'

That hybrid species of privilege is not in point in this case.

d In relation to the older authorities the above summary owes much to a very learned article by Professor David Vaver published as long ago as 1974 in the University of British Columbia Law Review ('"Without Prejudice" Communication—Their Admissibility and Effect' (1974) U Br Col LR 85). Unlike Professor Vaver's article my summary is far from exhaustive; in particular, it does not touch on the decisions in *Kurtz v Spence* (1888) 5 RPC 161, *Skinner & Co v Shew & Co* [1893] 1 e Ch 413 and *Re Daintrey, ex p Holt* [1893] 2 QB 116, [1891–4] All ER Rep 209 (decisions which have been heavily relied on by Mr Geoffrey Hobbs QC on behalf of Unilever and to which I return below). It is apparent that none of the exceptions to the public policy rule involves the disclosure of admissions bearing on the subject matter in dispute, at any rate unless the expression 'admission' is given a f substantially wider meaning than it usually has in the law of evidence. (I disregard the old case of *Waldridge v Kennison* (1794) 1 Esp 142, 170 ER 306, which Lord Griffiths in the *Rush & Tompkins* case ([1988] 3 All ER 737 at 740, [1989] AC 1280 at 1300), regarded as exceptional.) Conversely, however, I respectfully doubt whether the large residue of communications which remain protected can all be described as admissions (again, unless that expression is given an unusually wide g meaning). One party's advocate should not be able to subject the other party to speculative cross-examination on matters disclosed or discussed in without prejudice negotiations simply because those matters do not amount to admissions.

In the second of the passages already quoted from Hoffmann LJ's judgment in h *Muller's* case he said: 'a without prejudice letter containing a threat is admissible to prove that the threat was made.' As he did not refer to any authority on this point it is not clear whether his remark was addressed to the sort of threats of perjury or blackmail which he had considered two years before in *Forster v Friedland,* or to *Kurtz v Spence.* Whether or not he had the latter case in mind, I j must now turn to it and to the other two nineteenth-century cases on which Mr Hobbs has relied.

Without prejudice: the old cases

This court was referred in detail to what seems to be the fullest report of *Kurtz v Spence* (1888) 5 RPC 161 (the case is also reported at (1888) 57 LJ Ch 238 and (1888) 58 LT 438). It was an action for threats under s 32 of the 1883 Act. The threats

relied on were said to have been made in four letters from the defendants sent between 23 January and 28 June 1886, and during the course of a meeting held on 11 February 1886. It was common ground that these communications were made with a view to achieving a settlement and would normally be governed by the without prejudice rule. Kekewich J heard as a preliminary issue the question whether there was a threat within the meaning of s 32. The defendants' counsel is reported as having argued that the alleged threats were mere warnings and that they occurred at a meeting held without prejudice and in letters written without prejudice. It is not clear whether the second point was free-standing or an elaboration of the first point. Kekewich J gave an extemporary judgment of some length in which (at 173) he set out two imaginary statements by a litigant. As was pointed out by Wilson J in the course of argument in this case, there is no perceptible difference of substance between the two, yet Kekewich J apparently regarded the first as protected by the rule, whereas he said of the second:

> '... it would be far from consonant with justice if I should shut out that threat and say that it is not a threat within Section 32, so as to entitle the person against whom the threat is made to bring an action to restrain the continuance of it. I think that would be stretching "without prejudice" much too far, and in fact giving it a meaning which it was never intended to have.'

The judgment as a whole is rather lacking in coherent analysis of the relevant principles. Nevertheless it has for a century appeared in a number of very reputable textbooks as authority for the proposition that an actionable threat may be made in a without prejudice communication.

The other two nineteenth century cases are relied on by Mr Hobbs by way of analogy only. *Skinner & Co v Shew & Co* [1893] 1 Ch 413 was an action for threats in connection with a patent for a camera. The defendants (the patentees) argued that letters answering questions posed by the plaintiffs (rival manufacturers) could not be threats, and that letters to a third party (apparently a wholesaler or retailer who did business with both manufacturers) were privileged. Laddie J took that as a reference to legal professional privilege but Mr Hobbs has suggested that it referred to qualified privilege. That seems the more likely view since counsel had cited two cases on the old law of trade libel, to which malice was relevant (see *Halsey v Brotherhood* (1880) 15 Ch D 514, the later of the two cases). Mr Hobbs relied by analogy on passages in the judgment of Lindley LJ ([1893] 1 Ch 413 at 422), ('There is nothing in the language of the 32nd section which invites or allows the consideration of such a question as privilege'), that of Bowen LJ (at 426), ('The statute says circulars and advertisements nevertheless may contain threats, and uses those words "or otherwise" so as to sweep into its net every kind of threat') and that of A L Smith LJ, who after noting the exceptions for well-founded threats and for prompt action said (at 426):

> 'If he cannot bring himself within either of those two, what I call saving clauses, then the section absolutely forbids a man threatening legal proceedings with regard to a patent action at all; and in my opinion, it is *nihil ad rem* to say that what he did was *bonâ fide*, or that what he did was on a privileged occasion, because the section enacts that a man shall not threaten unless he comes within either of the two provisos at the end of the section.'

In *Re Daintrey* a creditor had presented a bankruptcy petition based solely on a letter from his debtor (against whom he had taken proceedings but not yet obtained judgment). The letter was headed 'without prejudice' and made an offer

to compound for the debt. But it also stated that the debtor could not pay his debts and would suspend payment unless the composition was accepted. The issue for the court was whether this was an act of bankruptcy, and the Brighton County Court accepted the debtor's argument that it was not. On appeal the creditor's counsel argued that the without prejudice rule had no application, and that a debtor could not evade the bankruptcy law by putting a 'without prejudice' label on an act of bankruptcy. The debtor's counsel argued that the rule was very wide, citing *Hoghton v Hoghton* and *Walker v Wilsher*. This court (in a single reserved judgment) allowed the appeal. It said:

> 'In our opinion the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which alone the rule applies, exist. The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer the rule has no application. It seems to us that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms. Moreover, we think that the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed.' (See [1893] 2 QB 116 at 119–120, [1891–4] All ER Rep 209 at 211–212.)

Apart from the last sentence, this passage spells out the uncontroversial point that 'without prejudice' is not a label which can be used indiscriminately so as to immunise an act from its normal legal consequences, where there is no genuine dispute or negotiation. The obscurity of the last sentence has been commented on by Professor Vaver but it may contain the germ of the notion of abuse of a privileged occasion which has developed in later cases. *Re Daintrey* was not cited below and Mr Hobbs relied on it in this court as an example of the court lifting the 'without prejudice' veil so as to expose wrongdoing. But the real point of the decision was that the veil was never there in the first place.

Kurtz v Spence and the *Skinner & Co* case, on the other hand, were cited and very fully discussed before the judge, who devoted separate sections of his judgment ([1999] 2 All ER 691 at 704–706, [1999] 1 WLR 1630 at 1643–1646 (paras 40–42 and paras 43–46)) to these cases. As to *Kurtz v Spence* the judge ([1999] 2 All ER 691 at 705, [1999]1 WLR 1630 at 1644 (para 42)) concluded that it was essentially a decision on the construction of s 32 of the 1883 Act, and not on the exclusionary effect of the evidential rule. He stated that even had the case been more relevant:

> '... I would not follow it. Kekewich J was considering a very differently worded provision of the 1883 Act. The more focused target of modern threats legislation ... is not to be found in [the 1883] Act and the jurisprudence on the without prejudice rule and the public policy considerations were less developed in 1888.'

As to the *Skinner & Co* case the judge concluded ([1999] 2 All ER 691 at 706, [1999] 1 WLR 1630 at 1645–1646 (para 46)) that it did not throw light, even by analogy, on the issue which he had to decide: what was in issue in that case, he said, was open correspondence sent by one litigant to the other litigant and the latter's customer.

In my judgment the judge was right to conclude that neither of these old and rather obscure authorities was decisive, or even particularly helpful, on the issue before him. In *Kurtz v Spence* the obscurity centres on Kekewich J's understanding of principle behind the without prejudice rule. In the *Skinner & Co* case the most important issue was whether the words 'or otherwise' in s 32 of the 1883 Act should be read ejusdem generis, and the obscurity arose from counsel's submission harking back to the non-statutory law of trade libel. I consider that the judge was also right to give little or no weight to the fact that *Kurtz v Spence* has for so long made a regular appearance in leading textbooks. It has not been suggested that this is a point on which practitioners regularly rely on statements in textbooks in the way that conveyancers sometimes used to in the field of property law.

Without prejudice: conclusions

In those circumstances I consider that this court should, in determining this appeal, give effect to the principles stated in the modern cases, especially *Cutts v Head*, the *Rush & Tompkins* case and *Muller's* case. Whatever difficulties there are in a complete reconciliation of those cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in *Rush & Tompkins Ltd v Greater London Council* [1988] 3 All ER 737 at 740, [1989] AC 1280 at 1300: 'to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts.' Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.

Lord Griffiths in the *Rush & Tompkins* case noted, and more recent decisions illustrate, that even in situations to which the without prejudice rule undoubtedly applies, the veil imposed by public policy may have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule has been unequivocally abused.

With those principles in mind I come back to the facts of this case, bearing in mind (as Mr Hobbs enjoined the court to do) that this is an appeal in a strike-out and that the facts pleaded in Unilever's statement of claim ('a threat to take proceedings in the United Kingdom in respect of such alleged infringement') must be assumed, for strike-out purposes, to be true.

Ultimately Mr Hobbs' submission on this part of the case came down to two attractively simple propositions. The first was that there are some kinds of communication to which Parliament has attached particular consequences (such as a threat under s 70 of the 1977 Act, or a notice to creditors amounting to an act of bankruptcy as in *Re Daintrey*) and that those consequences cannot be avoided by pinning on a 'without prejudice' label. The other was that Procter & Gamble cannot for strike-out purposes deny the threat, which constitutes a statutory tort and so must be assumed to be wrongful and undeserving of protection.

These submissions were skilfully crafted and developed but I find them remote from the realities of the situation as I see them. The circumstances of the

Frankfurt meeting were as far removed as it is possible to imagine from the unilateral communication to which the debtor in *Re Daintrey* sought to add the 'without prejudice' label. It was a high level meeting between highly skilled professionals representing the interests of multinational groups which are household names. The meeting was in the judge's words held 'in the context of ongoing discussions with a view to settling a number of issues between the two organisations' ([1999] 2 All ER 691 at 693, [1999] 1 WLR 1630 at 1632). It was an occasion for both sides to speak freely. There is nothing (beyond the bare and unembroidered pleading of a threat) to suggest that Procter & Gamble's representatives at the meeting acted in any way that was oppressive, or dishonest, or dishonourable.

In my judgment the judge was right to conclude that it would be an abuse of process for Unilever to be allowed to plead anything that was said at the meeting either as a threat or as a claim of right. The circumstances were such that each side was entitled to expect to be able to speak freely, and their agreement to the meeting being arranged evinces that common intention. I would if necessary base my conclusion on the parties' agreement to extend the normal ambit of the rule based on public policy. But I do not think it is necessary to go that far. The Frankfurt meeting was undoubtedly an occasion covered by the normal rule based on public policy, and the pleading of the threat (or claim of right) has not been shown to come within any recognised exception. The expansion of exceptions should not be encouraged when an important ingredient of Lord Woolf's reforms of civil justice is to encourage those who are in dispute to engage in frank discussions before they resort to litigation. The decision in *Kurtz v Spence* should no longer be regarded as good law.

Subsidiary issues: general

That conclusion is not sufficient to dispose of the appeal because Unilever had a fall-back argument that its action could succeed as a general claim for a declaration (that is, a claim not based on either ss 70 or 71 of the 1977 Act) and that in order to succeed in obtaining a declaration under the general jurisdiction it was not necessary for Unilever to plead a claim of right (that is, Procter & Gamble's assertion of adverse rights against it).

There were in fact four subsidiary issues canvassed before the judge. The other three were grounds on which Procter & Gamble sought to strike out Unilever's action even if Procter & Gamble did not succeed on the without prejudice issue. The tactical marching and counter-marching during the interlocutory skirmishes may, I suspect, have caused even the expert advisers to the parties to have lost sight, from time to time, of the flags under which they were trying to rally. I will identify briefly Procter & Gamble's three would-be pre-emptive points and comment on them briefly. Then I will return to Unilever's fall-back argument.

Procter & Gamble's first subsidiary point was that Unilever's action could not be a threats action because a declaration of non-infringement (as opposed to a declaration of unjustifiable threats) cannot be obtained under s 70 of the 1977 Act. The judge did not accept this argument ([1999] 2 All ER 691 at 695, [1999] 1 WLR 1630 at 1634 (para 11)). He does not seem to have noticed (or if he did notice, to have thought it worth mentioning) that quite apart from the without prejudice point Unilever seemed to be faced with the dilemma of choosing between a threats action in which it could not claim the precise relief apparently required to give it standing in the European Patent Office, and an action under the general jurisdiction which would give standing in Munich but might raise

other problems. I do not think it is necessary to pursue this point further, because if it had been crucial there might have been an application for permission to amend.

Procter & Gamble's second point was that the pleaded particulars of a threat to sue for an infringement consisting of 'sale and marketing' were not supported by the minutes of the Frankfurt meeting, which did not specify sale or marketing (nor did they specify manufacture or importation). This point comes back to *Cavity Trays Ltd v RMC Panel Products Ltd* [1996] RPC 361 mentioned much earlier in this judgment. The judge declined to express a view on it ([1999] 2 All ER 691 at 706, [1999] 1 WLR 1630 at 1646 (para 48)). I do not regard it as a proper basis for a strike-out.

Procter & Gamble's third point shades into Unilever's fall-back point, in that it concerns Unilever's right to claim declaratory relief when the allegedly infringing acts would be carried out in the United Kingdom by Lever Bros Ltd (a wholly-owned subsidiary of Unilever's wholly-owned subsidiary). If that were all there was in the challenge to Unilever's standing I would not regard it as a strike-out point, especially in view of the factual matters deposed to in Mr Williams's second affidavit.

Subsidiary issues: claim of right

That is not, however, the only difficulty in the way of Unilever claiming a declaration under the general jurisdiction regulated by RSC Ord 15, r 16 as incorporated into the Civil Procedure Rules:

> 'No claim or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.'

The judge seems to have been satisfied (although he did not discuss the point at length, perhaps because he regarded it as clear) that Unilever could not obtain a declaration of non-infringement under the general jurisdiction unless Procter & Gamble (or, presumably, an exclusive licensee of Procter & Gamble) had asserted a relevant claim of right against it: see [1999] 2 All ER 691 at 699, 702, [1999] 1 WLR 1630 at 1638, 1641–1642 (paras 24, 34), where the judge referred to *Barclays Bank plc v Homan* [1993] BCLC 680 at 693.

Barclays Bank v Homan was a case concerned with problems of cross-border insolvency but in it Hoffmann J (at 693) stated the principle, not challenged on appeal, that 'a party against whom no claim has been formulated cannot sue for a declaration of non-liability' and he referred to *Re Clay, Clay v Booth, Re a Deed of Indemnity* [1919] 1 Ch 66, [1918–19] All ER Rep 94 as authority. Mr Hobbs has submitted that the authority of *Re Clay* has been cast into doubt by the decision of this court in *Re S (hospital patient: court's jurisdiction)* [1995] 3 All ER 290, [1996] Fam 1. But that case was concerned with a very different and very unusual question as to whether an elderly and disabled man should be cared for in Norway by his separated wife and son, or in England by his long-term companion. Millett LJ ([1995] 3 All ER 290 at 305, [1996] Fam 1 at 22) referred to 'something approaching an advisory declaration'. *Re Clay* was not cited. *Re S* has not in my judgment changed the law where only property rights are in play. In patent cases the court should be particularly wary of granting declarations of non-infringement under the general jurisdiction, because of the existence of the special jurisdiction under s 71 of the 1977 Act and the detailed requirements which it imposes.

For these reasons (which are largely the same as those given by the judge) I would dismiss this appeal.

WILSON J. I agree

SIMON BROWN LJ. I agree with all that Robert Walker LJ has said and add a short judgment of my own only because of the interest of the central point at issue and the excellence of the arguments upon it.

Coming as a stranger to this arcane world of patent infringement threats actions, I am struck by the initial difficulty in understanding just what is the policy underlying s 70 of the Patents Act 1977. It seems to me that it is only when this is discovered that one can confidently pronounce on whether 'the protection afforded by the [without prejudice] rule has been unequivocally abused' so that 'the veil imposed by public policy may have to be pulled aside' (to use Robert Walker LJ's language).

In 1893, just ten years after provision for these threats actions was first introduced by s 32 of the Patents Designs and Trade Marks Act 1883, the policy of the legislation was, I think, clear. As described by Bowen LJ in *Skinner & Co v Shew & Co* [1893] 1 Ch 413 at 426, it related to:

> '... every kind of threat, the result of which might be to paralyse a man in his trade by having an action on a patent suspended before his eyes, without the opportunity of determining the suspense at once and bringing the question raised by his antagonist to a speedy and immediate issue.'

But it is important to note (a) that the legislation at that time applied equally to manufacturers, importers and process users as to others, (b) that there was then no equivalent of the present s 71 of the 1977 Act (or, indeed, wide common law) scope for seeking declaratory relief, and (c) that the patentee was perfectly entitled to write threatening letters before action provided only that he thereafter commenced an action for infringement with due diligence.

Essentially, therefore, in its earliest manifestation this provision was designed to stop those patentees who were willing to wound but afraid to strike from hanging a Damocletian sword above any trader's head.

The true purpose of the legislation in its present form seems to me more difficult to discern. Limited clues are to be found in two of the subsections. As Robert Walker LJ has explained, s 70(4) of the 1977 Act as interpreted in *Cavity Trays Ltd v RMC Panel Products Ltd* [1996] RPC 361 is of some relevance in explaining the section's legislative purpose. I would refer to one further passage from Aldous LJ's judgment (at 378):

> 'The right of a patentee to make certain specified threats, but not others, without risk of proceedings being brought, may seem to provide an arbitrary division, but does not lead to absurdity. The subsection allows the main primary infringers (manufacturers and importers for disposal and users of processes), to be warned that they will be sued. That gives them an opportunity to stop manufacturing, importing or using the process or alternatively to explain their position so as to persuade the patentee to drop his threatened position. It is not necessary for the warning to go further and allege that proceedings will be started for such acts as sale.'

Section 70(5) of the 1977 Act perhaps provides another clue. It establishes, submits Mr Hobbs QC, a Rubicon between, on the one hand, the patentee

reserving rights (which is permissible) and, on the other, him saying that he will assert them (which is forbidden). *a*

I must say that I find the position today most curious and unsatisfactory. Although, essentially, I take the policy to be as contended for by Mr Thorley QC—namely that rival manufacturers may threaten each other but should not threaten each other's customers with the objective of inducing them to cease dealing with their rivals—it cannot be pretended that the legislation is this narrowly confined: *b* the decision in the *Cavity Trays* case and, indeed, the assumption that has to be made in the present action show otherwise. But the judge below must surely have been right in referring in para 36 of his judgment ([1999] 2 All ER 691 at 703, [1999] 2 WLR 1630 at 1642) to 'a stronger public interest in discouraging patentees from writing virulent threatening letters to their competitor's customers' than in suppressing threats of the sort assumed to have been made here. *c*

The reality is that a threat of the present kind does no damage whatever to the rival manufacturer. It is not one made publicly or to customers. That, of course, explains the absence of any damages claim in the present proceedings. Indeed there would have been no conceivable occasion for the present proceedings but for the possible standing they may give Unilever in the proceedings before the *d* European Patent Office. In reality it is preferable that those engaged in without prejudice negotiations should be entirely candid in stating their future intentions than that they should have to tread so warily as not to cross Mr Hobbs' Rubicon.

I assume, as for strike-out purposes I must, that in the course of the without prejudice negotiations here Procter & Gamble committed what Mr Hobbs calls 'a statutory tort' under s 70 of the 1977 Act. I nevertheless unhesitatingly conclude *e* that they did not thereby unequivocally abuse the protection afforded by the without prejudice rule.

I too would dismiss this appeal.

Appeal dismissed. Permission to appeal to the House of Lords refused.

Kate O'Hanlon Barrister.

NHS Trust A v M
NHS Trust B v H

FAMILY DIVISION

DAME ELIZABETH BUTLER-SLOSS P

5, 6, 25 OCTOBER 2000

Medical Treatment – Withdrawal of treatment – Insensate patients – Patient in persistent vegetative state without hope of recovery – Whether withdrawal of artificial nutrition and hydration from patients in permanent vegetative state infringing right to life – Whether withdrawal or continuance of such nutrition constituting inhuman or degrading treatment – Human Rights Act 1998, Sch 1, arts 2, 3.

The applicant hospital trusts sought declarations enabling them to withdraw artificial nutrition and hydration from two patients in a permanent vegetative state—a clinical condition of unawareness of self and environment. At the hearing, the court was asked to consider whether the discontinuance of such nutrition and hydration would contravene the right to life in art 2[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). In particular, it was asked to determine whether such discontinuance constituted an intentional deprivation of life within the meaning of art 2 and, if not, whether, in the circumstances, that article imposed a positive obligation to provide life-sustaining treatment. The issue also arose whether the prohibition on inhuman or degrading treatment in art 3 of the convention would be breached during the period between the withdrawal of treatment and the patients' deaths, or whether that article could be invoked to ensure protection of the right of a patient in a permanent vegetative state to die with dignity.

Held – An omission to provide treatment would only be incompatible with art 2 of the convention where the circumstances were such as to impose a positive obligation on the state to take steps to prolong a patient's life. The phrase 'deprivation of life' imported a deliberate act, as opposed to an omission, by someone acting on behalf of the state, which resulted in death. Thus a responsible decision by a medical team not to provide treatment at the initial stage could not amount to intentional deprivation of life by the state. The death of the patient would be the result of the illness or injury from which he suffered, and that could not be described as a deprivation. Nor was there any difference between that situation and a decision to discontinue treatment which was no longer in the best interests of the patient and would therefore be a violation of his autonomy, even though that discontinuance would have the effect of shortening the patient's life. Moreover, where a responsible clinical decision was made to withhold treatment, on the grounds that it was not in the patient's best interests, and that clinical decision was made in accordance with a respectable body of medical opinion, the state's positive obligation under art 2 was discharged. Furthermore, on the assumption that art 3 of the convention had to be considered, the proposed withdrawal of treatment in the instant cases had been anxiously considered by a

a Article 2 is set out at p 806 *j* to p 807 *a*, post

number of experts, was in accordance with the practice of a responsible body of medical opinion and was for a benign purpose in accordance with the best interests of the patients. In any event, art 3 required the victim to be aware of the inhuman and degrading treatment which he was experiencing or at least to be in a state of physical or mental suffering. Article 3 therefore had no application. It was in the best interests of the patients not to continue the artificial nutrition and hydration, and it was lawful for the trusts to withdraw them. Accordingly, the declarations sought would be granted (see p 809 *j* to p 810 *b*, p 811 *c f*, p 813 *a* and p 814 *d e g*, post).

Airedale NHS Trust v Bland [1993] 1 All ER 821 applied.

Notes

For the right to life and the prohibition on inhuman and degrading treatment, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 106, 123, 124.

For the Human Rights Act 1998, Sch 1, arts 2, 3, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 522.

Cases referred to in judgment

A (children) (conjoined twins: surgical separation), Re [2000] 4 All ER 961, CA.
Airedale NHS Trust v Bland [1993] 1 All ER 821, [1993] AC 789, [1993] 2 WLR 316, Fam D, CA and HL.
Association X v UK (1978) 14 DR 31, E Com HR.
Auckland Area Health Board v AG [1993] 1 NZLR 235, NZ HC.
Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, [1957] 1 WLR 582.
Clarke v Hurst 1992 (4) SA 630, SA SC.
Cruzan v Director, Missouri Department of Health (1990) 497 US 261, US SC.
D v UK (1997) 24 EHRR 423, ECt HR.
F v West Berkshire Health Authority (Mental Health Act Commission intervening) [1989] 2 All ER 545, sub nom *Re F (mental patient: sterilisation)* [1990] 2 AC 1, [1989] 2 WLR 1025, HL.
Frenchay Healthcare NHS Trust v S [1994] 2 All ER 403, [1994] 1 WLR 601, CA.
G, Re [1997] 4 LRC 146, NZ HC.
Herczegfalvy v Austria (1992) 15 EHRR 437, ECt HR.
Ireland v UK (1978) 2 EHRR 25, ECt HR.
Law Hospital NHS Trust v Lord Advocate [1996] 2 FLR 407, Ct of Sess.
McCann v UK (1995) 21 EHRR 97, ECt HR.
Osman v UK [1999] 1 FLR 193, (1998) 5 BHRC 293, ECt HR.
Peters v Netherlands (1994) 77A DR 75, E Com HR.
S (adult patient: sterilisation), Re [2000] 3 WLR 1288, CA.
Stewart v UK (1983) 7 EHRR 453, E Com HR.
T v UK (1999) 7 BHRC 659, ECt HR.
Ward of Court, Matter of [1995] 2 ILRM 401, Ir SC.
Widmer v Switzerland App No 20527/92 (10 February 1993, unreported), E Com HR.
X and Y v Netherlands (1985) 8 EHRR 235, ECt HR.
X v Germany (1983) 7 EHRR 152, E Com HR.

Cases also cited or referred to in skeleton arguments

Andronicou v Cyprus (1998) 25 EHRR 491, ECt HR.
C (adult: refusal of medical treatment), Re [1994] 1 All ER 819, [1994] 1 WLR 290.
Corbett v D'Alessandro (1986) 487 So 2d 368, Fla Ct of Apps.

Fiori, Re (1995) 652 A 2d 1350, Pa SC.
J (a minor) (child in care: medical treatment), Re [1992] 4 All ER 614, [1993] Fam 15, CA.
Paton v UK (1980) 3 EHRR 408, E Com HR.
R v UK (1983) 33 DR 270, E Com HR.
R v Woollin [1998] 4 All ER 103, [1999] 1 AC 82, HL.
Rasmussen v Fleming (1987) 741 P 2d 674, Ariz SC.
Superintendent of Belchertown State School v Saikewicz (1977) 370 N E 2d 417, Mass SJC.
T (adult: refusal of medical treatment), Re [1992] 4 All ER 649, [1993] Fam 95, CA.

Applications

By application dated 24 March 2000, NHS Trust A sought a declaration enabling it to withdraw artificial nutrition and hydration from M, a patient in its care who was in a permanent vegetative state. By application dated 26 September 2000, NHS Trust B sought a similar declaration in respect of H, a patient in its care who was also in a permanent vegetative state. The facts are set out in the judgment.

John Grace QC and *Christopher Johnston* (instructed by *Hill Dickinson*, Liverpool) for the trusts.
Ben Emmerson QC for the Official Solicitor.

6 October 2000. The applications were granted for reasons to be given later.

25 October 2000. The following judgment was delivered.

DAME ELIZABETH BUTLER SLOSS P.

1. I should first like to express my gratitude to counsel for their most helpful skeleton arguments and oral submissions which I have found to be of the greatest help in writing this judgment.

2. On 5 and 6 October 2000 I heard applications by two hospital trusts (Trust A and Trust B) seeking similar declarations to enable hospitals managed by them to discontinue artificial nutrition and hydration provided to two patients, Mrs M and Mrs H. The applications were supported by the families of each patient and by the hospital staff. The Official Solicitor represented both patients in accordance with the *Practice Note (persistent vegetative state: withdrawal of treatment)* [1996] 4 All ER 766. The Official Solicitor did not oppose the applications. Mr Wood, representing an unincorporated organisation called ALERT, sought to intervene to put forward grounds upon which it was asserted that I should refuse to grant the declarations. For reasons which I gave at the time I refused to allow ALERT to intervene. Since a decision in respect of Mrs H was urgent, I gave my decisions on 6 October, granted both declarations in the terms sought and reserved my reasons.

(A) THE FACTS

Mrs M's Case

3. Mrs M is 49 and married with three adult children. She and her husband went to live in a foreign country in 1984 where he had obtained employment. On 10 September 1997 Mrs M was admitted to hospital for gynaecological surgery. The facts are not entirely clear since the medical notes of that hospital are not available but it appears that she had a cardio-respiratory arrest while under general anaesthesia and suffered hypoxic brain injury. She was diagnosed as

being in a chronic vegetative state by a consultant physician in the foreign country. She remained in hospital until January 1998. After a brief period at home she went into a nursing home. Her husband decided to return to England and he and his son managed to bring Mrs M back by air on a regular flight in October 1998. She was admitted to hospital in the area where they had previously lived and has remained there ever since under the care of Dr L. I have been provided with written evidence from her husband and a nursing representative from the hospital. The specialist medical evidence was given by: (i) Dr L who is a consultant physician and retains the overall care of Mrs M, made the diagnosis of a vegetative state in October 1998; (ii) Dr S, who carries out regular clinical sessions for Trust A, examined Mrs M in October 1998. He examined her again on 5 October 1999 and found she was in a permanent vegetative state (PVS); (iii) Professor Jennett who is Professor Emeritus of neurosurgery at the University of Glasgow was asked by the Trust to examine Mrs M and did so on 5 May 1999; and (iv) Professor Wade who is a consultant in neurological disability, was asked by the Official Solicitor to examine her and did so on 26 August 2000. He agreed that Mrs M was in a permanent vegetative state.

4. Professor Jennett gave oral evidence. He was satisfied that Mrs M was in a permanent vegetative state. She had suffered anoxic brain damage. She was being fed through a PEG tube. The prospects of any change were 'vanishingly small' and she could live for many years. He agreed with the conclusions of the Royal College of Physicians in 1996 that in PVS cases that were not caused by head injury it was appropriate to wait six months after the diagnosis of permanent vegetative state. In the present case, Mrs M has probably been in a vegetative state since immediately after the event in September 1997. She has therefore been in this state for over three years. He confirmed that if artificial nutrition and hydration were withdrawn she would not suffer any pain in the brief period before she died.

Mrs H's Case

5. She is 36. She was previously married and has one son now aged ten. She lived with her son. From her teens she suffered from severe episodes of epilepsy and has for many years been under the care of Dr C at the hospital run by Trust B. Despite her serious medical problems she had a lively and bubbly personality. Her medication had side effects and caused her episodes of pancreatitis. At Christmas 1998 she became engaged to be married and went on holiday with her future husband to the United States in 1999. While she was there she developed pancreatitis. After her return to England she had another attack of pancreatitis in October 1999 and was admitted to hospital. She was discharged but on 16 January 2000 she was readmitted and on 18 January she was found collapsed in an asystolic cardiac arrest. She suffered anoxic brain damage. She was moved to her present hospital and has continued under the care of Dr C.

The evidence

6. I have been provided with written evidence from Mrs H's mother, her fiancé, two close friends of the family, her general practitioner, one of the nursing staff on her ward and the Director of Nursing and Hospital Services. The specialist medical evidence was given by: (i) Dr C, who is a consultant neurologist, who also gave oral evidence; (ii) Dr CY, a consultant neurologist from the same hospital who examined Mrs H in March and in July 2000; (iii) Dr Venables, a consultant neurologist and Associate Postgraduate Dean, Faculty of Medicine, Sheffield

University examined Mrs H on 9 August as an independent expert at the request of the Trust; (iv) Professor Jennett, invited by the Trust as an independent expert, examined Mrs H on 28 September; and (v) Dr Young, a consultant neurologist, examined Mrs H, on behalf of the Official Solicitor, on 2 October. The opinion of the consultants was unanimous that Mrs H suffers from permanent vegetative state. Professor Jennett in his written report said that the chances of 'even slight improvement are vanishingly small'.

7. Dr C in his written and oral evidence explained that he has had Mrs H under his care since 1987. She has particular problems in accepting artificial nutrition and hydration. She was originally fed with a PEG tube. Feeding became difficult and she frequently vomited. Because of this a PJEG tube was reinserted in June. The tube has been subject to recurrent blockage. It became blocked three times since June. Twice it was unblocked but on the third occasion on 23 September the medical team was unable to unblock it. Since 23 September Mrs H has received no nutrition. She has however continued to receive the prescribed drugs and some degree of hydration which until early October was provided intravenously. That method became unsatisfactory and she was, at the time he gave evidence, receiving hydration sub-cutaneously. That method was also unsatisfactory and only provided about half the hydration that she needs.

8. There are alternative methods of providing artificial nutrition and adequate hydration. It is not just a question of replacing a tube. Each possible method would require some degree of invasive procedure. Each is unsatisfactory and presents serious risks to Mrs H such as septicaemia, risk of perforation or major abdominal surgery by performing a laparotomy. The hospital faces an acute dilemma. Hydration alone is equally unsatisfactory and would create a deterioration in her physical condition which would present considerable nursing problems, would be distressing for her family and would only postpone death for a period of weeks. None of the invasive procedures would appear to be in the best interests of the patient.

9. Professor Jennett in his written evidence and Dr Venables in oral evidence confirmed the considerable risks attendant upon any of the proposed procedures to try to reintroduce artificial nutrition with the probability that it might only survive for a month or two before the problem reoccurred. There was no long-lasting solution. She has probably been in a vegetative state since 18 January. It is therefore over nine months that she has remained in that state.

10. Unlike Mrs M who could live for many years in her present condition. it is clear that the attempts to stabilise Mrs H's condition present unacceptable risks for her and a decision in respect of Mrs H was urgent. Both Mrs M and Mrs H are being nursed with a high degree of skill in their respective hospitals. If the artificial nutrition and hydration were withdrawn neither would suffer pain or discomfort. They would continue to be nursed for the brief period before death ensued. In each hospital there is in place support for the families and for the nursing staff.

Permanent vegetative state

11. In April 1996 the Royal College of Physicians defined the vegetative state as:

> 'A clinical condition of unawareness of self and environment in which the patient breathes spontaneously, has a stable circulation and shows cycles of eye closure and eye opening which may simulate sleep and waking. This may be a transient stage in the recovery from coma or it may persist until death.

The continuing vegetative state

When the vegetative state continues for more than four weeks it becomes increasingly unlikely that the condition is part of a recovery phase from coma and the diagnosis of a continuing vegetative state can be made.

The permanent vegetative state

A patient in a continuing vegetative state will enter a permanent vegetative state when the diagnosis of irreversibility can be established with a high degree of clinical certainty. It is a diagnosis which is not absolute but based on probabilities. Nevertheless, it may reasonably be made when a patient has been in a continuing vegetative state following head injury for more than twelve months or following other causes of brain damage for more than six months.'

12. The college set out the criteria for diagnosis of permanent vegetative state. The report of the college was endorsed by the Conference of Medical Royal Colleges and their Faculties of the United Kingdom. In the United States the report of the Multi-Society Task Force on PVS was published in the New England Journal of Medicine on 26 May 1994. It predates the college report and its findings are similar. The only difference of substance for the purposes of this judgment, as far as I can see, is that the periods suggested before artificial nutrition and hydration might properly be discontinued are shorter than those recommended by the college.

Conclusion on the facts

13. The diagnosis of permanent vegetative state has been made by four consultants in the case of Mrs M and by five consultants in the case of Mrs H. The diagnosis is not challenged by the Official Solicitor representing each patient. Mrs M has been in that state for over three years and Mrs H for over nine months. Each diagnosis falls within the guidelines of the college. There is the added major problem with Mrs H that to restore nutrition presents considerable risks. On the evidence presented to me it would not be in the best interests of either patient to continue treatment and the case for granting the declarations in respect of each patient is very strong if it is lawful to withdraw the provision of artificial nutrition and hydration.

(B) THE LAW

14. I turn now to the law governing the granting of declarations by the courts in these cases. Prior to 2 October 2000 English domestic law was governed by the principles laid down in the speeches of the House of Lords in *Airedale NHS Trust v Bland* [1993] 1 All ER 821, [1993] AC 789. Those principles have now to be reconsidered in the light of the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the convention) into our domestic law by virtue of the Human Rights Act 1998. I have to consider principally art 2 but also arts 3 and 8.

Article 2

15. Article 2, 'Right to life', states:

'1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'

16. Mr Emmerson QC, for the Official Solicitor, in his submissions posed three key questions: (1) is a patient diagnosed as in a permanent vegetative state alive; and (2) does the withdrawal of artificial nutrition and hydration constitute an 'intentional deprivation of life' within the meaning of art 2(1)? That question breaks down into two further questions: (a) is the 'intention' of the withdrawal of treatment to bring about the patient's death or shorten his or her life; and (b) does an omission to provide life-sustaining treatment constitute 'an intentional deprivation'? (3) If the withdrawal does not constitute an intentional deprivation of life, are the circumstances such that art 2 must be taken to impose a positive obligation to provide life-sustaining treatment? I have found the questions very helpful in my approach to this case and therefore adopt them.

Is a patient diagnosed as in a permanent vegetative state alive?

17. The answer to question 1 is clearly yes from the description of permanent vegetative state in the report of the college. The brain stem of the patient remains intact. All the judges in *Bland*'s case, supported by the medical experts, accepted that he was alive despite the diagnosis that he was suffering from persistent vegetative state, as it was then described. Article 2 therefore clearly protects Mrs M and Mrs H.

2(a) *Is the 'intention' of the withdrawal of treatment to bring about the patient's death or shorten his or her life?*

18. Turning to question 2(a), Mr Emmerson QC and Mr Grace QC, for the Trusts, disagree in their submissions on the issue whether the intention to withdraw artificial nutrition and hydration is to bring about the patient s death or to shorten life. Mr Grace argued that it was not the intention of the Trust to bring about death. Withdrawing treatment would not be ending the life of either patient by the act of another, nor by culpable omission if carried out within the guidelines laid down in *Bland*'s case. The cause of death would be the disease or injury that created their condition. In my view the issue was decided by the House of Lords in *Bland*'s case. Although, since the implementation of the convention, I am no longer bound by the decision in *Bland*'s case, the speeches of Lord Browne-Wilkinson ([1993] 1 All ER 821 at 880, [1993] AC 789 at 881), where he said 'the whole purpose of stopping artificial feeding is to bring about the death of Anthony Bland', and of Lord Lowry ([1993] 1 All ER 821 at 876–877, [1993] AC 789 at 876–877) are most persuasive. I do not consider there is any difference in principle in this context between intention and purpose.

2(b) *Does an omission to provide a life-sustaining treatment constitute an intentional deprivation?*

19. The question of discontinuing artificial nutrition and hydration to a patient in a permanent vegetative state has not yet arisen in the European Court of Human Rights, and guidance on the applicability of art 2 has to be gleaned from decisions of that court dealing with entirely different situations.

20. Article 2 is a fundamental right in the convention. In *McCann v UK* (1995) 21 EHRR 97 at 160 the European Court said: *a*

> 'Article 2 ranks as one of the most fundamental provisions in the Convention indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed.' *b*

21. In *Stewart v UK* (1983) 7 EHRR 453 at 457 the European Commission of Human Rights said there are four sets of situations set out in art 2 in which the taking of a life by a public authority may be permitted:

> 'These situations, where deprivation of life may be justified, are exhaustive and must be narrowly interpreted, being exceptions to, or indicating the limits of, a fundamental Convention right.' *c*

22. Article 2 clearly contains a negative obligation on the state to refrain from taking life intentionally. Question 2(b) raises the issue of the extent of the negative obligation not intentionally to deprive a patient of life within the meaning of art 2(1). Robert Walker LJ in *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 961 at 1068 said: *d*

> 'The convention is to be construed as an autonomous text, without regard to any special rules of English law, and the word "intentionally" in art 2(1) must be given its natural and ordinary meaning. In my judgment the word, construed in that way, applies only to cases where the purpose of the prohibited action is to cause death.' *e*

23. In *Widmer v Switzerland* App No 20527/92 (10 February 1993, unreported) on a petition by a son that the hospital in which his father had died had engaged in 'passive euthanasia' the European Commission held that the failure of the Swiss state to criminalise 'passive euthanasia' did not amount to a breach of the convention since the state sufficiently punished attacks on life. In *Association X v UK* (1978) 14 DR 31 the European Commission held that where a small number of children had died as a result of a vaccination scheme whose sole purpose was to protect the health of society by eliminating infectious diseases, it could not be said that there had been an intentional deprivation of life within the meaning of art 2, or that the state had not taken adequate and appropriate steps to protect life. *f* *g*

24. It is clear from the judgment of Robert Walker LJ and the decisions of the European Commission in *Widmer*'s case and the *Association X* case that there are limits to the extent of the negative obligation under art 2(1).

25. The medical profession cannot treat patients who are competent without their consent. To do so, without consent, would be unlawful. A competent adult would have the absolute right to refuse artificial nutrition and hydration even though such refusal would lead to his death. This position is clear from English common law. Lord Goff of Chieveley said in *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545 at 563, [1990] 2 AC 1 at 73: 'I start with the fundamental principle, now long established, that every person's body is inviolate.' *h* *j*

26. That fundamental principle of English law is also to be found in art 8 of the convention. If a patient does not have the capacity to accept or refuse treatment it is the duty of the doctor, under the doctrine of necessity, to treat such a patient if it is in his best interests: see *F*'s case. As the speeches of the House of Lords showed

in *Bland*'s case, the duty of the doctor is to treat the patient as long as it is in his best interests to have that treatment. If, however, it is no longer in the patient s best interests to have that treatment, it is not the duty of the medical team to continue it. Lord Goff said:

> '... if the justification for treating a patient who lacks the capacity to consent lies in the fact that the treatment is provided in his best interests, it must follow that the treatment may, and indeed ultimately should, be discontinued where it is no longer in his best interests to provide it.' (See [1993] 1 All ER 821 at 869, [1993] AC 789 at 867.)

27. Lord Browne-Wilkinson went further. In his speech he said:

> 'Unless the doctor has reached the affirmative conclusion that it is in the patient's best interest to continue the invasive care, such care must cease ... Only if the doctors responsible for his care held the view that, though he is aware of nothing, there is some benefit to him in staying alive, would there be anything to indicate that it is for his benefit to continue the invasive medical care. In Anthony Bland's case, the doctors do not take that view. The discontinuance of life support would be in accordance with the proposals contained in the discussion paper on *Treatment of Patients in Persistent Vegetative State* issued in September 1992 by the medical ethics committee of the British Medical Association. Therefore the *Bolam* requirement (*Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, [1957] 1 WLR 582) is satisfied. In these circumstances, it is perfectly reasonable for the responsible doctors to conclude that there is no affirmative benefit to Anthony Bland in continuing the invasive medical procedures necessary to sustain his life. Having so concluded, they are neither entitled nor under a duty to continue such medical care. Therefore they will not be guilty of murder if they discontinue such care.' (See [1993] 1 All ER 821 at 883–884, [1993] AC 789 at 884–885.)

28. Although lack of entitlement to treat an incompetent patient if it is not in his best interests was not specifically referred to in the other speeches in *Bland*'s case, such treatment would violate the patient's personal autonomy which he retains despite being incompetent. Lord Browne-Wilkinson's analysis is clearly correct both at common law and under art 8.

29. If a decision to cease medical treatment in the best interests of the patient is to be characterised as intentional deprivation of life, in view of the absolute nature of the prohibition on intentional killing, Mr Emmerson submitted that there would be a duty in every case to take steps to keep a terminally-ill patient alive by all means possible, and to continue those steps indefinitely, until the patient's body could no longer sustain treatment, irrespective of the circumstances or the prognosis. I agree with Mr Emmerson that such an interpretation of art 2 cannot be correct.

30. Although the intention in withdrawing artificial nutrition and hydration in PVS cases is to hasten death, in my judgment the phrase deprivation of life must import a deliberate act, as opposed to an omission, by someone acting on behalf of the state, which results in death. A responsible decision by a medical team not to provide treatment at the initial stage could not amount to intentional deprivation of life by the state. Such a decision based on clinical judgment is an omission to act. The death of the patient is the result of the illness or injury from which he suffered and that cannot be described as a deprivation. It may be

relevant to look at the reasons for the clinical decision in the light of the positive obligation of the state to safeguard life, but in my judgment, it cannot be regarded as falling within the negative obligation to refrain from taking life intentionally. I cannot see the difference between that situation and a decision to discontinue treatment which is no longer in the best interests of the patient and would therefore be a violation of his autonomy, even though that discontinuance will have the effect of shortening the life of the patient.

31. The analysis of these issues by the House of Lords in *Bland's* case is entirely in accordance with the convention case law on art 2 and is applicable to the distinction between negative and positive obligations. An omission to provide treatment by the medical team will, in my judgment, only be incompatible with art 2 where the circumstances are such as to impose a positive obligation on the state to take steps to prolong a patient s life. Mr Grace made it clear the concern of the Trusts that my judgment dealing with omission to provide treatment should not in future be applied to cases which might arise, in which treatment was given which had the effect of shortening life. I understand his concern. This judgment is dealing only with the situation where treatment is to be discontinued and is not concerned with nor relevant to acts by doctors or other members of the health service, such as the giving of palliative drugs to a terminally ill patient, which might have the effect of shortening his life.

32. Mr Grace advanced the argument that the quality of life of a patient was relevant to the protection under art 2. I agree however with Mr Emmerson that the quality of life may be relevant to the clinical assessment of whether it is in the patient's best interests for treatment to continue but does not form part of the question whether this is an intentional deprivation of life within the meaning of art 2.

(3) *If the withdrawal does not constitute an intentional deprivation of life, are the circumstances such that art 2 must be taken to impose a positive obligation to provide life-sustaining treatment?*

33. However, art 2 also contains a positive obligation, to take adequate and appropriate steps to safeguard life: see *Osman v UK* (1998) 5 BHRC 293 at 321 (para 115). In answer to question (3), that positive obligation upon a state to protect life, is not absolute. In *Osman's* case the European Commission explained that:

> 'The first sentence of art 2(1) also imposes a positive obligation on contracting states that the right to life be protected by law. In earlier cases, the Commission considered that this may include an obligation to take appropriate steps to safeguard life ... While effective investigation procedures and enforcement of criminal law prohibitions in respect of events which have occurred provide an indispensable safeguard and the protective effect of deterrence, the Commission is of the opinion that for art 2 to be given practical force it must be interpreted also as requiring preventative steps to be taken to protect life from known and avoidable dangers. However, the extent of this obligation will vary inevitably, having regard to the source and degree of danger and the means available to combat it. Whether the risk to life derives from disease, environmental factors or from the activities of those acting outside the law, there will be a range of policy decisions relating inter alia, to the use of state resources, which it will be for the contracting states to assess on the basis of their aims and priorities, subject to these being

compatible with the values of democratic societies and the fundamental rights guaranteed in the Convention.'

34. The European Court held in *Osman v UK* (1998) 5 BHRC 293 at 321 (para 116):

> 'For the court, and having regard to the nature of the right protected by art 2, a right fundamental in the scheme of the convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.'

35. The standard applied by the European Court bears a close resemblance to the standard adopted in the domestic law of negligence and approximates to the obligation recognised by the English courts in the *Bolam* test (see *Bland*'s case above). In a case where a responsible clinical decision is made to withhold treatment, on the grounds that it is not in the patient's best interests, and that clinical decision is made in accordance with a respectable body of medical opinion, the state's positive obligation under art 2 is, in my view, discharged. In *Widmer*'s case the European Commission considered the claim that there was negligent failure on the part of the hospital to treat the applicant's father. The commission rejected the petition and said that 'the idea that the right of any person to life is protected by law requires the state ... to take all reasonable steps to protect life'.

36. It considered that Switzerland in its legislation had taken sufficient steps to carry out the duty imposed upon it by art 2. The European Court in *Osman*'s case said that the positive obligation under art 2 'must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities'.

37. Article 2 therefore imposes a positive obligation to give life-sustaining treatment in circumstances where, according to responsible medical opinion, such treatment is in the best interests of the patient but does not impose an absolute obligation to treat if such treatment would be futile. This approach is entirely in accord with the principles laid down in *Bland*'s case where Lord Goff said:

> '... for my part I cannot see that medical treatment is appropriate or requisite simply to prolong a patient's life when such treatment has no therapeutic purpose of any kind, as where it is futile because the patient is unconscious and there is no prospect of any improvement in his condition.' (See [1993] 1 All ER 821 at 870, [1993] AC 789 at 869.)

38. In our use of the declaratory jurisdiction of the High Court in PVS cases we impose in our domestic law a higher test than the standard set by the European Court, since the High Court reviews the medical conclusion on best interests and may not necessarily accept the medical opinion: see *Frenchay Healthcare NHS Trust v S* [1994] 2 All ER 403, [1994] 1 WLR 601. Sir Thomas Bingham MR said:

> 'It is, I think, important that there should not be a belief that what the doctor says is the patient's best interest *is* the patient's best interest. For my part I would certainly reserve to the court the ultimate power and duty to review the doctors' decision in the light of all the facts.' (See [1994] 2 All ER 403 at 411, [1994] 1 WLR 601 at 609; Sir Thomas Bingham MR's emphasis.)

(See also *Re S (adult patient: sterilisation)* [2000] 3 WLR 1288.)

39. It is also of great significance, in my judgment, that discontinuance of artificial nutrition and hydration in PVS cases is accepted in many parts of the world both in common law and civil jurisdictions. In some countries there are constitutional guarantees such as a Bill of Rights in New Zealand, legislation, in Denmark, the Civil Code in France. A parens patriae jurisdiction is applied in parts of the United States and in Ireland. The jurisdictional basis varies and thought processes differ but the conclusions that there is no continuing obligation to maintain life in the circumstances of PVS patients and that it is compatible with the right to life to withdraw artificial nutrition and hydration in such cases are the same: see *Auckland Area Health Board v AG* [1993] 1 NZLR 235; *Cruzan v Director, Missouri Department of Health* (1990) 497 US 261; *Re G* [1997] 4 LRC 146; *Matter of a Ward of Court* [1995] 2 ILRM 401; *Clarke v Hurst* 1992 (4) SA 630; *Law Hospital NHS Trust v Lord Advocate* [1996] 2 FLR 407; see also Grubb et al 'Reporting on Persistent Vegetative State' (1998) 6 Med L Rev 161–210. The decision of the House of Lords forms an important part of international jurisprudence on this subject. The existing practice in the United Kingdom is accordingly compatible with the values of democratic societies.

Article 8

40. Before completing the answer to question 3, I turn to look in a little more detail at the rights encapsulated in art 8, to which I have already briefly referred, and the competing submissions addressed to me. The relevant part of art 8 which is headed 'Right to respect for private and family life' states:

'1. Everyone has the right to respect for his private and family life, his home and correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society ... for the protection of health.'

41. As I have already said art 8 protects the right to personal autonomy, otherwise described as the right to physical and bodily integrity. It protects a patient's right to self-determination and an intrusion into bodily integrity must be justified under art 8(2): see *X and Y v Netherlands* (1985) 8 EHRR 235, *Peters v Netherlands* (1994) 77A DR 75. Mr Grace suggested that art 8 may be in conflict with art 2 and is to be balanced against art 2. I prefer however the submission of Mr Emmerson that, in seeking to determine the scope of the positive obligation in art 2, assistance can be derived from the provisions of art 8. Mr Grace asked me to take into account under art 8 the views and feelings of the families. They are, of course, important considerations for the hospitals treating these patients to take into account. It is not necessary for me in the present cases to come to a conclusion whether the wishes and feelings of the families form part of the patient's right to respect for family life under art 8 in situations where the patient is insensate. If they are relevant they cannot outweigh any positive obligation on the state to maintain the patient's life. I rather doubt that the families have rights under art 8 separate from the rights of the patient, but a decision on that issue also is not a necessary part of my overall decision.

Article 3

42. Article 3, 'Prohibition of torture', states: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

43. I am asked by Mr Grace to consider the implications of art 3 to the continuation of treatment which is futile. Mr Wood, on behalf of Alert, wished me to consider art 3 on the basis that it was relevant to the withdrawal of artificial nutrition and hydration and would be breached during the short period leading up to the death of the two patients. I am satisfied that art 3 does not apply to either situation. Clearly the continuation of futile treatment or the withdrawal of such treatment cannot be described either as torture or as punishment. The issue is whether either is 'degrading treatment'. In *Ireland v UK* (1978) 2 EHRR 25 the European Court of Human Rights said, in the context of interrogation tactics in Northern Ireland, that degrading treatment meant—

> 'ill-treatment designed to arouse in victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them and possibly breaking their physical or moral resistance.'

44. In *D v UK* (1997) 24 EHRR 423 a broader approach was adopted in respect of the proposed deportation of an AIDS patient from the United Kingdom to St Kitts. The European Court said (at 447):

> '... the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection.'

45. The European Court held that to return him to St Kitts would amount to inhuman treatment.

46. Mr Grace submitted that art 3 can be invoked to ensure protection of a PVS patient's right to die with dignity and that it was degrading to enforce the continuation of life in those circumstances. He suggested that it was not necessary in order for art 3 to apply that the person within its protection had to be aware of the treatment complained of. The purpose of art 3 was to outlaw treatment which is inhuman or degrading and is objective as well as subjective. Mr Emmerson submitted that art 3 did not apply to an insensate patient and that for it to apply a person so treated had to be conscious of suffering. He further submitted that administration of medical treatment in good faith is unlikely to be a violation of art 3.

47. Two decisions of the European Court support Mr Emmerson's submission. In *T v UK* (1999) 7 BHRC 659 at 682–683 the European Court said:

> 'Ill-treatment must attain a minimum level of severity if it is to fall within the scope of art 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim ... Treatment has been held by the court to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering, and also "degrading" because it was

such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account ... but the absence of any such purpose cannot conclusively rule out a finding of violation of art 3.'

48. In *Herczegfalvy v Austria* (1992) 15 EHRR 437 at 484 the court said:

'... as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist.'

(See also *X v Germany* (1983) 7 EHRR 152 (forcible feeding of a prisoner on hunger strike not in violation of art 3.)

49. On the assumption that art 3 requires to be considered, I am satisfied that the proposed withdrawal of treatment from these two patients has been thoroughly and anxiously considered by a number of experts in the field of PVS patients and is in accordance with the practice of a responsible body of medical opinion. The withdrawal is for a benign purpose in accordance with the best interests of the patients not to continue life-saving treatment. It is legitimate and appropriate that the residual treatment be continued until death. I am, moreover, satisfied that art 3 requires the victim to be aware of the inhuman and degrading treatment which he or she is experiencing or at least to be in a state of physical or mental suffering. An insensate patient suffering from permanent vegetative state has no feelings and no comprehension of the treatment accorded to him or her. Article 3 does not in my judgment apply to these two cases.

50. Mr Emmerson raised certain issues which might arise in the future. It is not necessary nor helpful for me to set them out or comment on them when they are not necessary to the present judgment.

Conclusion

51. I am entirely satisfied on the facts and on the law that it is in the best interests of Mrs M and of Mrs H not to continue the artificial nutrition and hydration and that it is lawful for the Trusts to withdraw that artificial nutrition and hydration. For the reasons given in this judgment I granted the declarations in respect of both patients on 6 October.

Order accordingly.

Celia Fox Barrister.

United States Government v Montgomery (Montgomery, third party)

[2001] UKHL/3

HOUSE OF LORDS

LORD HOFFMANN, LORD COOKE OF THORNDON, LORD HUTTON, LORD HOBHOUSE OF WOODBOROUGH AND LORD SCOTT OF FOSCOTE

8, 9 NOVEMBER 2000, 25 JANUARY 2001

Criminal law – Appeal – Criminal cause or matter – Restraint orders made for purpose of aiding enforcement of external confiscation order – Judge subsequently setting aside restraint orders – Whether Court of Appeal, Civil Division having jurisdiction to entertain appeal against judge's decision – Whether judge's decision in a 'criminal cause or matter' – Supreme Court Act 1981, s 18(1)(a).

Sentence – Restraint order – Power to make restraint order – Restraint order for purpose of aiding enforcement of external confiscation order – External confiscation order – United States court ordering shares in company to be forfeited following criminal proceedings – Defendant failing to forfeit shares and United States court adding interest to sum outstanding – United States government seeking to enforce confiscation order in United Kingdom – Relevant legislation not applying to United States confiscation orders when first confiscation order made – Whether legislation applying retrospectively to United States confiscation orders – Whether confiscation order to which interest subsequently added an external confiscation order – Criminal Justice Act 1988, ss 76(1), 77, 96, 102(4) – Criminal Justice Act 1988 (Designated Countries and Territories) Order 1991.

In 1983 B was indicted in the United States for fraud and racketeering in relation to contracts to launder clothes for the United States army. Part of the proceeds of the fraud was passed to a company which B controlled. Before he was indicted, B transferred most of his shares in the company to the first appellant, M, his then wife. In 1984 B was convicted by a federal district court and he was ordered to forfeit his interest in the shares. He was also ordered to pay $US7m to the United States as restitution, but the district court ruled that his liability would be limited to that amount or the value of the shares, whichever was the higher. In order to enable the value of the shares to be ascertained, the district court ordered B to provide full information about the company's assets and liabilities. B paid $US7m into court, but did not comply with the order to provide information. As a result, it proved difficult to ascertain the value of the shares and determine whether B had extinguished his liability. In 1992 the district court made an order for discovery against M, but she failed to comply with it. In 1995 the district court put a value of over $US11m on the shares, held that B and M were both in contempt, ordered them to pay the difference between the $US7m already paid and the value of the shares, and added to that sum interest from 1985. In 1997, on an ex parte application by the United States government, the High Court made restraint orders under s 77[a] of the Criminal Justice Act 1988, in aid of the

a Section 77, so far as material, provides: '(1) The High Court may by order (referred to in this Part of this Act as a "restraint order") prohibit any person from dealing with any realisable property ... '

American confiscation orders, against M and her present husband, the second appellant. The power to make such orders in aid of confiscation orders made in the United States had been conferred upon the High Court, with effect from 1 August 1994, by the Criminal Justice Act 1988 (Designated Countries and Territories) Order 1991 (the DCO). That order was made under s 96[b] of the 1988 Act which provided that the order applied Pt VI of the Act (which included s 77) to 'external confiscation orders'. Such orders were themselves defined, by s 96(2), as an order made by a court in a designated country for the purpose of recovering property obtained as a result of or in connection with conduct corresponding to an offence to which Pt VI applied, or the value of the property so obtained, or for the purpose of depriving the person of the pecuniary advantage so obtained. Under s 76(1)[c] of the 1988 Act, the powers conferred on the High Court by s 77 were exercisable where, inter alia, proceedings had been instituted against the defendant in a designated country (para (a)) and either an external confiscation order had been made in the proceedings or it appeared to the High Court that there were reasonable grounds for thinking that such an order might be made in them (para (c)). Section 102(4)[d] provided that the powers in Pt VI of the Act could not be used in connection with English domestic proceedings instituted before the commencement of the Act. The appellants made a successful application to a High Court judge to set aside the restraint orders, and the United States government appealed. On the appeal, M and her husband raised a preliminary objection, namely that the Court of Appeal had no jurisdiction to hear the appeal by virtue of s 18(1)(a)[e] of the Supreme Court Act 1981 which excluded appeals 'from any judgment of the High Court in any criminal cause or matter'. The Court of Appeal rejected that contention and proceeded to allow the appeal. M and her husband appealed, contending (i) that the phrase 'in a criminal cause or matter' was to be given a wide meaning which was apt to embrace the enforcement of a confiscation order; (ii) that the 1995 district court orders were no more than attempts to enforce the original 1984 forfeiture order and that the DCO could not apply retrospectively to external confiscation orders which had been made before it was applied to the United States; and (iii) that, in so far as the confiscation order had been increased in amount by the addition of interest, it was not an external confiscation order capable of enforcement under the DCO.

Held – (1) The jurisdiction conferred upon the High Court under Pt VI of the 1988 Act was a civil jurisdiction, notwithstanding that it existed to enforce or determine disputes over the debts or proprietary rights created by or consequent upon a confiscation order made by a criminal court. That being so, the same had to be true of the use of the provisions of Pt VI which the DCO applied to external confiscation orders. Modern legislation, of which Pt VI was a good example, conferred powers upon criminal courts to make orders which might affect the property or obligations not only of the person against whom they were made but those of third parties as well. Thus the consequences of an order in criminal proceedings might be a claim or dispute which was essentially civil in character. There was no reason why the nature of the order which gave rise to the claim or

b Section 96 is set out at [26], post
c Section 76(1) is set out at [27], post
d Section 102(4) is set out at [45], post
e Section 18, so far as material, is set out at [3], post

dispute should necessarily determine the nature of the proceedings in which the claim was enforced or the dispute determined. Indeed, a restraint order under s 77 was no more than a specialised form of the freezing order used in ordinary civil proceedings. It followed in the instant case that the Court of Appeal's jurisdiction had not been excluded by s 18(1)(a) of the 1981 Act (see [19]–[20], [22], [34]–[40] and [52], post); *Re O (disclosure order)* [1991] 1 All ER 330 applied; dictum of Viscount Simon LC in *Amand v Secretary of State for Home Affairs* [1942] 2 All ER 381 at 385 explained.

(2) The DCO applied retrospectively to external confiscation orders which had been made before it was applied to the United States. There was nothing in the language of paras (a) or (c) of s 76(1) of the 1988 Act which confined them to proceedings instituted, or external confiscation orders made, since the commencement of the DCO. Indeed, in the case of para (a), there was an indication that the condition was definitely not intended to be so confined. Section 102(4) had been omitted from, and no equivalent provision included in, the 1988 Act as applied to external confiscation orders. That suggested that the DCO was intended to apply to proceedings which had been instituted before it came into force. If that was intended to be the effect of para (a), there was no reason why para (c) should be limited to orders made after it came into force. Nor was there anything unfair in such a conclusion in the instant case. The enforcement in the United Kingdom of rights conferred upon the United States by an order made before the DCO came into force was a very different matter from the retrospective imposition of a penalty (see [28], [30], [34]–[36] and [52], post).

(3) The interest element was part of an order for recovering from the appellants the value of the property obtained as a result of B's criminal conduct or, alternatively, for depriving them of a pecuniary advantage so obtained. The legislation was concerned with the value of the property to the wrongdoer and that value consisted not merely in its capital value at a given point of time but also in the value of the retention of the property, which gave the appellants an opportunity to profit by its use. Their acquisition of the assets which gave value to the shares was a result of or in connection with the criminal conduct of B and their continuing retention of those shares was likewise a result of the same conduct. Alternatively, if one looked at the pecuniary advantage which the appellants had obtained, the 1988 Act, as applied by the DCO, required them to be treated as if they had received a sum of money equal to the value of the pecuniary advantage, i e the shares. The retention of such a sum for ten years was in itself a pecuniary advantage even if the whole of the original capital was repaid. An order which deprived the appellants of that further advantage was within the definition of an external confiscation order. Accordingly, the appeal would be dismissed (see [32]–[36], [41] and [51]–[52], post).

Decision of the Court of Appeal [1999] 1 All ER 84 affirmed.

Notes

For restraint orders, see 11(2) *Halsbury's Laws* (4th edn reissue) paras 1291–1295.

For the Supreme Court Act 1981, s 18, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 1061.

For the Criminal Justice Act 1988, ss 76, 77, 96, 102, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 1043, 1044, 1073, 1075.

Cases referred to in opinions

Amand v Secretary of State for Home Affairs [1942] 2 All ER 381, [1943] AC 147, HL.
Barretto, Re, Wadsted v Barretto [1994] 1 All ER 447, [1994] QB 392, [1994] 2 WLR 149, CA.
Carr v Atkins [1987] 3 All ER 684, [1987] QB 963, [1987] 3 WLR 529, CA.
Clifford and O'Sullivan, Re [1921] 2 AC 570, HL.
Day v Grant, R v Crown Court at Manchester, ex p Williams [1987] 3 All ER 678, [1987] QB 972, [1987] 3 WLR 537, CA.
L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, The Boucraa [1994] 1 All ER 20, [1994] 1 AC 486, [1994] 2 WLR 39, HL.
O (disclosure order), Re [1991] 1 All ER 330, [1991] 2 QB 520, [1991] 2 WLR 475, CA.
Onslow v IRC (1890) 25 QBD 465, CA.
R (Hargraves) v Steel (1876) 2 QBD 37, CA.
R v Governor of Brixton Prison, ex p Levin [1997] 3 All ER 289, [1997] AC 741, [1997] 3 WLR 117, HL.
R v Southampton JJ, ex p Green [1975] 2 All ER 1073, [1976] QB 11, [1975] 3 WLR 277, CA.
Smalley v Crown Court at Warwick [1985] 1 All ER 769, [1985] AC 622, [1985] 2 WLR 538, HL.
Welch v UK (retrospective confiscation order) (1995) 20 EHRR 247, ECt HR.
Woodhall, Ex p (1888) 20 QBD 832, CA.

Appeal

The appellants, Kathleen Conway Montgomery and Lee Edwin Montgomery, appealed with permission of the Appeal Committee of the House of Lords given on 14 July 1999 from the decision of the Court of Appeal (Stuart-Smith, Swinton Thomas and Aldous LJJ) on 8 July 1998 ([1999] 1 All ER 84) allowing an appeal by the respondent, the United States government, from the order of Latham J on 20 February 1998 allowing an application by the appellants to discharge the restraint orders made against them by Collins J on 5 September 1997 under the Criminal Justice Act 1988 (Designated Countries and Territories) Order 1991. The facts are set out in the opinion of Lord Hoffmann.

Alun Jones QC and *James Lewis* (instructed by *Goldsmiths*) for the appellants.
Andrew Mitchell QC and *Kennedy Talbot* (instructed by the *Crown Prosecution Service*) for the United States government.

Their Lordships took time for consideration.

25 January 2001. The following opinions were delivered.

LORD HOFFMANN. My Lords,

The English proceedings

[1] On 5 September 1997 Collins J made restraint orders under s 77 of the Criminal Justice Act 1988 against the appellants Kathleen Montgomery and her husband Lee Edwin Montgomery. The orders restrained them from disposing of various assets and required the disclosure of financial information. They were made in aid of confiscation orders which had been made by a Federal District Court in the United States against Mrs Montgomery and her former husband Larry Barnette, following the conviction of the latter in 1984 for fraud upon the

government of the United States. The power to make restraint orders in aid of confiscation orders made in the United States (external confiscation orders) was conferred upon the High Court with effect from 1 August 1994 by the Criminal Justice Act 1988 (Designated Countries and Territories) Order 1991, SI 1991/2873, (the DCO) as amended by the Criminal Justice Act 1988 (Designated Countries and Territories) Amendment Order 1994, SI 1994/1639.

[2] On 20 February 1998, on the application of Mr and Mrs Montgomery, Latham J discharged the orders. He did so on two grounds. The first was that the powers of the 1998 Act could not be used in aid of American confiscation orders made before the DCO was applied to the United States. The second was the orders of the Federal District Court did not qualify as external confiscation orders for the purposes of the DCO.

[3] The government of the United States appealed to the Court of Appeal ([1999] 1 All ER 84). There, Mr and Mrs Montgomery raised the preliminary objection that the court had no jurisdiction to hear the appeal. They said that jurisdiction was excluded by s 18(1)(a) of the Supreme Court Act 1981 which provides that 'no appeal shall lie to the Court of Appeal ... from any judgment of the High Court in any criminal cause or matter'. The Court of Appeal (Stuart-Smith, Aldous and Swinton Thomas LJJ) overruled the objection. They said that enforcement proceedings under the DCO were civil in nature. A restraint order was not a judgment in a criminal cause or matter. They proceeded to hear the appeal and reversed the judge on both points. The restraint orders were accordingly reinstated. Against this decision Mr and Mrs Montgomery appeal to your Lordships' House.

The American proceedings

[4] My Lords, in order to follow the shape of the argument advanced to your Lordships, it is necessary to know something about what one American judge described as the prodigious litigation between the government of the United States and Mr Larry Barnette and his then wife, now Mrs Montgomery, which has been proceeding in the Federal District Court for the Middle District of Florida since 1983. Mr Barnette is an American citizen who controlled companies which, between 1977 and 1982, enjoyed the benefit of profitable contracts to operate laundries constructed by the United States government in Germany to wash the clothes of American servicemen. During this period he defrauded the United States of some $US15m. Mr Barnette also laundered money. Part of the proceeds of the fraud were passed to a Panamanian company which he controlled called Old Dominion SA (ODSA). It transferred the money to accounts in its name in such places as Switzerland and Liechtenstein.

[5] In August 1983, shortly before he was indicted for the fraud, Mr Barnette transferred 800 of the 900 shares which he held in ODSA to Mrs Barnette (as she then was) and the remaining 100 to his children. After a lengthy trial in 1984, he was convicted on a number of counts of fraud and related offences, including offences under the Racketeer Influenced and Corrupt Organisations Act (RICO). On 15 October 1984, under a power contained in RICO, the District Court ordered that he forfeit his interest in the shares or common stock of ODSA. This forfeiture order forms the origin and basis of the confiscation orders which the United States is attempting to enforce in these proceedings. On 2 November 1984 Mr Barnette was sentenced to a term of imprisonment and (under powers contained in another statute) to pay $US7m to the United States by way of restitution. Requested to clarify the relationship between the forfeiture and restitution orders,

the judge ruled that the proceeds of the two orders were to be set off against each other, so that Mr Barnette's liability would be limited to $US7m or the value of the ODSA shares, whichever was the greater. In order to enable the value of the shares to be ascertained, Mr Barnette was ordered to provide full information about ODSA's assets and liabilities.

[6] On 10 January 1985 Mr Barnette paid $US7m into court in satisfaction of the forfeiture order. Whether he was under any further liability depended upon the value of the ODSA shares. But the government had great difficulty in ascertaining what that value was. He did not comply with the order to provide information or subsequent orders for discovery. He claimed that the shares could not have been forfeited because when the order was made he no longer owned them. But the court ruled that under RICO the government's title to the forfeited property related back to 3 August 1982, the date of the last criminal act of which he had been convicted. It therefore antedated the transfer to Mrs Barnette and the children. Mr Barnette was obliged to surrender the shares or their value whether he still owned them or not. Mr Barnette also claimed that as his wife now controlled ODSA, he could not provide the required information. She had left him in 1983 and taken up citizenship in the Caribbean and residence in England. On 15 December 1992 the court made an order for discovery against Mrs Barnette but she was out of the jurisdiction and did not comply.

[7] In January 1995 the Unites States government lawyers had a success when they managed to persuade a Liechtenstein bank, which held $US3,758,127·93 in an account in the name of ODSA, that they were entitled to give instructions on behalf of the corporation. They confiscated the money. The government then invited the court to determine the value of the ODSA shares as at 15 October 1984 on the materials available, so that the balance payable under the forfeiture order could be ascertained. It also moved for orders that both Mr and Mrs Barnette were in contempt of court, first, for conspiring with each other to frustrate the original forfeiture order and secondly, for failing to comply with the discovery orders against them.

[8] In a judgment dated 18 August 1995 the court found that the value of the ODSA shares as at 15 October 1984 was $US11,217,833·01. That meant that, after giving credit for the $US7m already paid, Mr Barnette owed the United States $US4,217,833·01. The court held that Mr and Mrs Barnette were both in contempt and made an order against both of them for payment of the $US4,217,833·01. This is the second of the confiscation orders upon which the United States government now relies.

[9] Neither side was satisfied with this order and they both invited the court to revise it. Mr Barnette wanted credit for the $US3,758,127·93 which the government had seized in Liechtenstein. In addition, the $US7m paid into court had earned $US459,705·08 interest. If credit was given for both these sums, the debt to the government would be extinguished. The government, on the other hand, said that the sum of $US4,217,833·01 reflected only what should have been paid in 1984. That sum should be increased to reflect the value to Mr and Mrs Barnette of having retained this forfeited property for over ten years. In addition the Barnettes should pay the government's legal, investigative and expert fees.

[10] In an order dated 15 November 1995 the court made an order giving effect to all these adjustments. Mr Barnette was allowed credit for the Liechtenstein money and the interest. On the other hand, the sum to be forfeited was increased from $US4,217,833·01 to $US11,767,754 by applying United States

Treasury interest rates from January 1985 to June 1995. $US326,275·58 was also ordered to be paid in respect of fees and expenses.

[11] The order which the United States government seeks to enforce is the revised forfeiture order of 15 November 1995, other than the sum awarded for fees and expenses, which it accepts does not qualify for enforcement under the DCO.

The question of jurisdiction

[12] The jurisdiction to make a restraint order under s 77 of the 1988 Act (whether in aid of a domestic or external confiscation order) is conferred upon the High Court. In general, appeals from the High Court lie to the Court of Appeal. Section 16 of the 1981 Act provides that 'subject as otherwise provided by this or any other Act ... the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court'. The only provision relied upon as excluding this jurisdiction is s 18(1)(a) of that Act, which excludes appeals 'from any judgment of the High Court in any criminal cause or matter'.

[13] Mr Mitchell QC, who appeared for the United States government, submitted that whether the restraint order had been made in a criminal cause or matter or not, it was an 'order' and not a 'judgment' within the meaning of s 18(1)(a) of the 1981 Act. In civil procedure there was a distinction between judgments and orders, which was discussed by Lord Esher MR in *Onslow v IRC* (1890) 25 QBD 465. Put shortly, a judgment was a decision obtained in an action. Other decisions of the court were orders. But this distinction is impossible to transpose into criminal procedure. Ever since the phrase 'judgment of the High Court in any criminal cause or matter' first appeared in s 47 of the Judicature Act 1873, it has been uniformly interpreted as applying generally to all orders made in a criminal cause or matter (see *R (Hargraves) v Steel* (1876) 2 QBD 37, *Ex p Woodhall* (1888) 20 QBD 832). I would therefore reject this submission.

[14] Mr Mitchell's alternative submission, which was accepted by the Court of Appeal, was that restraint orders are made in civil proceedings, even though they are made in anticipation of or consequential upon confiscation orders made in criminal proceedings. Mr Alun Jones QC, who appeared for the appellants, said that this gave too narrow a construction to the phrase 'in a criminal cause or matter'. The authorities showed that it should be given a wide meaning which was apt to embrace the enforcement of a confiscation order as well as the order itself.

[15] The leading authority in this House on the meaning of the phrase is *Amand v Secretary of State for Home Affairs* [1942] 2 All ER 381, [1943] AC 147, in which an order of the Divisional Court, refusing a writ of habeas corpus to a person who had been arrested with a view to his being handed over to a foreign power for trial on a charge of desertion, was held to have been made in a criminal cause or matter. Viscount Simon LC said:

> 'It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal.' (See [1942] 2 All ER 381 at 385, [1943] AC 147 at 156.)

[16] In *R v Southampton JJ, ex p Green* [1975] 2 All ER 1073, [1976] QB 11 the question was whether an order by which magistrates estreated the recognisance of a surety for an accused who failed to answer bail was made in a 'criminal cause

or matter'. Lord Denning MR ([1975] 2 All ER 1073 at 1076, [1976] QB 11 at 15), quoted the second of the two sentences of Viscount Simon LC in *Amand*'s case which I have cited above and said that if one applied 'that test', the application to estreat the recognisance could not result in the trial of the surety or his punishment for any offence. The recognisance was simply a bond giving rise to a civil debt with a special enforcement procedure which was also civil.

[17] My Lords, like Lord Bridge of Harwich in *Smalley v Crown Court at Warwick* [1985] 1 All ER 769 at 773, [1985] AC 622 at 634, I express no view upon the actual decision in *Ex p Green*. But I think, with respect to Lord Denning MR, that Viscount Simon LC intended his second sentence to be illustrative of a case in which the 'nature and character of the proceedings' were criminal and not an exhaustive definition of such proceedings. If they were, it would be difficult to explain why an order for the taxation of the defendant's costs in a failed prosecution for criminal libel was held to be 'in a criminal cause or matter' in *R (Hargraves) v Steel*. Indeed, I would doubt the wisdom of trying to formulate any definition of 'criminal cause or matter' to supplement the undefined expression used by Parliament.

[18] Most of the cases on the subject concern orders made with a view to a criminal prosecution, such as for extradition (*R v Governor of Brixton Prison, ex p Levin* [1997] 3 All ER 289, [1997] AC 741) or the issue of a witness summons (*Day v Grant, R v Crown Court at Manchester, ex p Williams* [1987] 3 All ER 678, [1987] QB 972) or the production of documents (*Carr v Atkins* [1987] 3 All ER 684, [1987] QB 963) or else decisions of superior courts by way of appeal from or judicial review of orders in criminal proceedings. Apart from some problems caused by Lord Denning MR's 'test' in *Ex p Green* [1975] 2 All ER 1073 at 1076, [1976] QB 11 at 15, to which I have referred above, they have caused little difficulty. The present case, however, concerns the enforcement of an order made in criminal proceedings.

[19] My Lords, it may be right, and possibly in most cases would be right, to regard orders made by way of enforcement of orders made or to be made in criminal proceedings as part and parcel of those proceedings. This was certainly the case in *R (Hargraves) v Steel*. But I would not accept what I regard as the extreme proposition of Mr Alun Jones that the nature of the proceedings in which the original order was made will necessarily determine whether the machinery of enforcement through the courts is a criminal cause or matter. Modern legislation, of which Pt VI of the 1988 Act is a good example, confers powers upon criminal courts to make orders which may affect rights of property, create civil debts or disqualify people from pursuing occupations or holding office. Such orders may affect the property or obligations not only of the person against whom they are made but of third parties as well. Thus the consequences of an order in criminal proceedings may be a claim or dispute which is essentially civil in character. There is no reason why the nature of the order which gave rise to the claim or dispute should necessarily determine the nature of the proceedings in which the claim is enforced or the dispute determined.

[20] A striking feature of the provisions of s 77 and the following sections of the 1988 Act is that the powers which they create are not given to the Crown Court or magistrates' court which made the confiscation order but to the High Court. Furthermore, those powers either mirror or are expressly by reference to the jurisdiction of the High Court in civil proceedings for the recovery of debts or the determination of proprietary disputes. The restraint order under s 77 is no more than a specialised form of the freezing order used in ordinary civil

proceedings. The 1988 Act likewise applies the civil procedures for execution by charging orders over property and the appointment of receivers.

[21] Furthermore, under Pt VI, a confiscation order is enforceable against 'realisable property', which is defined to include property in which the defendant has any interest (see ss 74(1)(a) and 102(7) of the 1988 Act). It will therefore include property held by a nominee on trust for the defendant. It will also include property held beneficially by a person to whom the defendant has made a gift caught by the 1988 Act (see sub-ss 74(1)(b) and (10) of that Act). It was presumably in reliance on these provisions that the restraint order was made against Mr Montgomery as well as Mrs Montgomery. But such provisions obviously give rise to the possibility of proprietary disputes involving third parties. The 1988 Act contains provisions for giving notice by registration under the Land Charges Act 1972 or the Land Registration Act 1925 and for the resolution of third party claims as well as the determination of priorities in bankruptcy or winding up.

[22] In my opinion, therefore, the jurisdiction conferred upon the High Court under Pt VI of the 1988 Act is a civil jurisdiction, notwithstanding that that jurisdiction exists to enforce or determine disputes over the debts or proprietary rights created or consequent upon a confiscation order made by a criminal court. This was the view of the Court of Appeal in *Re O (disclosure order)* [1991] 1 All ER 330, [1991] 2 QB 520. If that is correct, then the same must be true of the use of the provisions of Pt VI which the DCO applies to external confiscation orders. Mr Alun Jones accepted that his submission that the criminal nature of the proceedings in Florida was determinative of whether the restraint order had been made in a criminal cause or matter was inconsistent with *Re O*. He submitted that it was wrongly decided. But for the reasons I have given, I respectfully think that it was right.

[23] I should add that it seems to me very improbable that Parliament intended that there should be no right of appeal from orders made in the High Court under Pt VI. Mr Alun Jones said that restraint orders were merely interlocutory and that Parliament might well have regarded a right of appeal as unnecessary. But there is no general rule that interlocutory decisions are not subject to appeal (apart from rulings in the course of a criminal trial, which involve special policy considerations) and orders under Pt VI may have important consequences for the prosecution, the defendant and third parties. It seems clear to me that Parliament made no special provision for appeals because it considered that there was an appeal under the general jurisdiction of the Court of Appeal to hear appeals from the High Court. Of course Parliament may have been under a misapprehension, but this conclusion would produce such an unfortunate result that I would not accept it unless I felt compelled to do so.

Retrospectivity

[24] It will be recalled that one of the reasons why Latham J discharged the restraint orders was that in his opinion the DCO did not apply retrospectively to external confiscation orders which had been made before it was applied to the United States on 1 August 1994. The Court of Appeal said that even if this was the case, the relevant confiscation orders were those made against Mrs Montgomery on 18 August 1995 and 15 November 1995. Both were made after the relevant date.

[25] Mr Alun Jones said that the later orders were no more than attempts to enforce the original forfeiture order of 15 October 1984. If that would not have been enforceable under the DCO, the ancillary orders against Mrs Montgomery

should not be enforceable either. There seems to me some merit in this submission and although I do not disagree with the Court of Appeal, I would feel uneasy about the result if I did not think that the 1984 order would also have been enforceable.

[26] For the purposes of this part of the argument, it is necessary to refer to some of the relevant statutory provisions. The DCO was made under powers conferred by s 96 of the 1988 Act:

> '(1) Her Majesty may by Order in Council—(a) direct in relation to a country or territory outside the United Kingdom designated by the Order ("a designated country") that, subject to such modifications as may be specified, this Part of this Act shall apply to external confiscation orders and to proceedings which have been or are to be instituted in the designated country and may result in an external confiscation order being made there ...
>
> (2) In this Part of this Act—"external confiscation order" means an order made by a court in a designated country for the purpose—(a) of recovering—(i) property obtained as a result of or in connection with conduct corresponding to an offence to which this Part of this Act applies; or (ii) the value of property so obtained; or (b) of depriving a person of a pecuniary advantage so obtained; and "modifications" includes additions, alterations and omissions.'

[27] Section 76 of the 1988 Act as modified and applied by the DCO provides:

> '(1) The powers conferred on the High Court by sections 77(1) and 78(1) below are exercisable where—(a) proceedings have been instituted against the defendant in a designated country; (b) the proceedings have not been concluded; and (c) either an external confiscation order has been made in the proceedings or it appears to the High Court that there are reasonable grounds for thinking that such an order may be made in them.'

[28] There is nothing in the language of conditions (a) or (c) to confine them to proceedings instituted or external confiscations orders made since the commencement of the DCO. In the case of condition (a), there is an indication that the condition was definitely not intended to be so confined. Section 102(4) of the 1988 Act expressly provided that the powers of Pt VI could not be used in connection with English domestic proceedings instituted before the commencement of the Act. But this provision was omitted, and no equivalent provision included, in the Act as applied to external confiscation orders. This suggests that Her Majesty in Council intended the DCO to apply to proceedings which had been instituted before it came into force. And if this was intended to be the effect of condition (a) there seems no reason why condition (c) should be limited to orders made after it came into force.

[29] Mr Alun Jones had two answers to this reasoning. First, he said that the omission of a provision equivalent to s 102(4) of the 1988 Act was ultra vires the powers conferred on Her Majesty in Council by s 96 of that Act. The words 'nothing in this Part of this Act confers any power on any court in connection with proceedings against a person for an offence instituted before the commencement of this Part of this Act' meant that s 96 conferred no power upon Her Majesty in Council to apply the DCO to external confiscation orders in such a way as to confer upon an English court any power in connection with proceedings instituted in the foreign court before the commencement of the DCO. But this is not what s 102(4) says. The words refer to the institution of English proceedings in respect of offences under English law to which the 1988 Act

applies. Whether an equivalent provision should be included in the Act as it applies to foreign proceedings was a matter for Her Majesty in Council, which decided to omit s 102(4) under its general power to modify the provisions of the 1988 Act in its application to external confiscation orders.

[30] The second answer was that the power should be limited by the general presumption against retrospective legislation. This was the basis upon which Latham J held that the DCO did not apply to the 1984 Florida order. In the case of the imposition of a confiscation order by the criminal court, I can see that there are strong arguments for applying the presumption so as to limit the power to offences committed after the legislation came into force (see *Re Barretto, Wadsted v Barretto* [1994] 1 All ER 447, [1994] QB 392). Indeed, in *Welch v UK (retrospective confiscation order)* (1995) 20 EHRR 247 the European Court of Human Rights decided that the application of the power to make a confiscation order in respect of an offence committed before Pt VI came into force offended against the prohibition on retrospective penalties in art 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). But, as Lord Mustill said in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, The Boucraa* [1994] 1 All ER 20 at 29, [1994] 1 AC 486 at 525, 'the basis of the rule is no more than simple fairness'. There is no suggestion that the Florida confiscation order was imposed in respect of an offence committed before the power conferred by RICO came into force. It was made under existing powers in respect of property which Larry Barnette had obtained by a fraud upon the United States. In my opinion the enforcement in this country of rights conferred upon the United States by an order made before the DCO came into force is a very different matter from the retrospective imposition of a penalty. Even if there was nothing which the United States government could have done before 1 August 1994 to recover its assets from Mr or Mrs Montgomery by proceedings in this country, I see no unfairness in it now being allowed to do so.

The interest element

[31] Mr Alun Jones finally submitted that so far as the confiscation order had been increased in amount by the addition of interest in November 1995, it was not an 'external confiscation order' capable of enforcement under the DCO. The interest element had been added to punish the defendants for their contempt in not complying with the 1984 order at the proper time. It was not for the purpose of recovering the value of property obtained in connection with criminal conduct. That value had been determined in August 1995 and the debt in respect of the full amount had been discharged. This was the second ground upon which Latham J discharged the restraint orders.

[32] My Lords, I agree with the Court of Appeal that the interest element was also part of an order for recovering from the defendants the value of property obtained as a result of the criminal conduct of Larry Barnette or, alternatively, for depriving them of a pecuniary advantage so obtained. The legislation is concerned with the value of the property to the wrongdoer and this value consists not merely in its capital value at a given point of time but also in the value of the retention of the property, which gave the defendants the opportunity to profit by its use. The defendants' acquisition of the assets which gave value to the ODSA shares was as a result of or in connection with criminal conduct of Larry Barnette and their continuing retention of those shares was likewise a result of the same conduct. Alternatively, if one looks at the pecuniary advantage which

the defendants received, s 71(4) of the 1988 Act as applied by the DCO requires the defendants to be treated as if they had received 'a sum of money equal to the value of the pecuniary advantage', ie the ODSA shares. The retention of such a sum for ten years is in itself a pecuniary advantage even if the whole of the original capital is repaid. In my opinion, therefore, an order which deprives the defendants of that further advantage is within the definition of an external confiscation order.

[33] I would therefore dismiss the appeal.

LORD COOKE OF THORNDON. My Lords,

[34] I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. I agree with it and would dismiss the appeal.

LORD HUTTON. My Lords,

[35] I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. I agree with it, and for the reasons which he gives I, too, would dismiss the appeal.

LORD HOBHOUSE OF WOODBOROUGH. My Lords,

[36] This appeal has raised three points. On two of them I am in complete agreement with the rest of your Lordships. On the third, I was at the conclusion of the argument in favour of allowing the appeal but have now concluded that this ground of appeal must also fail.

[37] I agree that the orders made by Collins and Latham JJ were not made in a criminal cause or matter. The parties to those proceedings were (and are) the United States government and Mr and Mrs Montgomery. They are proceedings brought in an English court under the civil jurisdiction conferred on the High Court by the Criminal Justice Act 1988 and the Criminal Justice Act 1988 (Designated Countries and Territories) Order 1991, SI 1991/2873, (the DCO) as amended by the Criminal Justice Act 1988 (Designated Countries and Territories) Amendment Order 1994, SI 1994/1639. The order which was made by Collins J and discharged by Latham J was a restraint order made under s 77 of the 1988 Act. The argument that these proceedings are criminal is solely based upon the fact that Mr Barnette, the former husband of Mrs Montgomery, has been tried and convicted of offences of fraud in the United States Federal District Court in Florida and forfeiture and restitution orders were made by that court in those proceedings. Mrs Montgomery was not a party to those proceedings and the United States court had no criminal jurisdiction over her. She was subsequently cited in those proceedings because she was held to have been in civil contempt of the United States court for aiding and abetting Mr Barnette in evading the restitution and forfeiture orders made against him and having received the 900 shares the subject of one of the forfeiture orders and not having returned them. Mr Montgomery has no connection at all with the United States proceedings. All that is alleged against him is that he has in his possession property in England which can be traced though his wife back to money she received from Mr Barnette.

[38] This does not suffice to make the English proceedings criminal nor does it make the orders made in the English proceedings orders made in any criminal cause or matter. The restraint orders were not made in the United States criminal proceedings: they were made in the English proceedings. Some cases may present a problem as to where the line is to be drawn. The present case is not

such a case. The highest that it can be put is that the proceedings in which these orders were made, the English proceedings, were civil proceedings the commencement of which was indirectly consequent upon orders made in the United States criminal proceedings against Mr Barnette.

[39] The present case is peculiar in that the jurisdiction point under s 18 of the Supreme Court Act 1981 is being taken by the individual litigants. Their submission is that there is no right of appeal at all from the decision of a High Court judge in respect of any matter arising under Pt VI of the 1988 Act. This would be a remarkable state of affairs in that it would mean that the civil law property rights of individual citizens could be taken away without any possibility of appealing an adverse decision. The Crown do not support such a view of the law. The case of *Re O (disclosure order)* [1991] 1 All ER 330, [1991] 2 QB 520 decided that there is a right of appeal and that decision has as a matter of course been followed many times since. It was correctly decided. The appellants argued that that decision was inconsistent with what was said by Viscount Cave in *Re Clifford and O'Sullivan* [1921] 2 AC 570 at 580 and by Viscount Simon LC in *Amand v Secretary of State for Home Affairs* [1942] 2 All ER 381 at 385, [1943] AC 147 at 156. Those authorities stress the test of asking whether the court making the order in question was exercising or claiming a criminal jurisdiction and do not support the appellants' argument. The High Court neither has nor claims in these proceedings any criminal jurisdiction over either of the appellants, nor, if it be relevant, did the United States court.

[40] It follows that the Court of Appeal ([1999] 1 All ER 84) was right in the present case to hold that it had jurisdiction to hear the appeal of the United States government. This ground of appeal fails.

[41] The second point upon which I agree with your Lordships is the question whether or not the relevant orders of the United States court in their application to Mrs Montgomery were 'external confiscation orders' within the meaning of s 71 of the 1988 Act as applied by the DCO and s 96(2) of that Act. The appellants submit that the order for the forfeiture of $US7·8m odd was by way of punishment for civil contempt and thus outside the definition and was arrived at by making a calculation of notional damages for the delayed payment of money. I agree that this argument was rightly rejected by the Court of Appeal. The scope of the definition is widely drawn. It looks to the purpose of the relevant order of the foreign court. One of the purposes may be the purpose '(b) of depriving a person of a pecuniary advantage' obtained as a result of or in connection with the relevant criminal conduct, that is to say, the frauds practised by Mr Barnette. Mrs Montgomery had had the benefit of having the 900 shares since August 1983. It is clear that the United States court was seeking to deprive her of the pecuniary advantage that she had thereby enjoyed and had resorted to the interest calculation as the best available way of assessing and quantifying that advantage. This is a legitimate approach under the common law as is illustrated by, for example, the law of restitution. (See also s 71(5) of the 1988 Act—s 71(4) in the DCO—which likewise would authorise that approach.) This ground of appeal fails.

[42] But now, my Lords, I come to the third point upon which I was at one stage minded to allow the appeal. The point concerns the construction of ss 96 and 102(4) of the 1988 Act. It is a short point of vires depending upon the interrelation of the two statutory provisions. On ordinary principles s 102(4) would be construed as controlling, inter alia, the power to make orders by way of delegated legislation in s 96. If so, the DCO would have to be read subject to

an implicit limitation in the terms of s 102(4) or be held to be ultra vires. But it is necessary to examine the scheme of Pt VI of the 1988 Act in order to see if this is the correct reading of these sections.

[43] The primary scheme of Pt VI of the 1988 Act is domestic. It is drafted by reference to proceedings in England and Wales and confers on the Crown Court and magistrates' courts an extensive power to make confiscation orders in relation to benefit convicted offenders may have obtained from 'relevant' criminal conduct (s 71 of that Act). This primary provision is then fleshed out with a number of sections some of which are procedural in character but others of which can have a substantive impact on others. Thus, s 74(1) of the 1988 Act defines 'realisable property' and includes not only property held by the defendant but also 'any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Part of this Act'. Gifts are caught by the 1988 Act regardless of whether they were made before or after the commencement of Pt VI provided that they were made after the commission of an offence to which the proceedings relate and the court considers it appropriate in the circumstances to take the gift into account (s 74(10) of the 1988 Act). Sections 76 to 89 of the 1988 Act confer jurisdiction on the High Court to make various orders including restraint and charging orders, appointing receivers, ordering the realisation of property, making orders in respect of the estate of bankrupt defendants or in respect of companies holding relevant property which are being wound up and other cases of insolvency. The exercise of these powers will or may impact on the rights of others and the provisions recognise that confiscation orders may prejudice others or compete with their rights.

[44] The sequence which the scheme of Pt VI of the 1988 Act follows is: (i) the offence/criminal conduct by the offender; (ii) the institution of criminal proceedings against the offender; (iii) the conviction of the offender; (iv) the making of a confiscation order; and (v) proceedings in the High Court consequential on the making of the confiscation order. Into this sequence there may be inserted two other material events. A third party may have acquired a benefit from the offender: this may be interposed at any time after stage (i). A restraint or charging order may be made in anticipation of a confiscation order provided that the relevant criminal proceedings have been instituted (s 76 of the 1988 Act): it may therefore be interposed after stage (ii).

[45] Unsurprisingly, the draftsman of Pt VI found it necessary to have an interpretation section. This is s 102: 'Part VI—Interpretation'. This includes some 16 subsections. Most deal with points of interpretation or definition. Subsections (3) to (5) deal with points of application. Subsection (4) provides—

> 'References in this Part of this Act to offences include a reference to offences committed before the commencement of this Part of this Act; but nothing in this Part of this Act confers any power on any court in connection with proceedings against a person for an offence instituted before the commencement of this Part of this Act.'

This subsection, therefore, addresses how the sequential structure of Pt VI is to fit in with the commencement of Pt VI. Since Pt VI has a largely procedural content, one approach open to those deciding upon the policy of the 1988 Act could have been to provide for the part fully to come into force but to qualify the substantive provisions. But, instead, it provides that Pt VI applies to offences whenever committed and gifts made at any time after the offence was committed and applies the cut-off point at what I have called stage (ii), the institution of the

criminal proceedings. This is the criterion used for the commencement of the application of Pt VI. Part VI does not apply where the proceedings were instituted prior to the commencement date.

[46] It is not in dispute that this is the effect of s 102(4) of the 1988 Act in the domestic context, that is to say where the criminal proceedings are taking place in England or Wales and the confiscation order has been or will be made by a court in England or Wales pursuant to the powers given to that court by the earlier sections in Pt VI. Those proceedings must have been instituted after Pt VI came into force otherwise, under s 102(4), the court will not have the power to make a confiscation order and the rationale of the rest of Pt VI will be absent. Where however the confiscation order is an 'external confiscation order' made by a foreign court, the external order does not depend for its validity on any provision of the 1988 Act. The powers of the foreign court depend upon the law of the foreign country and must be determined, if disputed, by the courts of that country. The role of the English courts is confined to one of recognition and enforcement under ss 96 and 97 and consequential matters. There is therefore a distinction to be made. The question of construction is whether the distinction should be made having regard to the strong and comprehensive language—'nothing in this Part of this Act confers any power on any court'—used in s 102(4).

[47] So far I have been examining Pt VI of the 1988 Act without referring to s 96(1) which is the subsection which authorises delegated legislation to enable external confiscation orders, as defined in s 96(2) to which I referred earlier, to be enforced in the High Court, in particular by registration under s 97. Section 96(1)(a) provides—

> 'Her Majesty may by Order in Council—(a) direct in relation to a country or territory outside the United Kingdom designated by the Order ("a designated country") that, subject to such modifications as may be specified, this Part of this Act shall apply to external confiscation orders and to proceedings which have been or are to be instituted in the designated country and may result in an external confiscation order being made there ...'

'Modifications' is further defined in sub-s (2) as including, 'in this Part of this Act', 'additions, alterations and omissions'.

[48] The question of construction is whether this liberty in s 96(1)(a) of the 1988 Act to specify modifications empowers the making of delegated legislation which overrides s 102(4) of that Act so that the delegated legislation can apply to external confiscation orders made in foreign proceedings instituted before the commencement of Pt VI. There is a literal contradiction of s 102(4) since that subsection refers to *any* power on *any* court and the English court is acting 'in connection with' proceedings, albeit foreign proceedings, for an offence instituted before the commencement of Pt VI and provides that *nothing* in Pt VI, i e including s 96, should confer such a power. On this reading it would not assist the respondent that s 96 authorises Orders in Council which specify alterations and omissions in the application of Pt VI 'to external confiscation orders and to proceedings which have been or are to be instituted in' a designated country: it would still be subject to the overriding limitation in s 102(4). The DCO would have omitted s 102(4) in excess of the powers given by Pt VI.

[49] The logic of this argument and the drafting of s 102(4) are persuasive that the DCO cannot validly apply where, as here, the relevant foreign proceedings were instituted before the commencement of Pt VI. However I have come to the conclusion that the full breadth of s 102(4) should be read as only applicable to

domestic proceedings. Where the relevant proceedings are in a foreign court and it is that court which has made or is to make the external confiscation order, it is appropriate and unobjectionable that s 102(4) should be modified or omitted. As I have already observed, the powers of the foreign court are not the concern of the English courts nor are they derived from Pt VI. It is therefore for the draftsman of the Order in Council to consider whether the order should, as the DCO does, omit s 102(4). If the omission is specified, the omission is within the vires of the order making power in s 96(1).

[50] It appears that the ultra vires argument as put to and rejected by the Court of Appeal was different from that which I have been discussing. The argument on the construction of Pt VI is more persuasive but likewise fails.

[51] Accordingly, I agree that the appeal should be dismissed.

LORD SCOTT OF FOSCOTE. My Lords,

[52] I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Hoffmann and Lord Hobhouse of Woodborough. I agree with them and for the reasons they give I, too, would dismiss the appeal.

Appeal dismissed.

Dilys Tausz Barrister

R (on the application of Ebrahim) v Feltham Magistrates' Court and another Mouat v Director of Public Prosecutions

[2001] EWHC Admin 130

QUEEN'S BENCH DIVISION, DIVISIONAL COURT
BROOKE LJ AND MORISON J
12 JANUARY, 21 FEBRUARY 2001

Criminal law – Trial – Stay of proceedings – Abuse of process – Abuse of process application based on non-availability of videotape evidence – Guidance.

(1) Where a defendant applies to stay a prosecution as an abuse of process on the grounds that videotape evidence is no longer available, the court must first determine whether the prosecutors were under any duty to obtain and/or retain the material in question. In making that determination, the court must have recourse to (i) the Code of Practice, published pursuant to ss 23[a] and 25[b] of the Criminal Procedure and Investigations Act 1996, relating to the nature and extent of the duty of the police and other investigating authorities to obtain and retain material which may be relevant to an investigation, and (ii) the guidelines issued by the Attorney General on 29 November 2000, relating to the disclosure of information in criminal proceedings. If, in all the circumstances, there was no duty to obtain and/or retain the videotape evidence before the defendant first sought its retention, there can be no question of the subsequent trial being unfair on that ground. If, on the other hand, there has been a breach of duty, the court must go on to consider whether it should take the exceptional course of staying the proceedings for abuse of process on that ground. In doing so, it should generally apply two well-known principles, namely (i) that the ultimate objective of the discretionary power to stay proceedings is to ensure that there should be a fair trial according to law, which involve fairness both to the defendant and the prosecution, and (ii) that the trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded. Furthermore, if the behaviour of the prosecution has been so very bad that it is not fair to try the defendant, the proceedings should be stayed on that ground. In that respect, a useful test is to ask whether there was an element of bad faith or at the very least some serious fault on the part of the police or the prosecution authorities (see [16], [23], [25] and [74], post).

(2) If a complaint about the unavailability of videotape evidence is raised on an appeal by a defendant to the Crown Court from his conviction in the magistrates' court, he should not apply for the proceedings to be stayed because his conviction will still stand if the proceedings in the Crown Court are merely stayed. Rather, he should apply for an order allowing his appeal and quashing his conviction on the

a Section 23, so far as material, provides: '(1) The Secretary of State shall prepare a code of practice containing provisions designed to secure ... (d) that any other material which is obtained in the course of a criminal investigation and may be relevant to the investigation is retained ... '

b Section 25, so far as material, provides: ' ... (2) ... the Secretary of State ... shall lay the code before each House of Parliament, and when he has done so he may bring it into operation on such a day as he may appoint by order ... '

grounds that the original trial was unfair and the unfairness was of such a nature that it could not now be remedied on appeal (see [31] and [75], post).

(3) If a ruling on a stay application is made in a lower court, that court should give its reasons, however briefly, and it is the professional duty of the advocates for the parties to take a note of those reasons. If the decision is to be challenged on judicial review, the Divisional Court will expect to see a note of the lower court's reasons before deciding whether to grant permission for the application to proceed. If any relevant oral evidence was given, the Divisional Court will hope that an agreed note can be prepared, summarising its effect (see [75], post).

Notes

For abuse of process in criminal proceedings, see 1(1) *Halsbury's Laws* (4th edn reissue) para 111 n7.

For the Criminal Procedure and Investigations Act 1996, ss 23, 25, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 1807, 1810.

Cases referred to in judgment

A-G's Reference (No 1 of 1990) [1992] 3 All ER 169, [1992] QB 630, [1992] 3 WLR 9, CA.
DPP v Chipping (11 January 1999, unreported), DC.
DPP v Garrety (11 December 2000, unreported), DC.
DPP v Humphrys [1976] 2 All ER 497, [1977] AC 1, [1976] 2 WLR 857, HL.
R v Beckford (1996) 1 Cr App R 94, CA.
R v Belmarsh Magistrates' Court, ex p Watts [1999] 2 Cr App R 188, CA.
R v Birmingham [1992] Crim LR 117.
R v Derby Crown Court, ex p Brooks [1985] 80 Cr App R 164, DC.
R v Medway [2000] Crim LR 415, CA.
R v Reid (10 March 1997, unreported), CA.
R v Stallard (13 April 2000, unreported), CA.
R v Swingler (10 July 1998, unreported), CA.

Cases also cited or referred to in skeleton arguments

Bennett v Horseferry Road Magistrates' Court [1993] 3 All ER 138, sub nom *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42, HL.
Jespers v Belgium (1981) 27 DR 61, E Com HR.
R v Hereford Magistrates' Court, ex p Rowlands [1998] QB 110, [1997] 2 WLR 854, DC.
R v Uxbridge JJ, ex p Sofaer (1986) 85 Cr App R 367, DC.

Application for judicial review and case stated

R (on the application of Ebrahim) v Feltham Magistrates' Court and anr

Mohammed Rafiq Ebrahim applied for judicial review of the decision of a stipendiary magistrate (Stephen Nicholas Day) at Feltham Magistrates' Court on 31 August 1999 dismissing his application to stay, on the grounds of abuse of process, a prosecution against him for assault. The facts are set out in the judgment of the court.

Mouat v DPP

Paul Alexander Mouat appealed by way of case stated from the decision of the Crown Court at Stafford (Judge McEvoy QC) on 11 August 2000 dismissing his appeal from his conviction at the Burton-on-Trent Magistrates' Court on 15 June 2000 for

driving in excess of the speed limit. The questions for the opinion of the High Court are set out [46] post. The facts are set out in the judgment of the court.

Andrew Smiler (instructed by *Pemila & Nathan*, Southall) for Mr Ebrahim.
John McGuinness (instructed by the *Crown Prosecution Service*) for the DPP.
Ian Wise (instructed by *Bhatia Best*, Nottingham) for Mr Mouat.
Stuart Clarkson (instructed by the *Crown Prosecution Service*, Stafford) for the DPP.

Cur adv vult

21 February 2001. The following judgment was delivered.

BROOKE LJ.

[1] This is the judgment of the court.

Introductory

[2] On 12 January 2001 we heard an application by Mohammed Rafiq Ebrahim for judicial review of a decision by District Judge Day, who was sitting as a stipendiary magistrate at Feltham Magistrates' Court on 31 August 1999, when he dismissed an application by Mr Ebrahim for a stay of proceedings against him for common assault on the grounds of abuse of process. We will call this case 'the Feltham case'.

[3] On 16 January 2001 we heard an appeal by Paul Alexander Mouat by way of case stated from a decision of the Stafford Crown Court on 11 August 2000, when dismissing his appeal from his conviction for speeding by the Burton-on-Trent Magistrates' Court on 15 June 2000, to the effect that it was not willing to stay those proceedings for abuse of process on the grounds that the police officers in the case had destroyed a video recording of the relevant incident soon after it took place. We will call this case 'the Stafford case'.

[4] In both these cases the original defendant's complaint related to the obliteration of video evidence. The facts of the Feltham case are confused, but what seems clear is that when the police officer attended the Tesco store where the alleged assault took place, he went and viewed what he thought was the only available video recording of the scene of the incident and satisfied himself that it showed nothing at all of any relevance. As a result he took no steps to seize or retain any of the videotape or film images used at the store on the day in question, and it all appears to have been re-used or otherwise obliterated within about five weeks in the usual course of the store's business, long before any inquiries about the availability of video evidence were first made by the defence.

[5] In the Stafford case, the court accepted the evidence of two police officers that they had followed the appellant's car at a distance of 200 metres for three tenths of a mile and that during this time they had recorded speeds of 90 mph on their calibrated speedometer. They had a video in their car, and when they stopped the appellant and invited him into their car, they played the video back to him. It showed their speed registering at 90 mph and his car in front of them. It also recorded the time as the cars went along. The police officers then served him with a fixed penalty notice and a notice requiring him to produce a document (not in his possession at the time) at a named police station. He said: 'What am I going to do?' They permitted him to drive off, and so far as the Crown Court was aware, they then reused the videotape in the ordinary course of their duties. Although it appeared from the papers before us that no inquiry about videotape

evidence appeared to have been made by the appellant or his advisers until the hearing of the appeal at Stafford Crown Court over ten months after the incident, it was suggested at the hearing in this court that the matter had been raised in correspondence in advance of that appeal. Because this had never been mentioned before, we did not ask to see the correspondence.

[6] During the two hearings we were referred to a large number of unreported decisions of this court and of the Court of Appeal in which similar complaints were made about the non-availability of video evidence which in fact showed, or which might have showed, an incident or incidents which were said to be material by one side or the other when the eventual trial took place. None of these unreported decisions established any new point of principle. This, no doubt, was the reason why none of them was reported. Notwithstanding this fact, counsel in the two cases have seized on various phrases in what were probably all ex tempore judgments as if they established some new point of principle, and a great deal of time was taken up on both occasions, both at the hearing and in pre-hearing reading, in looking at the facts of these unreported cases in an attempt to derive from them some new principle.

[7] We therefore decided to reserve judgment in both cases and to prepare this single, reserved judgment in the expectation that in future courts may be spared the prolonged 'trial by unreported judgment' to which we were subjected. One of the reasons why we took this course was that devices like CCTV are becoming more and more common, and the proceedings of courts are likely to become more and more disrupted each time the defence complains that what was or might have been relevant videotape evidence has been destroyed and is not available to the defence. There are also procedural matters of general importance to which we wish to refer.

The 1997 Code of Practice and the Attorney General's new guidelines

[8] Since 1997 the police and other investigating authorities have had the benefit of codified guidance relating to the nature and extent of their duty to obtain and retain 'material which may be relevant to their investigation' (see below for the meaning of the phrase). In para 2.1 of the Code of Practice (the 1997 code) published pursuant to ss 23 and 25 of the Criminal Procedure and Investigations Act 1996, which came into force on 1 April 1997, it is said:

> '... material may be relevant to the investigation if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case.'

[9] That the extent of the duty of investigation should be proportionate to the seriousness of the matter being investigated is evident from para 3.4 of the 1997 code:

> 'In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances.'

[10] Paragraph 3.5 describes the extent of the investigative duty when it is believed that other persons may be in possession of material that may be relevant to the investigation:

> 'If the officer in charge of an investigation believes that other persons may be in possession of material that may be relevant to the investigation, and if this has not been obtained under paragraph 3.4 above, he should ask the disclosure officer to inform them of the existence of the investigation and to invite them to retain the material in case they receive a request for its disclosure ... However, the officer in charge of an investigation is not required to make speculative enquiries of other persons: there must be some reason to believe that they may have relevant material.'

[11] Paragraph 5 of the code identifies the duty to retain material obtained in a criminal investigation which may be relevant to an investigation (para 5.1) and the length of time over which that duty will continue in effect (paras 5.6–5.10). Paragraph 5.3 provides:

> 'If the officer in charge of an investigation becomes aware as a result of developments in the case that material previously examined but not retained (because it was not thought to be relevant) may now be relevant to the investigation, he should, wherever practicable, take steps to obtain it or ensure that it is retained for further inspection or for production in court if required.'

[12] These provisions of the 1997 code preserve and amplify common law rules which were prescribed by the judges before the 1997 code came into force. We mention this fact because the investigations in some of the cases to which we were referred took place before 1 April 1997. In one of them, *R v Reid* (10 March 1997, unreported), Owen J said, in effect, that: (i) there is a clear duty to preserve material which may be relevant; (ii) there must be a judgment of some kind by the investigating officer, who must decide whether material may be relevant; (iii) if he does not preserve material which may be relevant, he may in future be required to justify his decision; and (iv) if his breach of duty is sufficiently serious, then it may be held to be unfair to continue with the proceedings.

[13] In both the present cases reference was also made to the guidelines issued by the Attorney General on 29 November 2000 in relation to *Disclosure of Information in Criminal Proceedings*, even though the police investigations, such as they were, in each case predated the publication of those guidelines. We were referred in particular to paras 1, 6, 20, 21, 37 and 40(iv) of the guidelines. These paragraphs are concerned with the disclosure of material obtained and retained by investigators, and not to the process which leads to material being obtained and then retained, except for para 6 which reads:

> 'In discharging their obligations under the statute, code, common law and any operational instructions, investigators should always err on the side of recording and retaining material where they have any doubt as to whether it may be relevant.'

[14] In the Stafford case it is said that the investigators had obtained the relevant video evidence which they were obliged to retain pursuant to their duties under para 5 of the 1997 code (see para 11 above). In this context para 1 of the new guidelines observes that fair disclosure to an accused is an inseparable part of a fair trial (as guaranteed under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the European Convention on Human Rights)), and para 5 tells investigators that they must be fair and objective and that a failure to

take action leading to proper disclosure may lead to a successful abuse of process argument.

[15] In para 20 of the new guidelines prosecutors are told that in deciding what material should be disclosed they should resolve any doubt they may have in favour of disclosure (subject to a proviso which is irrelevant in the present context). In the course of a discussion of the obligations of primary disclosure in para 37, prosecutors are warned that they should pay particular attention to material that has potential to weaken the prosecution case or is inconsistent with it. One of the examples that is given (see para 37(iii)) relates to any material which may cast doubt upon the reliability of a confession. During the discussion of secondary disclosure in para 40, express reference is made in sub-para (iv) to 'video recordings made by investigators of crime scenes'.

[16] So much for the duty to pursue all reasonable lines of inquiry, and the duties to obtain, retain and disclose relevant material. When a complaint is made on an abuse application that relevant material is no longer available, the first stage of the court's inquiry will be to determine whether the prosecutors had been under any duty, pursuant to the 1997 code and the new guidelines, to obtain and/or retain the material of whose disappearance or destruction complaint is now made. If they were under no such duty, then it cannot be said that they are abusing the process of the court merely because the material is no longer available. If on the other hand they were in breach of duty, then the court will have to go on to consider whether it should take the exceptional course of staying the proceedings for abuse of process on that ground.

The jurisdiction of a court to stay criminal proceedings for abuse of process

[17] We think it may be helpful to restate the principles underlying this jurisdiction. The Crown is usually responsible for bringing prosecutions and, prima facie, it is the duty of a court to try persons who are charged before it with offences which it has power to try. None the less the courts retain an inherent jurisdiction to restrain what they perceive to be an abuse of their process. This power is 'of great constitutional importance and should be ... preserved' (per Lord Salmon in *DPP v Humphrys* [1976] 2 All ER 497 at 527–528, [1977] AC 1 at 46). It is the policy of the courts, however, to ensure that criminal proceedings are not subject to unnecessary delays through collateral challenges, and in most cases any alleged unfairness can be cured in the trial process itself. We must therefore stress from the outset that this residual (and discretionary) power of any court to stay criminal proceedings as an abuse of its process is one which ought only to be employed in exceptional circumstances, whatever the reasons submitted for invoking it. See *A-G's Reference (No 1 of 1990)* [1992] 3 All ER 169 at 176, [1992] QB 630 at 643.

[18] The two categories of cases in which the power to stay proceedings for abuse of process may be invoked in this area of the court's jurisdiction are; (i) cases where the court concludes that the defendant cannot receive a fair trial, and (ii) cases where it concludes that it would be unfair for the defendant to be tried. We derive these two categories from the judgment of Neill LJ in *R v Beckford* (1996) 1 Cr App R 94 at 101. He observed that in some cases these categories may overlap. There may, of course, be other situations in which a court is entitled to protect its own process from abuse, for example where it considers that proceedings brought by a private prosecutor are vexatious (see *R v Belmarsh Magistrates' Court, ex p Watts* [1999] 2 Cr App R 188), but we are not here attempting to carry out an exhaustive review of this jurisdiction.

[19] We are not at present concerned with the second of these two categories (which we will call 'Category 2' cases), in which a court is not prepared to allow a prosecution to proceed because it is not being pursued in good faith, or because the prosecutors have been guilty of such serious misbehaviour that they should not be allowed to benefit from it to the defendant's detriment. In some of these cases it is this court, rather than any lower court, which possesses the requisite jurisdiction (see *Ex p Watts* per Buxton LJ (at 195)).

[20] In these cases the question is not so much whether the defendant can be fairly tried, but rather whether for some reason connected with the prosecutors' conduct it would be unfair to him if the court were to permit them to proceed at all. The court's inquiry is directed more to the prosecutors' behaviour than to the fairness of any eventual trial. Although it may well be possible for the defendant to have a fair trial eventually, the court may be satisfied that it is not fair that he should be put to the trouble and inconvenience of being tried at all.

[21] Neill LJ gave three examples of this type of case in his judgment in *R v Beckford* (1996) 1 Cr App R 94 at 101–102. In all such cases—and one hopes they will be very rare—the court has to make a value judgment about the character of the prosecutor's conduct. If it is satisfied that it would not be fair to allow the proceedings to continue, the court does not then concern itself with the possibility that any ensuing trial might still be a fair one, because it will have formed the prior view that it would not be fair to the defendant if it were to take place at all.

[22] This, in our judgment, is the type of situation which Sir Roger Ormrod, sitting in this court with Lord Lane CJ in *R v Derby Crown Court, ex p Brooks* [1985] 80 Cr App R 164 at 168–169, had in mind when he said that it may be an abuse of process if 'the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality'.

[23] In one of the unreported cases we were shown, it was said that there had to be either an element of bad faith or at the very least some serious fault on the part of the police or the prosecution authorities for this ground of challenge to succeed.

[24] The first category of case (see para 18 above: we will call these 'Category 1' cases) is founded on the recognition that all courts with criminal jurisdiction, including magistrates' courts, have possessed a power to refuse to try a case, or to refuse to commit a defendant for trial, on the grounds of abuse of process, but only where it is clear that otherwise the defendant could not be fairly tried. An unfair trial would be an abuse of the court's process and a breach of art 6 of the European Convention of Human Rights. In these cases the focus of attention is on the question whether a fair trial of the defendant can be had.

[25] Two well-known principles are frequently invoked in this context when a court is invited to stay proceedings for abuse of process. (i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. (ii) The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded.

[26] We have derived the first of these principles from the judgment of Sir Roger Ormrod in *Ex p Brooks* (at 168) and the second from the judgment of Lord

Lane CJ in *A-G's Reference (No 1 of 1990)* [1992] 3 All ER 169 at 176, [1992] QB 630 at 644. The circumstances in which any court will be able to conclude, with sufficient reasons, that a trial of a defendant will inevitably be unfair are likely to be few and far between. The power of a court to regulate the admissibility of evidence by the use of its powers under s 78 of the Police and Criminal Evidence Act 1984 (PACE) is one example of the inherent strength of the trial process itself to prevent unfairness. The court's attention can be drawn to any breaches by the police of the codes of practice under PACE, and the court can be invited to exclude evidence where such breaches have occurred.

[27] It must be remembered that it is a commonplace in criminal trials for a defendant to rely on 'holes' in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence.

[28] In relation to this type of case Lord Lane CJ said in *A-G's Reference (No 1 of 1990)* that no stay should be imposed—

> 'unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held, in other words that the continuance of the prosecution amounts to a misuse of the process of the court.' (See [1992] 3 All ER 169 at 176, [1992] QB 630 at 644.)

Cases in which these principles have been applied

[29] We turn now to the facts of a number of cases in which courts have been concerned with applications to stay a prosecution for abuse of process when CCTV or video evidence has not been available at trial. We can summarise their effect, to which we have appended our comments, in this way:

> (i) Violent disorder broke out at a night club. The judge was satisfied that a video camera was trained on an area of the club where an incident occurred prior to the arrival of the police and where part of the incident of violent disorder took place. Police officers viewed the video but its existence was not revealed to the defence in spite of their specific requests for unused material, and by the time of the trial the videotape had disappeared. The judge ordered a stay.
>
> This was a Category 1 case. It was not a case of the prosecution deliberately manipulating or misusing the process of the court, but the police had actually viewed the video and decided not to retain it because it did not assist their case, without performing their duty of considering whether it assisted the defendant's case. The court considered that the trial would not be fair. (*R v Birmingham* [1992] Crim LR 117.)
>
> (ii) Violence broke out at a chemist's shop. The jury heard evidence from three independent witnesses. A police officer told the court that he saw a video film which contained nothing of relevance, and that one of the cameras did not cover the particular area. He said that if the recording had

been relevant it would have been seized. The trial judge refused a stay, and the Court of Appeal dismissed a challenge to his decision. It asked itself whether it was unfair that those video pictures had disappeared, and since the judge accepted the police officer's evidence he was entitled to find that there had been no unfairness.

This was neither a Category 1 case nor a Category 2 case. There was nothing unfair and nothing exceptional about it. (*R v Reid* (10 March 1997, unreported).)

(iii) In a rape case, the complainant said that she had been raped close to a bridge over a railway line. The jury heard evidence from a number of independent witnesses. Video cameras were mounted on the bridge, but the detective constable in charge of the investigation was told by British Transport Police that the cameras were not switched on. In fact they were working, but the police did not ascertain this fact until a month later, by which time the film had been destroyed. The trial judge refused a stay, and the Court of Appeal dismissed a challenge to his decision. It directed itself that before there could be any successful allegation of an abuse of process based on the disappearance of evidence, there had to be either an element of bad faith or at the very least some serious fault on the part of the police or the prosecution authorities.

The court considered that there was no bad faith and no serious fault on the part of the police and that it was possible to have a fair trial. It suggested, obiter, that a lackadaisical failure on the part of the police to make proper investigation might in certain circumstances be held, in effect, to give rise to a Category 2 case, but those circumstances did not exist in that case. (*R v Swingler* (10 July 1998, unreported).)

(iv) The police were called to licensed club premises following an incident. They complained that during the course of their inquiries the defendant had used threatening words or behaviour and that he had also assaulted them in the execution of their duty. The incident in which the defendant was involved had taken place at the entrance of the premises and in the area just outside the door. A CCTV camera covered the foyer and three steps down to the street, and gave a reasonably good image of people's faces. Police viewed the video but formed the opinion that it was of no use. They returned it to the club, and it was subsequently re-used. The stipendiary magistrate stayed the proceedings for abuse of process on the grounds that since the camera covered the doorway and the surrounding area anything shown on it might well affect the assault charges. This court refused to quash her decision, holding that it was well within the limits of her judgment to take the course she did, because it could not be shown that the videotape evidence would have had no effect on the trial at all. It said that the difference between this case and *R v Birmingham*, where it was established beyond doubt that the destroyed video evidence had shown the locus in quo of the alleged offences, was a difference of degree and not of substance.

This was a borderline Category 1 case. Most courts would have refused the stay. In *R v Stallard* (see below) the Court of Appeal said that if it had to choose between the reasoning in *DPP v Chipping* and the reasoning in *R v Swingler*, it preferred the latter. (*DPP v Chipping* (11 January 1999, unreported).)

(v) A CCTV camera was operating in a street where a robbery took place, and it was so positioned that it was at the very least possible that something of the robbery might have been filmed, The jury received compelling

evidence from two independent witnesses. A police officer looked at the film and formed the opinion that it showed nothing of value. He did not preserve the tape, which was then reused. The Court of Appeal upheld the judge, who had refused to stay the proceedings for breach of process. It said that in *DPP v Chipping* there was simply a refusal to hold that the magistrate had acted outside the generous ambit of her discretion. It was recognised that in cases where evidence had been tampered with, lost or destroyed it might well be that a defendant would be disadvantaged, but it did not necessarily follow that [a Category 1 or Category 2 case] was established. There would need to be something wholly exceptional about the circumstances of the case to justify a stay on the ground that evidence had been lost or destroyed.

In this context, the use of the word 'wholly' adds nothing to the word 'exceptional'. A fair trial was possible, and this was not a Category 2 case. (*R v Medway* [2000] Crim LR 415.)

(vi) A purse was stolen in a shop. Video cameras were operating, which each showed a different picture and all the pictures appeared on one tape. A compilation tape was then made and retained, and the original tapes were destroyed in accordance with routine practice. It then turned out that the compilation tape began too late and ended too soon, and did not show the whole of the story. The Court of Appeal upheld the judge's refusal to stay the proceedings for abuse of process. It held that there was nothing on the facts of the case to approach the kind of serious fault [in a Category 2 case] that would be required before the court could begin to consider whether the continuation of the proceedings were an abuse of its process. It had earlier dismissed the possibility of this being a [Category 1 case] by saying that it did not see how it could properly be said that the appellant could not have a fair trial without the video.

This case is a good example of the way in which these cases should be analysed. (*R v Stallard* (13 April 2000, unreported[c]).)

(vii) A woman was arrested, following a road traffic accident, and charged with driving a motor vehicle whilst unfit through the consumption of drugs. Although a police officer at the scene, who did not attend court, had circled in his note book the response 'yes' to the question whether there was any video evidence, it was entirely speculative as to how any video evidence, assuming such existed, was or might have been relevant to any issue in the case. The defendant had persuaded the magistrates that in some unspecified manner she had been disadvantaged, and the proceedings were stayed for abuse of process. This court held that in taking this course the justices had exceeded any reasonable exercise of their discretion.

A fair trial was clearly still possible, and there was no question of any misbehaviour at all. (*DPP v Garrety* (11 December 2000, unreported).)

[30] *DPP v Chipping* is the only decision which it is difficult to reconcile with the principles we have stated. It must be remembered, however, that all that that case showed was the higher court being unwilling to interfere with the exercise of the decision of the lower court on the basis that it was clearly wrong. There is no hint in the judgment of Buxton LJ, with whom Collins J agreed, that he thought that the magistrate was clearly right.

c Editor's note: there is a brief note of this case at (2000) 164 JPN 374.

[31] Before we turn to the facts of the present cases, there is one further point of general importance we need to mention. If a defendant is convicted and then appeals to the Crown Court, he will gain nothing by inviting the Crown Court to stay the proceedings for abuse of process. If the proceedings in the Crown Court are merely stayed, his conviction will stand. It appears to us, in these circumstances, that his appropriate course, if any unfairness cannot be corrected in a fresh hearing on appeal, will be to invite the Crown Court to allow his appeal and quash the conviction on the grounds that, even if he made no complaint at the time, the trial in the magistrates' court was not a fair one, and that any such unfairness is irremediable.

[32] We turn now to the facts of the two cases with which we are concerned.

The Stafford case

[33] The case stated by Judge McEvoy QC is in the following terms.

[34] On 5 October 1999 Paul Mouat was driving his car out of Burton-upon-Trent when he was stopped by police officers. He was informed that he had been exceeding the speed limit and was given a fixed penalty ticket. The police officers took him into their vehicle and showed him a video recording of the incident.

[35] He did not pay the fixed penalty, but asked for a magistrates' court trial. He wished to put forward a defence of duress. He would say that he was travelling in the outside lane of a dual carriageway, overtaking several vehicles, including large lorries. He was not exceeding the speed limit at that point. An unidentified vehicle then came up behind him at speed and proceeded to travel only a few inches from his bumper. He was extremely frightened and intimidated by this action. He felt that the vehicle was too close for him to be able to safely slow down. He could not pull to his left due to vehicles on his inside. He therefore increased his speed to avert the danger.

[36] He was shocked to discover that the vehicle which had behaved in this way was a police car.

[37] He was not represented when he appeared for trial at Burton-upon-Trent Magistrates' Court on 15 June 2000. A police officer, whilst giving evidence, conceded that the video recording of the incident had been destroyed. The issue of fairness of trial does not appear to have been raised.

[38] He was convicted. The magistrates imposed a fine of £90 and endorsed his driving licence with three penalty points. He was ordered to pay £65 towards the cost of the prosecution.

[39] He appealed against his conviction to Stafford Crown Court. That hearing took place on 11 August 2000. He was represented by counsel.

[40] Counsel argued that proceedings should be stayed as Paul Mouat could not have a fair trial as the video evidence had been destroyed. The court's attention was drawn to the cases of *R v Birmingham* and *DPP v Chipping*.

[41] The Crown argued that Mr Mouat could receive a fair trial. Police officers would give evidence to the court in respect of the incident. It is routine practice for video recordings of this nature to be wiped off unless the motorist has made some protest at the time of the incident.

[42] The prosecution's position so far as the video evidence was concerned was that it was never originally intended to produce it in court in order to prove the speeding offence. Proof of the offence was to be achieved by evidence of following the offending vehicle at the constant distance for three tenths of a mile and that the police speedometer was in proper working order. A video was to be used to illustrate to the motorist that an offence had been committed. The vascar

capability had not been activated but the speed of the police vehicle was recorded on the video. a

[43] Both police officers said that the appellant when shown the video did not dispute the contents of it, ie that he was speeding at 90 mph and when given the fixed penalty ticket he is recorded as saying 'what am I going to do'. Both officers said that if he had done or said anything to dispute the video evidence it would have been retained (it would not have been possible to use the fixed penalty procedure). b

[44] Mr Mouat's evidence was to the effect that he asked what would happen to the video and the police replied that they kept it should he try and contest the case. He asserted that he told the police that the only reason he went to 90 mph was that the police car was up his backside or words to that effect. He did admit that the speed of 90 mph was registered on the video. c

[45] The court found the appellant not to be a credible witness. The circumstances of watching a video of the driving and saying 'what am I to do' amounted implicitly to admitting to the offence and the police were entitled to regard it as so. Moreover under s 34 of the Criminal Justice and Public Order Act 1994 the court was entitled to draw such inferences as appeared proper from the appellant's failure to mention the facts he relied upon at the hearing. d

[46] At the end of the hearing the court delivered an ex tempore judgment which sets out the facts and reasons for dismissal of the appeal. It was found that in the circumstances the police were entitled to reuse the video and the appellant was not prejudiced or prejudiced to the extent that he could not have a fair trial. The court exercised its discretion and refused to stay the case. A copy of the court's judgment was attached to the case. In those circumstances the court asked the following questions for the opinion of the High Court: '(1) Could a fair hearing take place given the fact that the police had destroyed the video recording of the incident? (2) Should Paul Mouat's silence at the time of the incident be considered relevant to the police's duty to retain evidence?' e f

[47] It appeared to us on the hearing of the appeal to this court that something had gone wrong in this case. The videotape in the police car contained material which might be relevant to the police's investigation of the speeding offence, and they were not entitled to assume that Mr Mouat would simply pay the penalty required by the fixed penalty notice. Indeed, the law allowed him a 21-day 'suspended enforcement period' in which he could decide whether he wanted to be tried at a court for the offence specified in the notice (see, generally, the statutory scheme set out in Part III of the Road Traffic Offenders Act 1988). g

[48] Mr Clarkson, however, told us in his skeleton argument that:

> '... financial considerations would mean that it would be impractical for there to be a new tape every time a speeding car is stopped and the driver disputes, or may in the future dispute, any fact contained therein. In fact it would mean that all such video tapes would have to be kept.' h

[49] It appeared to us that this claim of impracticality revealed a willingness to ignore the clear requirements of the 1997 code. We could not understand why, at the very least, it was impractical for the police to keep the relevant tapes at least until the suspended enforcement period had expired (or until trial, if the motorist exercised his right to require a trial). We therefore asked counsel for the prosecution to make further inquiries about police practice before we delivered judgment. We are grateful to them and their solicitors for undertaking this task. j

[50] Mr Clarkson in due course told us, after inquiries had been made of seven police forces in England and Wales, that there were no national guidelines for the police which related to the retention of video recordings taken of suspect vehicles from video recording equipment in police vehicles. The policy of the Staffordshire force was expressed in the following terms (with occasional comments about the practice of other forces):

> 'The Staffordshire force has 14 video recording units although fewer would be on the road at any one time. That seems to be a reasonable average for police forces. The videos are 3 hours long, although other forces use shorter tapes. Some operators keep them running nearly all the time; others only turn it on if there is something interesting or illegal happening at the time. If no offences are revealed they are kept for 28 days and then wiped clean. If offences are revealed they are kept for 12 months following conviction; if there is an acquittal they are wiped shortly after the trial. If a fixed penalty notice is given they are kept for 12 months. That applies to all forces except Gwent which keep the tapes for 7 years following conviction. The Staffordshire force also keeps a back-up tape called a shift tape onto which all offences, or potential offences are transferred in any one shift. That is kept for 12 months.'

[51] Mr Mouat's solicitors had made inquiries whose results were rather less illuminating. A representative of the Home Office, when approached, knew nothing about any police guidelines. Two representatives of the Association of Chief Police Officers (ACPO) were contacted. They both said that they believed ACPO had published guidelines, but neither of them was able to find them. A representative of the Nottinghamshire Police (policy unity and legal section) said that the Nottinghamshire Police Force followed ACPO guidelines, but they, too, were unable to produce a copy of them.

[52] At the very least it appears that the Crown Court was misled, no doubt unwittingly, by the Crown when inquiries were made about police practice at the time of Mr Mouat's appeal. It was told (see para 41 above) that it was routine practice for video recordings of this nature to be wiped off unless the motorist made some protest at the time of the incident. We now know that in Staffordshire policy dictates that all these tapes are kept for 28 days, and that if they reveal an offence they are retained for 12 months following a conviction (and for 12 months if a fixed penalty notice is given). Mr Mouat's appeal was heard well within both these periods. There should also have been the back-up shift tape, which should also have been kept for 12 months.

[53] Because we do not know why, despite the Staffordshire policy, the videotapes in the police car were re-used, or what happened to the shift tape, if any, which ought to have been preserved for 12 months, and because the Crown Court appears to have been misled, it appears to us that the decision of that court cannot stand, and the case must be remitted for the appeal to be heard again by a differently composed court. The answers to the questions posed by the court are: (1) In the light of the further evidence received in this court we do not know if a fair hearing took place or could take place. This must be a matter for a new court to decide in the light of the principles we have set out in this judgment. (2) No. He was entitled to consider during the suspended enforcement period whether he wished to contest his liability in court, and the police were under a duty under the Code of Practice to retain the videotapes until after that period expired, at the very least.

The Feltham case

[54] These proceedings arose out of an incident at a Tesco superstore in Hayes Road, Southall on 17 October 1998 when it is alleged that Mr Ebrahim punched the complainant Mr Chopra, who was another customer in the store. The store was fitted with closed circuit television. The concern of Mr Ebrahim and his advisers was directed to the possibility that an earlier incident at the store, when Mr Ebrahim says that he was assaulted by a number of people, including Mr Chopra, when he first entered the store, was recorded on videotape. They complained that this videotape, if any, had been destroyed by Tesco during the course of the proceedings.

[55] Form 86A, which is confirmed in evidence by the applicant's solicitor, shows that the application to the magistrate to stay the proceedings was based on the contention that a store security video, which was essential to the defence case and for which a witness summons had been obtained, had been destroyed, and that without this video the applicant could not have a fair trial.

[56] The background facts were set out in Form 86A in the following terms. Mr Ebrahim is of good character, and he maintains that he was threatened and abused by a group of people when he entered the Tesco store to do some shopping. A little later one of these people became involved in an argument with him, and he believed that he was about to be struck. He therefore grabbed at this man in order to restrain him in self-defence. At the time of his arrest the arresting officer viewed only one of the numerous video cameras in the store and did not seize any of the tapes. Mr Ebrahim was not interviewed himself, and it is said that he therefore had no proper opportunity at the time to explain about the events which occurred prior to the incident for which he was arrested.

[57] It appears that a pre-trial review on 11 February 1999 was adjourned after defence counsel had requested the Crown Prosecution Service's help in obtaining a tape which showed the earlier incident when Mr Ebrahim entered the store, because it was thought at that time that this tape was held by the police. It then became evident that the Crown did not possess this tape, and on 25 March the defence applied successfully for a witness summons against Tesco for its production. This summons was duly served, but it did not elicit the production of the tape, and the Tesco manager did not appear at the trial on 10 June despite the summons. It appears that he had told the Crown in April that he would not be attending, presumably because he had nothing to produce, but this information was not passed on to the defence or to the court.

[58] It was then stated in Form 86A that it had transpired, after further inquiries, that the videotape had been destroyed by Tesco on about 19 May 1999, some weeks after the service, of the summons, and after the store manager had notified the Crown that he did not wish to attend court. The defence complained that no effort appeared to have been made to preserve the tape or to comply with the summons.

[59] Evidence has been adduced by the Crown in response to this application to the effect that Pc Webster, the officer in the case, gave evidence at the hearing on 31 August 1999 that before arresting Mr Ebrahim he had gone to the CCTV room at the store and had ascertained that the location of the alleged assault had not been recorded on film by any of the CCTV cameras. In those circumstances he had not seized any of the substantial quantity of videotapes which were being used at the time of the incident. In the statement which represents his evidence in the criminal proceedings he says that he went to view the video on monitor

a no 7 of the area where the incident was alleged to have taken place, and that the monitor did not cover the scene.

[60] We also received in evidence three affidavits by Tesco's customer service manager at this store, Mr Jeff Graham, by way of explanation of the siting of the CCTV cameras in this store. He is responsible for all security issues at the store, and he produced a big plan of the store which identified the location of the b different security cameras. He said that they had not been moved since the store was opened.

[61] They are all connected to a video recording room, where eight video recorders simultaneously record various parts of the store. The recording switches from one camera to another in a pre-programmed order. The sequence could be overridden manually if there was a need to concentrate on one particular camera c and its vision.

[62] The plan shows a 360 degree camera (no 8) in the vicinity of the National Lottery counter which was the scene of the alleged assault and another one (no 9) which could be directed towards the entrance of the store. Some difficulty arose over numbering. The cameras (at least 37 in number) have one set of numbering, d and the video recorders and their monitor screens have another. In his witness statement Pc Webster said he went to view the video on monitor no 7. In his first statement Mr Graham said that the video recorder no 7 covered the camera no 10, although it could be, and would be, switched to another camera if the need arose. In his second statement he said that 'monitor no 7 does not exist and did not exist at the time of the incident'. In his third statement he said that the e National Lottery counter was positioned in front of camera no 8 and that it was viewable from monitor no 8 in the security room. He had earlier said that the image from the camera at the entrance to the store was continuously recorded on recorder no 6.

[63] During the course of the hearing we were given the original plan which f was before the magistrate on 27 August 1999. The position of the cameras is indicated in manuscript on the plan, and it usefully illustrates the layout of the relevant part of the store in relation to the cameras.

[64] We also received in evidence a statement by Mr Roger Coe, a senior Crown prosecutor, who had appeared for the prosecution in the lower court. He g told us that he had first become involved at a hearing on 10 June 1999, at which Pc Webster had been instructed to obtain a statement from Mr Leon Anthony relating to the status of the video. This statement, which was faxed to the court that day, is not mentioned in Form 86A or in the applicant's evidence. It reads:

> h 'I am a security officer employed by Capital Security Services and working at Tesco, Hayes, Balsbridge. Our CCTV system runs on a system based with 247 video tapes. These tapes are used daily at the rate of 7 tapes per day. This would give approx. 5 weeks of recording before all tapes would be taped over again. Also I would like to add that I destroyed over 300 video tapes so the store could start using new video tapes, therefore all recordings before j the 19th May 1999 are now destroyed.'

[65] Mr Coe tells us that this evidence formed the underlying basis for the argument before the magistrate on 31 August, when the hearing lasted three hours. He told us that at that hearing—

> 'PC Webster gave evidence that he had viewed the video, it contained no relevant evidence, and that he had viewed it following receipt of the

allegation and having spoken to the witnesses. It was clear from his evidence that no cameras covered the location of the incident alleged at the time.' a

[66] Mr Smiler, who appeared for Mr Ebrahim without a representative of his solicitors in attendance at the court below, did not take a note of Pc Webster's oral evidence. We see no reason to disbelieve Mr Coe's account of what took place.

[67] Because we do not have a full note of Pc Webster's oral evidence, it is necessary to refer to his original witness statement in order to understand what he did by way of investigating the alleged offence when he was called out to the Tesco store at 11.30 pm that evening. His witness statement reads: b

'On Friday 16th October 1998 at about 23.30hrs I was on duty in full uniform in a marked police vehicle in company with PC 156TX HEDLEY. Due to a call received on our personal radios, we attended Tesco Superstore, Balsbridge Industrial Estate, Hayes Road, Southall. On arrival we were met by Store Security who showed me just inside the store, where I met two Asian males. The first I now know to be Mr Rajinder Singh CHOPRA ... The second I now know to be Mr Mohammed R. EBRAHIM. In the presence and hearing of Mr EBRAHIM, Mr CHOPRA said "I was queuing at the Lottery counter to buy a ticket, when this man pushed into my wife for no reason. He did not apologise, so I said 'Why did you push my wife?' He then turned and punched m[e] in the face and started to shout and swear for no reason. I said to EBRAHIM "You have heard what this gentleman has had to say, what do you have to say?" He replied "I never punched him, I have witnesses, she stuck two fingers at me." I then left both men with my colleague PC 156TX and went to the CCTV room to view the video on monitor seven of the area where the incident was alleged to have taken place. The monitor did not cover the scene. I then returned and spoke with an independent witness, Mr Mark LAWRENCE, the Duty Manager of Tesco's. I said "Can you tell me what you have seen?" He replied "I was stood by the Lottery desk, when I saw this man pointing to Mr EBRAHIM. He punched into that man's wife for no reason. When asked for an apology he punched him in the face. He was only sticking up for his wife." I then noticed the inside bottom lip of Mr CHOPRA which appeared to be swollen. I advised him to contact his doctor. At about 23.50hrs, I said to EBRAHIM "I'm reporting you for the offence to be considered of prosecuting you for Common Assault," and cautioned him to which he became very irate and began to shout and swear.' c d e f g

[68] It will be evident from this statement that while Pc Webster received a version of events from both the participants before he went to see if there was any relevant video evidence, he did not make any further inquiries of Mr Ebrahim about the course of events that night. The outcome of such inquiries might have identified the importance of seeing if there was video evidence of the earlier incident at the entrance to the store. According to Mr Graham, any such evidence, if it existed, would have been available on recorder no 6. h j

[69] We were told that the magistrate gave no reasons for his ruling when he dismissed the application for a stay. District Judge Day (as he now is) has very helpfully filed a short statement in response to this application. It reads:

'On 31 August 1999 at Feltham Magistrates' Court I tried an information against Mohammed Rafiq Ebrahim alleging common assault upon Rajinder

Singh Chopra at Tesco Superstore, Hayes Road, Southall, Middlesex on 17 October 1998, contrary to s 39 Criminal Justice Act 1988. I was asked at the outset to stay the prosecution as an abuse of the process of the court on the ground that a video recording of an earlier incident in the store in which the accused claimed to have been abused and jostled by a group including Mr Chopra was not available. Because [Mr Ebrahim] had not been interviewed at any time, the nature of his defence (namely self-defence) and the consequent significance of the earlier encounter and any video record of it was not known until the pre-trial review on 4 February 1999. It was not clear to me that any such earlier incident would definitely have been captured on video but what was clear was that no such recording was available despite the issue of a witness summons against the relevant staff member at the store. Indeed the staff member did not even attend court. I was of the opinion that although the conduct of Tesco appeared cavalier, that did not alter the fundamental basis upon which I should decide the application. The only issue was whether the defendant would receive a fair trial. I based my decision on the following factors. 1. There was no certainty that the earlier incident had been recorded. 2. Paragraph 3.4 of the Code of Practice (Criminal Procedure and Investigations Act 1996) did not in these circumstances, months after the incident, impose a duty upon the police to search through all the recordings. That would go far beyond what was reasonable. 3. My experience is that such recordings were unlikely still to be available after such a period. 4. The decision to stay a prosecution is a matter of discretion for the court. The destruction of evidence may prevent a fair trial but does not automatically do so (*R v Beckford* (1996) 1 Cr App R 94). The discretion should be used sparingly (*R v Medway* [2000] Crim LR 415). 5. The defence to be raised by Mr Ebrahim was not dependent upon the existence or production of video evidence, although obviously if such evidence had existed it would have been of assistance, assuming it was as Mr Ebrahim claimed it to be. He was perfectly well able to give his account of that earlier incident in exactly the same way as if it had occurred in a place where there was no suggestion of the existence of video cameras. The situation is more similar to that dealt with in the case of *R v Stallard* (13 April 2000, unreported) mentioned at (2000) 164 (20) JPN 374 than the case of *R v Birmingham* [1992] Crim LR 117 referred to in the applicant's argument. Accordingly, I declined to find that there was an abuse of the process of the court and adjourned the case to allow the matter to be dealt with by way of judicial review at the request of the defence.'

[70] It appears to us that the magistrate directed himself impeccably. He focused correctly on the extent of the police officer's investigative obligations pursuant to para 3.4 of the 1997 code, and on the guidance in that paragraph to the effect that the extent of the duty of investigation should be proportionate to the seriousness of the matter being investigated (see para 9 above). Pc Webster had no reason to believe that his investigations should encompass what had occurred elsewhere in the store an hour earlier, so that para 3.5 of the 1997 code had no relevance (see para 10 above). He made a reasonable investigation to see if there was any video evidence of the assault which was the subject of his investigation and he was satisfied that there was none. On the evidence available to us, we cannot disentangle the muddle in the witness statement over the non-existent monitor no 7: if the lawyers in court had made and retained a

reliable note of the police officer's oral evidence on 31 August 1999 this would no doubt have removed any confusion about what he in fact saw. Any video recording of that earlier incident was therefore obliterated in the ordinary course of Tesco's business five weeks later.

[71] This was not a Category 2 case because there was no evidence of any improper practice by the police. Nor was it a Category 1 case, because even if Pc Webster should have asked some further questions of Mr Ebrahim before going off in search of relevant video evidence, the magistrate was satisfied, on reasonable grounds, that it was still possible to have a fair trial. No doubt at that trial Mr Ebrahim's representative will press Pc Webster as to the reasons why he did not give him a better opportunity to give his full account of what happened that night before he went off to the video recording room, but cross-examination of this type is the very stuff of a criminal trial of this type. There is certainly no reason to stay the proceedings on this ground. We would therefore dismiss this application.

[72] We would not wish to leave the Feltham case without expressing some concern about the way this judicial review application was presented. The 'grounds of relief' on Form 86A give, in paras 10–12, a very garbled version of what happened at the hearing on 10 June. No mention is made of Mr Anthony's statement being faxed to the court that day, or of the fact that it showed that the contents of the relevant videotape (showing the entrance to the store) would have been obliterated within five weeks of the date of the incident, and not, as stated in para 12, some weeks after the service of the summons. Neither Pc Webster's oral evidence on 31 August, nor the content of the magistrate's ruling that day, are mentioned in Form 86A, and the misleading 'facts' stated in that form are verified by a statement of a partner in the firm of solicitors acting for the applicant, who was never present at court, and who confirms, without identifying her source of information, but merely referring to 'file records', that the facts stated in the statement of grounds were true to the best of her knowledge and belief.

[73] If a proper statement of the facts of this case had been placed before Mitchell J we doubt very much if he would have granted leave. At the very least, he would have given the prosecutor an opportunity to state his version of the events before directing that there should be a substantive judicial review hearing.

Conclusion

[74] We would suggest that in similar cases in future, a court should structure its inquiries in the following way. (1) In the circumstances of the particular case, what was the nature and extent of the investigating authorities' and the prosecutors' duty, if any, to obtain and/or retain the videotape evidence in question? Recourse should be had in this context to the contents of the 1997 code and the Attorney General's guidelines. (2) If in all the circumstances there was no duty to obtain and/or retain that videotape evidence before the defence first sought its retention, then there can be no question of the subsequent trial being unfair on this ground. (3) If such evidence is not obtained and/or retained in breach of the obligations set out in the 1997 code and/or the guidelines, then the principles set out in paras 25 and 28 of this judgment should generally be applied. (4) If the behaviour of the prosecution has been so very bad that it is not fair that the defendant should be tried, then the proceedings should be stayed on that ground. The test in para 23 of this judgment is a useful one.

[75] We would add the following two matters by way of procedural guidance. (5) If a complaint of this type is raised on an appeal by a defendant from his conviction in the magistrates' court, he should not apply for the proceedings to be stayed. He should apply for an order allowing his appeal and quashing his conviction on the grounds that the original trial was unfair and the unfairness was of such a nature that it cannot now be remedied on appeal. (6) If a ruling on a stay application is made in a lower court, the court should give its reasons, however briefly, and it is the professional duty of the advocates for the parties to take a note of these. If the decision is to be challenged on judicial review, this court will expect to see a note of the lower court's reasons before deciding whether to grant permission for the application to proceed. If any relevant oral evidence was given, this court will hope that an agreed note can be prepared, summarising its effect.

Mr Ebrahim's application for judicial review dismissed. Mr Mouat's appeal allowed.

Dilys Tausz Barrister.

R v Secretary of State for Health and others, ex parte Imperial Tobacco Ltd and others

HOUSE OF LORDS

LORD SLYNN OF HADLEY, LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD CLYDE AND LORD MILLETT

22–24 MAY, 7 JULY, 7 DECEMBER 2000

Injunction – Interlocutory – Reference to European Court – Directive banning advertising and sponsorship of tobacco products within European Community – United Kingdom government proposing to implement directive by secondary legislation – Tobacco companies challenging validity of directive and seeking injunction restraining implementation pending judgment on validity – Judge granting injunction but Court of Appeal reversing decision – Tobacco companies appealing to House of Lords – European Court of Justice holding directive invalid before determination of appeal – Whether House of Lords entitled to give ruling on questions of law raised by appeal – Council Directive (EC) 98/43.

In July 1998 the legislature of the European Community, purportedly acting under the treaty provision on the establishment and functioning of the single market, adopted Council Directive (EC) 98/43 on the approximation of the laws, regulations and administrative provisions of the member states relating to the advertising and sponsorship of tobacco products. Article 3 of the directive required the banning, within the European Union, of all forms of advertising and sponsorship of tobacco products. Member states were required to introduce legislation complying with the directive's terms by 30 July 2001. In December 1998 the government of the United Kingdom decided to introduce the requisite legislation by means of regulations under s 2 of the European Communities Act 1972. A number of tobacco companies challenged that decision in judicial review proceedings, contending that the directive itself was invalid since its true intention was to harmonise the laws of member states for health purposes—a matter that lay outside the competence of the Community institutions. The judge referred questions on the validity of the directive to the Court of Justice of the European Communities, but the government subsequently published the regulations and proposed to implement them in December 1999. The tobacco companies applied for an injunction, restraining the government from implementing the directive until the Court of Justice's decision on its validity. The judge granted the injunction, but his decision was reversed by the Court of Appeal. The tobacco companies appealed to the House of Lords, but after the appeal was opened the Court of Justice held that the directive was ultra vires. The tobacco companies nevertheless asked their Lordships for a ruling on the question whether interim relief should have been granted. In particular, they sought a ruling on whether the test to be applied by a national judge when considering whether to grant an injunction was that applicable only under domestic law or whether the test under Community law was to be applied and, if so, whether and to what extent it was different from that under domestic law.

Held – If it had been necessary, in order to give judgment on the appeal, to consider (i) whether Community law applied and (ii) the scope of its application in the instant case, it would have been necessary and obligatory (Lord Hoffmann and Lord Millett dissenting) for the House to refer a question to the Court of Justice. However, it was not necessary to decide either question in order to give judgment, and accordingly the reference procedure was not available. It followed (Lord Hoffmann and Lord Millett concurring) that no order would be made on the appeal, save as to costs (see p 855 *h* to p 856 *a e f*, p 863 *b d e* and p 864 *d*, post).

Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe Joined Cases C-143/88 and C-92/89 [1991] ECR I-415 considered.

No order made on appeal from decision of the Court of Appeal [2000] 1 All ER 572.

Notes

For injunctions restraining the enforcement of legislation pending a decision of the Court of Justice of the European Communities, and for capacity and obligation to order a reference to the Court of Justice, see respectively 24 *Halsbury's Laws* (4th edn reissue) para 811 and 51 *Halsbury's Laws* (4th edn) para 3.82.

Cases referred to in opinions

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, [1975] AC 396, [1975] 2 WLR 316, HL.

Atlanta Fruchthandelgesellschaft mbH v Bundesamt für Ernährung und Forstwirtschaft Case C-465/93 [1996] All ER (EC) 31, [1995] ECR I-3761, ECJ.

EC Commission (CLECAT intervening) v Atlantic Container Line AB (EC Shipowners' Associations ASBL intervening) Case C-149/95 P(R) [1995] All ER (EC) 853, [1995] ECR I-2165, CFI.

Factortame Ltd v Secretary of State for Transport (No 2) Case C-213/89 [1991] 1 All ER 70, [1991] 1 AC 603, [1990] 3 WLR 818, [1990] ECR I-2433, ECJ and HL.

Foto-Frost v Hauptzollamt Lübeck-Ost Case 314/85 [1987] ECR 4199.

Francovich v Italy Joined cases C-6/90 and C-9/90 [1991] ECR I-5357.

Germany v European Parliament Joined cases C-376/98 and C-74/99 [2000] All ER (EC) 769, ECJ.

Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry [1974] 2 All ER 1128, [1975] AC 295, [1974] 3 WLR 104, HL.

Inter-Environnement Wallonie ASBL v Région Wallonie Case C-129/96 [1998] All ER (EC) 155, [1997] ECR I-7411, ECJ.

Marleasing SA v La Comercial Internacional de Alimentación SA Case C-106/89 [1990] ECR I-4135.

Pfizer Animal Health SA/NA v EC Council Case T-13/99 R [1999] 3 CMLR 79, CFI.

R v Secretary of State for the Home Dept, ex p Salem [1999] 2 All ER 42, [1999] 1 AC 450, [1999] 2 WLR 483, HL.

Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe Joined cases C-143/88 and C-92/89 [1991] ECR I-415.

Appeal

The appellant tobacco companies, Imperial Tobacco Ltd, Gallaher Ltd, Rothmans (UK) Ltd and British Tobacco Investments Ltd, appealed with permission of the Appeal Committee of the House of Lords given on 3 February 2000 from the decision of the Court of Appeal (Lord Woolf MR and Ward LJ; Laws LJ dissenting) on 16 December 1999 ([2000] 1 All ER 572, [2000] 2 WLR 834) allowing an appeal by the respondents, the Secretary of State for Health, the Secretary of State for Trade and

Industry and the Attorney General, from the order of Turner J on 29 October 1999 restraining the respondents from making regulations under s 2 of the European Communities Act 1972, implementing Council Directive (EC) 98/43, until the Court of Justice of the European Communities had given judgment on a reference for a preliminary ruling on the validity of the directive. The facts are set out in the opinion of Lord Slynn of Hadley.

Jonathan Sumption QC, David Anderson QC and *Jemima Stratford* (instructed by Lovells) for the appellants.

Christopher Vajda QC and *Sarah Moore* (instructed by the *Solicitor to the Department of Social Security and Department of Health*) for the respondents.

Their Lordships took time for consideration.

7 December 2000. The following opinions were delivered.

LORD SLYNN OF HADLEY. My Lords, Council Directive (EC) 98/43 (OJ 1998 L213 p 9) of the European Parliament and the Council dated 6 July 1998 provided, subject to specified qualifications, that all forms of advertising or sponsorship with the aim or the direct or indirect effect of promoting a tobacco product shall be banned in the Community.

The directive, made having regard to arts 57(2), 66 and 100a of the EEC Treaty (now arts 47(2), 55 and 95 EC), recited that there existed differences between the laws and administrative provisions of the member states in relation to such advertising and sponsorship which—

> 'transcend the borders of the Member States and the differences in question are likely to give rise to barriers to the movement between Member States of the products which serve as the media for such advertising and sponsorship and to freedom to provide services in this area, as well as distort competition, thereby impeding the functioning of the internal market ...'

Accordingly these barriers should be removed and the laws of member states be approximated. The directive further recited that—

> 'in accordance with Article 100a(3) of the Treaty, the Commission is obliged, in its proposals under paragraph 1 concerning health, safety, environmental protection and consumer protection, to take as a base a high level of protection.'

The directive came into force on 30 July 1998 but it provided in art 6 that 'Member States shall bring into force laws, regulations, and administrative provisions necessary to comply with this Directive not later than 30 July 2001' but:

> 'In exceptional cases and for duly justified reasons, Member States may continue to authorise the existing sponsorship of events or activities organised at world level for a further period of three years ending not later than 1 October 2006 ...'

The United Kingdom government had already announced on 14 May 1997 in the Queen's speech that it would be adopting measures, including legislation, to ban tobacco advertising. On 10 December 1998 the government published a White Paper, *Smoking Kills* (Cm 4177) and it subsequently published proposed regulations to give effect to the directive with effect from 10 December 1999.

The Community directive was controversial. Germany brought proceedings against the European Parliament and the Council challenging its validity and the four tobacco companies (the appellants) on 30 November 1998 applied for judicial review of the Secretary of State's decision to implement the directive. Turner J having granted leave to apply for judicial review on 16 December 1998, on 2 February 1999 ordered a reference to the Court of Justice of the European Communities under art 177 of the EEC Treaty (now art 234 EC). On 29 October 1999 he granted an injunction restraining the Secretary of State from making regulations under s 2 of the European Communities Act 1972 in order to implement the directive, such injunction to continue until the Court of Justice determined the validity of the directive on the reference.

There was an immediate appeal with the leave of the judge and on 16 December 1999 the Court of Appeal by a majority (Lord Woolf MR and Ward LJ; Laws LJ dissenting) set aside the injunction ([2000] 1 All ER 572, [2000] 2 WLR 834). The majority, whilst accepting that there were serious doubts as to the directive's validity, considered that the grant of interim relief had to be decided in accordance with Community law principles. The latter involved the applicant showing that serious and irreparable damage would result and for that purpose financial damage could not in principle be regarded as irreparable. The majority also considered that to grant an injunction would usurp the political judgment involved in the government's decision to promote public health.

When the appeal was opened before your Lordships' House, Mr Sumption QC on behalf of the tobacco companies, put forward forceful arguments that the directive was invalid on the basis that it had nothing to do with the internal market or the protection of competition, but was purely a measure to protect public health which was plainly outside the powers conferred on the institutions by the Treaty. It emerged however that the Advocate General's opinion in the reference was due to be given on 15 June 2000 and it was agreed that the hearing should be adjourned. The Advocate General concluded that the directive was ultra vires and the Secretary of State accepted that a national regulation should not be made pending the decision of the Court of Justice and that the tobacco companies should have their costs limited to two counsel. Subsequently on 5 October 2000 the Court of Justice held that the directive was ultra vires (see *Germany v European Parliament* Joined cases C-376/98 and C-74/99 [2000] All ER (EC) 769). It is in those circumstances unnecessary for your Lordships to consider that question.

The appellants however ask that the House should rule on the question whether it was right in this case to grant interim relief and in particular whether the test for a national judge to consider whether to grant an injunction is that applicable only under domestic law (as the appellants contend) or whether the test under Community law is to be applied and if so whether and to what extent it is different from that under domestic law.

If the grant of the injunction was to depend wholly on domestic law the principle laid down in e g *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396 and in *Factortame Ltd v Secretary of State for Transport (No 2)* Case C-213/89 [1991] 1 All ER 70, [1991] 1 AC 603 are to be followed. But the essential question is whether domestic law only is relevant or whether Community law has any application. That, it seems to me plainly, involves a question of Community law. The granting of interim relief has already been considered a number of times by the Court of Justice. Thus in the *Factortame (No 2)* case the Court of Justice held that in a case concerning Community law where interim relief was

sought, if a national court considered that the only obstacle which precluded it from granting such relief was a rule of national law it had to set that rule aside.

There the challenge was to domestic legislation which was said to be contrary to Community law. The Court of Justice did not give guidance as to the principles to be followed by a judge in considering whether to grant interim relief. In that case on the question posed it was not necessary to do so. The House of Lords in considering whether interim relief should be granted, applied the principles in the *American Cyanamid* case.

In *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* Joined cases C-143/88 and C-92/89 [1991] ECR I-415 the court was specifically asked to say 'under what conditions national courts may order the suspension of enforcement of a national administrative measure based on a Community regulation'.

The Court of Justice recognised that judges must follow rules of procedure determined by national law. At the same time it stressed (at 542 (paras 25–26)) as it has consistently done, that the 'uniform application [of Community law] is a fundamental requirement of the Community legal order'.

It followed that even applying national procedural rules the question of whether or not to suspend the enforcement of administrative measures should be considered in all member states, 'subject, at the very least, to conditions which are uniform so far as the granting of such relief is concerned'. Thus national judges should only grant relief upon the conditions on which the Court of Justice itself would grant relief under art 185 in the context of actions brought under art 183 of the EEC Treaty (now arts 242 and 240 EC).

It seems to me now as it seemed to me in the *Zuckerfabrik* case that unless judges throughout the Community follow recognised conditions for the grant of interim relief, the review of national regulations applying Community law is going to vary widely. This is plainly wrong. There should be a Community-wide approach to the application, even via national regulations, of Community law. It is obvious that the over-ready granting of interim injunctive relief could undermine such application. National judges therefore needed to be told of the conditions to be satisfied if inconsistent and unjustified injunctive relief was to be avoided.

Neither the *Factortame (No 2)* case nor the *Zuckerfabrik* case dealt expressly with the present situation which is not concerned with national legislation already in force and whose validity depends on Community law, but with the control of a member state's power to adopt national regulations giving effect to a Community directive whose validity is challenged. Clearly prima facie the state has a duty to give effect to the directive within the time laid down and not to take steps which are liable seriously to compromise the result prescribed by the directive to be achieved by the end of that period (see *Inter-Environnement Wallonie ASBL v Région Wallonie* Case C-129/96 [1998] All ER (EC) 155, [1997] ECR I-7411). This is an obligation laid on all member states equally where a regulation is made or, as here, where the directive is addressed to all the member states (art 249 EC, ex art 189). It seems to me that that uniformity which is 'a fundamental requirement of the Community legal order' is no less necessary here than in the *Zuckerfabrik* situation. What states may do in adopting or refusing to adopt Community directives for policy reasons is one thing; what courts should do in enforcing and applying Community law is another. At the least there should be a consistency of approach, whatever flexibility a judge may have in applying that approach (see *EC Commission (CLECAT intervening) v Atlantic Container Line AB (EC Shipowners' Associations ASBL intervening)* Case C-149/95 P(R) [1995] All ER (EC) 853, [1995] ECR I-2165). It seems

to me highly undesirable that the question whether different governments should be restrained even temporarily from giving effect to a directive, should be considered on wholly different tests in different national courts.

I think it is at the least arguable that if a directive is implemented in national law before the prescribed final date, any application for interim relief to suspend the operation of the directive would be a matter for Community law, and that the position should be the same on an application for interim relief to prevent the directive being adopted.

I do not however exclude the possibility, if such Community test is satisfied, of a court granting interim relief against a national government, even though on the basis of *Foto-Frost v Hauptzollamt Lübeck-Ost* Case 314/85 [1987] ECR 4199 it is only the Court of Justice which can declare the directive invalid.

It seems to me, therefore, that Community law is a relevant factor or at least that it is not clear beyond doubt that it is not a relevant factor and that as a starting point the conditions referred to in the *Zuckerfabrik* case (as followed in *Atlanta Fruchthandelgesellschaft mbH v Bundesamt für Ernährung und Forstwirtschaft* Case C-465/93 [1996] All ER (EC) 31, [1995] ECR I-3761) should be applied. It is not necessary to set them out. How far there is a difference between those conditions and the *American Cyanamid* case has been much debated before your Lordships. In many respects it seems to me that the tests overlap—urgency, the need to avoid serious and irreparable damage to the applicant, serious grounds to consider that the legislation is invalid—but there may be differences e g as to how far financial damage can be taken into account. In respect of this the court said in the *Zuckerfabrik* case ([1991] ECR I-415 at 543 (para 29)) that financial damage cannot 'be regarded in principle as irreparable' but it went on:

> 'However, it is for the national court hearing the application for interim relief to examine the circumstances particular to the case before it. It must in this connection consider whether immediate enforcement of the measure which is the subject of the application for interim relief would be likely to result in irreversible damage to the applicant which could not be made good if the Community act were to be declared invalid.'

The *Zuckerfabrik* case was the first case in which the court gave such an indication of the principles to be applied but Community law develops and is refined as different situations are presented to the court. The *Zuckerfabrik* case is not necessarily the last word on the subject any more than *Francovich v Italy* Joined cases C-6/90 and C-9/90 [1991] ECR I-5357 could ever have been regarded as the last word on when damages against a state for breach of a Community obligation could be awarded.

I am therefore firmly of the view that if in order to give judgment in this appeal it had been necessary to consider; (a) whether Community law applied, and (b) what was the scope of its application in the present case, it would have been necessary and obligatory for your Lordships to refer a question to the Court of Justice under art 234 of the EC Treaty.

It is, however, not necessary to decide either question in order to give judgment on this appeal so that the reference procedure is not available. Any regret that this question should be left open is reduced, at least, by the consideration that on an application of this kind the full circumstances have to be taken into account.

I would accordingly make no order on the appeal save that the appellants should have their costs in the Court of Appeal and before your Lordships' House

limited to two counsel in accordance with the general practice. I am not persuaded that this is a case justifying an exceptional order for three counsel. a

LORD NICHOLLS OF BIRKENHEAD. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Slynn of Hadley and Lord Hoffmann. Lord Hoffmann is of the view that, where the validity of a directive is challenged before the date prescribed for its b implementation, Community law is inapplicable on an application to a national court for interim relief. There is force in his reasoning, but I am not persuaded this can be regarded as acte claire. A directive has immediate legal effect according to its tenor. Hence, Community law does not require uniform application of the directive before the implementation date. During the prescribed implementation period member states are not in breach by failing to transpose the directive into national c law. Thus, an order by a national court suspending reliance on an impugned directive during the implementation period does not put a member state in breach of its obligations under Community law. In the sense, therefore, of absence of breach of the directive, Community legal order is not affected if a member state, through its courts or any other of its institutions, delays d implementation within the implementation period. But in another, broader, sense Community legal order is affected, or may be regarded as affected, by such a suspension, because the decision of the national court does interfere with the operation of the directive in a member state during the implementation period. The court order precludes the operation of the directive as a valid directive.

I have found myself compelled therefore to reach the same conclusion as Lord e Slynn. Had it been necessary to give judgment on this appeal, it would have been necessary for the House to refer a question to the Court of Justice of the European Communities. I have reached this conclusion with reluctance, because it means that the present appeal will not provide the answer to an important question of law. The question will have to remain open for another occasion. This is an f unsatisfactory outcome in a case where an interlocutory application has come as far as this House. But, as matters have turned out, I see no escape from this conclusion.

LORD HOFFMANN. My Lords, in December 1998 the government published a White Paper, *Smoking Kills* (Cm 4177) in which it announced its intention to bring forward secondary legislation in the 1998–1999 Parliamentary session to g implement Council Directive (EC) 98/43 (OJ 1998 L213 p 9) 'on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising or sponsorship of tobacco products'. The power under which it proposed to legislate was that conferred by s 2(2) of the European Communities Act 1972: h

> '(2) ... Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision—(*a*) for the purpose of implementing any Community obligation of the United Kingdom ...'

The Act defines a 'Community obligation' in Sch 1 as 'any obligation created j or arising by or under the Treaties, whether an enforceable Community obligation or not'.

By art 189 of the EEC Treaty (now art 249 EC), a directive is 'binding as to the result to be achieved' upon each member state. The objective stated by the directive in art 1 was to 'approximate the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of

tobacco products'. The form of approximation required by the directive was, by art 3, that all forms of advertising and sponsorship should be banned. By art 6, member states were to bring into force the laws, regulations and administrative provisions necessary to comply with the directive not later than 30 July 2001.

Prima facie therefore, the directive gave rise to a Community obligation which the Secretary of State was entitled to make regulations under s 2(2) of the Act to implement. By art 191 of the EEC Treaty (now art 254 EC), a directive enters into force on the date which it specifies. Article 8 of the directive said that this was to be the date of its publication in the Official Journal. That happened on 30 July 1998. The duty to implement a directive comes into existence when it enters into force although it does not become enforceable until the implementation date. The Community obligation is, so to speak, debitum in praesenti, solvendum in futuro. Meanwhile, however, the directive is not without practical effect in Community law. In *Inter-Environnement Wallonie ASBL v Région Wallonie* Case C-129/96 [1998] All ER (EC) 155, [1997] ECR I-7411 at 7499 (paras 43–45) the Court of Justice of the European Communities said that although member states 'cannot be faulted for not having transposed the directive into their internal legal order before expiry of [the implementation period]', they were obliged during that period to 'refrain from taking any measures liable seriously to compromise the result prescribed'. And of course as a matter of United Kingdom domestic law, the 'Community obligation' which creates the power to make regulations under s 2(2) of the Act comes into existence immediately the directive enters into force. The definition in Sch 1 to that Act specifically provides that the obligation need not be enforceable.

The appellants, who are four tobacco companies, challenge the exercise of the power on the grounds that the directive is invalid and that no Community obligation therefore exists at all. The basis for the challenge is that the directive is ultra vires the powers conferred upon the Community institutions by the treaty. It purported to be made pursuant to art 100a (now art 95 EC). This gives the Council power to adopt measures 'which have as their object the establishment and functioning of the internal market'. The directive recites that its object is to eliminate barriers between member states in the provision of services in connection with tobacco advertising and sponsorship and the movement of products which serve as media for such advertising and sponsorship. The appellants say, putting the matter shortly, that the internal market in the provision of services in connection with tobacco advertising and sponsorship cannot be made more efficient by a total prohibition on those activities

The appellants therefore commenced judicial review proceedings in which they claimed a declaration that the directive was invalid and requested a reference to the Court of Justice. On 2 February 1999 Turner J made an order requesting a preliminary ruling. In June 1999 the government published draft regulations to implement the directive and, after a period of consultation, announced its final proposals on 11 October 1999. On the same day the appellants gave notice of an application to Turner J for an order that the decision to implement the regulations should be stayed pending the preliminary ruling of the Court of Justice, which was expected in late 2000 or early 2001. On 29 October 1999 the judge granted the order. He directed himself in the exercise of his discretion by the principles laid down by the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396 as applied to the peculiar problems of restraining the enforcement of legislation by the decision of the House in *Factortame Ltd v Secretary of State for Transport (No 2)* Case C-213/89 [1991] 1 All ER 70, [1991] 1 AC 603. He concluded

that the appellants had a strong case on the merits and that damages would not be an adequate remedy either for them or the Secretary of State. He made a careful examination of the various factors relevant to the balance of convenience and said that it came down firmly in favour of the grant of interlocutory relief.

The Court of Appeal, by a majority (Lord Woolf MR and Ward LJ; Laws LJ dissenting) allowed an appeal and discharged the injunction ([2000] 1 All ER 572, [2000] 2 WLR 834). They said that the judge had been wrong to exercise his discretion according to the relevant principles of English law. He should have applied the principles of Community law laid down by the Court of Justice in *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* Joined cases C-143/88 and C-92/89 [1991] ECR I-415. These principles were to be applied by all member states in applications to suspend the enforcement of national measures based on Community legislation. The Court of Appeal said that they imposed a more demanding standard than English domestic law. The applicant had to demonstrate that he had a strong case on the merits and that, in the absence of interlocutory relief, he would suffer irreparable damage. For this purpose, 'purely financial damage' was deemed not to be irreparable merely because damages would not be an adequate remedy. The applicant had to show that it would be 'placed in a situation which could endanger its very existence or irremediably affect its market share': *Pfizer Animal Health SA/NA v EC Council* Case T-13/99 R [1999] 3 CMLR 79 at 114 (para 138). The majority held that the appellants had failed to satisfy this condition.

Laws LJ said that the principles in the *Zuckerfabrik* case had no application. The question of whether the directive should be implemented sooner or later within the implementation period was entirely a matter for the United Kingdom to decide. Therefore the question of whether a United Kingdom court should restrain implementation within that period in the interests of justice was a matter for domestic law. It followed that there were no grounds for interfering with the exercise of discretion by Turner J.

The appellants appealed to your Lordships' House. The position of counsel for the Secretary of State (Mr Vajda QC) was that on the merits the appellants had an arguable case but no more. Mr Sumption QC for the appellants argued that the case was a very strong one. He also submitted that Turner J was right in deciding the question according to English law and that, in any case, the criteria in the *Zuckerfabrik* case, when properly examined, were no different from those applied by Turner J. In particular, there was no European doctrine that financial damage was deemed not to be irreparable even if it was not capable of being repaired.

The oral hearing in the reference which Turner J had made in February 1999, together with conjoined proceedings brought by the Federal Republic of Germany to annul the directive, took place on 12 April 2000. On 15 June 2000, after the conclusion of argument before your Lordships, Advocate General Fennelly issued his opinion. He expressed the firm view that the directive was invalid for a number of reasons, including ultra vires on the grounds for which the appellants contended. In view of this turn of events, the Secretary of State offered an undertaking in substantially the form of interlocutory relief sought by the appellants. He also made an offer to pay the appellants' costs, limited to two counsel instead of the three actually employed. In view of this offer, the Secretary of State submitted that the proceedings had become moot and that your Lordships should accept the undertakings and make no order or express any views on the matters debated at the Bar. Since then, the Court of Justice has annulled the directive and the power to make regulations under s 2(2) of the Act

has disappeared (see *Germany v European Parliament* Joined cases C-376/98 and C-74/99 [2000] All ER (EC) 769). Even the undertakings are therefore no longer needed.

Mr Sumption on the other hand said that as the appeal was properly before the House, it had jurisdiction to give a judgment if it considered that there were good reasons in the public interest for doing so (see *R v Secretary of State for the Home Dept, ex p Salem* [1999] 2 All ER 42 at 47, [1999] 1 AC 450 at 456–457). In the present case, the important question as to whether the decision to grant interlocutory relief should have been decided according to English or Community law divided the Court of Appeal and was fully argued before your Lordships. Mr Sumption submits that if your Lordships consider that the majority of the Court of Appeal were wrong, you should say so. Their judgment should not be left to stand as authority, leaving some future litigants to bear the trouble and expense of bringing the matter once more before your Lordships' House.

My Lords, I have formed the clear view that upon the principal matter in dispute the decisions of Turner J and Laws LJ were right and that it would not be in the interests of justice to leave the point to be argued in a later appeal. I can see the advantages to the Secretary of State in facing future litigants with the prospect of having to bring the matter before your Lordships in order to have the authority of the Court of Appeal's decision overturned. But I do not think that this would be fair.

In order to decide whether the court was required by Community law to apply the principles stated in the *Zuckerfabrik* case, it is necessary to examine the reasoning of the Court of Justice in that case. It concerned a Council regulation forming part of the common agricultural policy which imposed various levies on sugar manufacturers. The customs office at Itzehoe in Schleswig-Holstein made a decision that Zuckerfabrik Süderdithmarschen (Zuckerfabrik), a sugar manufacturer, was liable to pay about DM2m as 'special elimination levy' pursuant to the regulation. Zuckerfabrik claimed that the regulation was invalid and applied to the Revenue Court in Hamburg for an interlocutory order suspending enforcement of the customs office order pending a preliminary ruling by the Court of Justice. The court also referred the questions of whether it had jurisdiction to make such an interlocutory order and the conditions upon which it could do so. In particular, it asked whether a uniform Community criterion existed or whether the matter should be decided according to national law.

There is no doubt that the regulation, if valid, was immediately and directly applicable in Germany. The decision of the customs office were merely an administrative order giving effect to the requirements of the regulation. The Court of Justice said that justice required national courts to have jurisdiction to suspend the enforcement of a Community regulation pending a decision on its validity. The right of individuals in member states to challenge the validity of Community regulations would be compromised if—

> 'pending delivery of a judgment of the Court, which alone has jurisdiction to declare that a Community regulation is invalid (see judgment in Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* ([1987] ECR 4199 at 4232 (para 20))), individuals were not in a position, where certain conditions are satisfied, to obtain a decision granting suspension of enforcement which would make it possible for the effects of the disputed regulation to be rendered for the time being inoperative as regards them.' (See [1991] ECR I-415 at 541 (para 17).)

The court then went on to consider what conditions should be satisfied, and in particular, whether those conditions should be left to national law or be uniform throughout the Community. It decided on uniformity and it is important to note the reason. The court said ([1991] ECR I-415 at 542 (paras 25–26)) that otherwise, differences in the criteria applied by national courts 'may jeopardise the uniform application of Community law ... Such uniform application is a fundamental requirement of the Community legal order'. The obligation of the national courts to adopt uniform criteria is thus one facet of the general obligation of a member state, as expressed for example in art 5 (now art 10 EC), to take all appropriate measures 'to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community'.

The court went on to say that the criteria applied by a national court should be the same as those applied by the Court of Justice in exercising its power under art 185 (now art 242 EC) to suspend the operation of a contested Community act in actions to annul such acts brought before the court itself under art 173 (now art 230 EC).

The question is therefore whether the reasoning in the *Zuckerfabrik* case can be extrapolated from the case in which it is sought to suspend the enforcement of a Community regulation which is prima facie enforceable to the case in which it is sought to suspend national legislation made to implement a directive which is not yet enforceable. Is there the same need for uniform criteria? This must in my opinion depend upon whether, in such a situation, differences in national criteria would jeopardise the uniform application of Community law.

In my view it is obvious that during the implementation period, differences in national criteria for the grant of interlocutory relief cannot jeopardise the uniform application of Community law. This is because Community law does not require uniform implementation of the directive before the implementation date. The member state has only the negative obligation stated in *Inter-Environnement Wallonie ASBL v Région Wallonie* Case C-129/96 [1998] All ER (EC) 155 at 177, [1997] ECR I-7411 at 7449 (para 45), to 'refrain from taking any measures liable seriously to compromise the result prescribed'. It is not disputed that the executive or legislative branches of government of a member state can delay the implementation of a directive until the end of the implementation period for any reasons of politics or expedience which they think fit. No one suggests that this would be a breach of their obligations under art 5 or jeopardise the uniform application of Community law. To object to the judicial branch of government delaying implementation on the narrow ground that, according to national criteria, the interests of justice so require, seems to me to swallow a camel and strain at a gnat.

The argument for the Secretary of State comes to saying that Community law requires the judiciary of a member state to defer to the executive on the question of when the directive should be implemented. Once the executive had decided that the directive should be implemented, the judiciary comes under a Community law obligation to co-operate and should behave as if the directive were already enforceable. In this way it is argued that enforcement can be suspended only if the *Zuckerfabrik* criteria are satisfied.

In my opinion this argument is mistaken. There is no authority for the proposition that Community law is concerned with the relations between the different branches of government of a member state. On the contrary, Community law is indifferent to the internal arrangements of power within a member state. The obligations of Community law are imposed on all the organs of government of the member state. It is in accordance with this principle that the duty of a member

state to give effect to a directive applies not only to its legislature or executive, which would, under the national constitution, ordinarily have the power to take the necessary measures, but also to its judiciary. This is the basis of the famous principle in *Marleasing SA v La Comercial Internacional de Alimentación SA* Case C-106/89 [1990] ECR I-4135 at 4159 (para 8):

> '... the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.'

Contrariwise, if a member state is not under a duty to implement a directive, then no such duty is binding upon any of the authorities of that member state. As a matter of domestic English law, the fact that the Secretary of State has decided to exercise the power to make the regulations is something to be taken into account in weighing the public interest element to be put into the scale of the balance of convenience. It is he who is prima facie entrusted by s 2(2) of the Act with the duty of deciding when the public interest requires the regulations to be made. A similar point was discussed in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128, [1975] AC 295. But Community law has nothing to say on the matter.

My Lords, I turn now to examine the contrary arguments advanced by the majority of the Court of Appeal. They are conveniently listed in the judgment of Ward LJ.

(1) The application for interlocutory relief is based upon the proposition that the directive is invalid in Community law. It is therefore inconsistent for the appellants to claim that their application should be determined according to principles of English law. This is put forward without reference to any rule or policy of Community law but as a straightforward matter of syllogistic logic. In my opinion it is fallacious. The appellants challenge the proposed regulations as ultra vires the powers conferred by the Act. That challenge raises a question of European law only because s 2(2) of the Act makes the validity of the regulations dependent upon the existence of a Community obligation. So one of the factors which must be considered in deciding whether to grant interlocutory relief is an assessment of the likelihood that the Court of Justice will hold that the directive is invalid and that no Community obligation exists. But there is nothing unusual about interlocutory relief depending upon an assessment of the likelihood that something will happen. The fact that the event in question is a decision of the Court of Justice does not in itself convert the question of whether to grant interlocutory relief into a question of European law. If, for example, a litigant bringing proceedings in Germany applies for ancillary relief in England (a freezing order, for example) the court will have to form a view on his chances of success in the German court according to German law. But that does not mean that the question of whether to grant interlocutory relief must be decided according to German law.

(2) The ultimate objective of the proceedings is to have the directive declared invalid and this is a matter of Community law. Therefore the case is 'redolent of European law'. This is the same argument as I have just rejected. Redolence is too vague a criterion for making a choice of law.

(3) The outcome should not turn upon whether the regulations had been made before the judicial review proceedings were commenced. In general, I would agree, although the fact that the regulations have been brought into force may be a factor which affects the balance of convenience. But that has nothing to do with the question of whether the matter should be decided according to principles of Community or domestic law.

(4) If the Court of Justice, which is seised of the matter, were to be asked to grant interim relief, it would do so according to principles of Community law. Therefore a national court considering the same question should also do so. This is in my opinion a false analogy because it is not comparing like with like. The appellants would have no locus standi to ask the Court of Justice for an interim order suspending the operation of the directive in Community law. Nor do they need to do so. They are perfectly satisfied with the present interim position under which the directive does not become enforceable in Community law until 30 July 2001. What they want is an interim order suspending the operation of the domestic regulations. The Court of Justice has no jurisdiction to grant such an order. The enforcement of the regulations are a matter for national law which, as Advocate General Fennelly put it, raises only collaterally the validity of the directive (*Germany v European Parliament* Joined cases C-376/98 and C-74/99 [2000] All ER (EC) 769 at 787–788 (para 33) of his opinion). The suspension of the enforcement of the directive and the suspension of the enforcement of the regulations in the period before the directive become enforceable are altogether different questions.

(5) The directive empowers the government to implement the directive at any time before the implementation date. An injunction would fetter a right granted to the government by European law and therefore affects the European interest. This in my opinion is also fallacious. The directive confers no powers upon the government. All that it does is to impose obligations upon the United Kingdom as a member state. The powers of the executive branch of government of the United Kingdom are entirely a matter of domestic law. It is s 2(2) of the Act which confers legislative power upon Her Majesty in Council and the Secretary of State. There is no need, as a matter of Community law, for the executive to avail itself of s 2(2) or for s 2(2) to exist. The legislative branch of government could discharge the Community obligations of the United Kingdom by enacting primary legislation. The fact that the government has power to do so under s 2(2) is a matter of domestic convenience. Parliament has chosen to make this power conditional upon the existence of a Community obligation and it is for this reason only that the validity of the directive is collaterally involved.

(6) The *Zuckerfabrik* case does not suggest that the test differs according to whether or not the regulations have already been enacted. I agree. This is the same as point (3). But it does not affect the question of whether, either before or after the enactment of the regulations, but before the implementation date, the question should be decided according to English or Community law.

The reasons given by Lord Woolf MR were substantially the same.

My Lords, for the reasons I have given above, I think that with all respect to the contrary views of the majority of the Court of Appeal it is plain and obvious, acte claire, that European law does not apply to the question of whether Turner J

should have granted the order which he did. European law was involved in the case only by virtue of a renvoi from s 2(2) of the Act and not in its own right. In the circumstances it is unnecessary for me to express any view upon whether the *Zuckerfabrik* criteria are different from those which are applied in English domestic law. If the question had been necessary for your Lordships' decision, I would have proposed that it be referred to the Court of Justice.

At conclusion of the argument I would have allowed the appeal and restored the order of Turner J. In the events which have happened, it is unnecessary to do more than propose that your Lordships make no order other than to order that the Secretary of State pay the appellants' costs in this House and the Court of Appeal.

LORD CLYDE. My Lords, at the close of the argument in this appeal I believed that a confident answer could be safely returned to the question whether English law or Community law should apply in the granting of an injunction against the making of the regulations in this case. My inclination was to hold that this was a matter purely of national law and that the conditions for relief should be those established under English law. However, having had the advantage of reading the speech which has been prepared by my noble and learned friend Lord Slynn of Hadley and having reconsidered in particular the observations of the Court of Justice of the European Communities in *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* Joined cases C-143/88 and C-92/89 [1991] ECR I-415, I have come to the conclusion that the point is not so clear that it can be properly resolved without the guidance of the Court of Justice. While I share the regrets which have been expressed at leaving the matter without a final determination, I am persuaded that the present situation is one where a reference would be proper, particularly where the point is plainly open to serious differences of view.

I agree that an order should be made in the terms proposed by Lord Slynn.

LORD MILLETT. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. I agree both with his conclusion and with his reasons for giving them. I wish, however, to add some observations of my own in regard to two matters.

The first is a matter of Community law. I share the concern expressed by my noble and learned friend Lord Nicholls of Birkenhead that the national court should not interfere with the operation of a directive during the implementation period. Where I respectfully differ from him is that I do not consider that it does so by making an order which allows the directive to be implemented in full by the end of that period. Moreover I believe that this much is acte claire.

I do not consider that the question which troubles Lord Nicholls can be answered in the abstract. It can only be answered by reference to a particular order which the national court proposes to make. The Court of Justice of the European Communities cannot sensibly decide whether a member state is proposing to act inconsistently with the Community legal order unless it knows what it is that the member state is proposing to do or refrain from doing. If it is told that the member state proposes to implement the directive in full before the end of the implementation period save only in so far as it is prevented from doing so by an order of its national court, the Court of Justice will need to see the order. In my view compliance with the Community legal order requires the national court to refrain from placing any obstacle in the way of full implementation of the directive by the end of the implementation period, but it does no more than this.

The best way of satisfying this requirement is for the national court to ensure that its order does not interfere with the power of the national authorities during the implementation period to take all such steps as may be necessary to implement the directive short of actually bringing it into force before the end of that period. *a*

The second is a matter of our own domestic law. I wish to express my profound disagreement with some of the observations made by the Court of Appeal in regard to what they saw as an impermissible attempt to interfere with the government's legislative programme. This raised an important constitutional issue concerning the relationship between the executive and the judiciary. The relevant constitutional doctrine is encapsulated in a passage from *Dworkin's Law's Empire* (1998) p 9: *b*

> 'The Rule of Law requires that State coercion shall always be backed by law. The State's force must not be used or withheld, no matter how useful that would be to the ends in view, no matter how beneficial those ends, except as licensed or required by law—i.e. by *valid* legislation or decisions of the Courts having the effect of making law.' *c*

It is the responsibility of the judges to ensure that this principle is observed and to inquire into the validity of any law which is invoked by the state to support its actions. *d*

I agree with the order which is proposed.

No order made on appeal save as to costs.

Celia Fox Barrister.

MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd

[2001] UKHL/6

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD HOPE, LORD HUTTON, LORD HOBHOUSE OF WOODBOROUGH

13, 14 NOVEMBER 2000, 8 FEBRUARY 2001

Income tax – Deduction in computing profits – Corporation tax – Charge on income – Interest payments – Statutory provision entitling companies to deduct from taxable profits any yearly interest 'paid' – Taxpayer company owing large arrears of interest to its owner and having no money to pay debt – Owner lending taxpayer money to pay the debt with a view to creating tax loss in taxpayer's favour – Taxpayer using the loan to discharge the interest debt – Whether taxpayer having 'paid' interest – Income and Corporation Taxes Act 1988, s 338.

The appellant taxpayer, W Ltd, was a company owned by ESPS, an approved superannuation scheme which was exempt from income tax. ESPS used W Ltd as a vehicle for some ill-advised property investments financed by money lent to W Ltd by ESPS. After the final liquidation of its properties, W Ltd had virtually no assets, but was left with a huge indebtedness to ESPS, including over £40m arrears of interest. Under s 338[a] of the Income and Corporation Taxes Act 1988, any yearly interest 'paid' by a company in an accounting period was, in determining its corporation tax liability for that period, deductible against its total profits for the same period. Accordingly, W Ltd potentially had value as a company with established tax losses, making it attractive to a purchaser which could transfer income-producing assets to it and take advantage of its losses to shelter against tax any future profits on which tax would otherwise be payable. However, that value could be realised only if W Ltd 'paid' the interest owing to ESPS. Since W Ltd had neither the money to pay the interest, nor any assets on which such money could be raised, ESPS itself lent W Ltd the money to make the payments. Thus in three successive years, ESPS lent W Ltd a sum of money, repayable as and when it was able, and W Ltd immediately used the money to pay arrears of interest. In each case, W Ltd accounted to the Revenue for tax due from the payee, and that tax was then reclaimed by ESPS under its exemption. In subsequent proceedings, the Revenue, relying on the so-called *Ramsay* principle, contended that the only purpose of the series of circular transactions was to produce an allowable deduction for corporation tax, that the payments by W Ltd to ESPS therefore had to be disregarded and that accordingly there had been no payments of interest for the purposes of s 338. The Special Commissioners rejected that contention, holding that the loans were real loans and were used for a real purpose, namely the discharge of the outstanding interest. The Revenue's appeal to the High Court was allowed, but that decision was reversed by the Court of Appeal. The Revenue appealed to the House of Lords.

a Section 338, so far as material, is set out at [20], post

Held – On its true construction, s 338 of the 1988 Act applied to a payment of interest made with money borrowed for that purpose from the person to whom the interest was due. That conclusion was not affected by the *Ramsay* principle which required the court to take a view of the facts, transcending the juristic individuality of the component parts of a preplanned series of transactions, only when the statutory language was to be construed as referring to commercial rather than purely legal concepts. The word 'paid' in s 338 could not be so construed. It was a legal concept, meaning the discharge of a debt, and did not have some other commercial meaning. It followed that the *Ramsay* principle had no application to the instant case. The interest debt had been discharged and the payments by W Ltd therefore fell within s 338. Accordingly, the appeal would be dismissed (see [14], [18], [48]–[49], [67]–[68], [69], [75], [76], [81], [91] and [94]–[98], post).

Cairns v MacDiarmid (Inspector of Taxes) [1982] STC 226 and *Customs and Excise Comrs v Faith Construction Ltd* [1989] 2 All ER 938 applied.

W T Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling [1981] 1 All ER 865, *IRC v Burmah Oil Co Ltd* [1982] STC 30 and *Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530 explained.

Notes

For general rules for interpretation of taxing acts, see 23 *Halsbury's Laws* (4th edn reissue) para 25.

For the Income and Corporation Taxes Act 1988, s 338, see 44 *Halsbury's Statutes* (4th edn) (1996 reissue) 549.

Cases referred to in opinions

Aberdeen Construction Group Ltd v IRC [1978] 1 All ER 962, [1978] AC 885, [1978] 2 WLR 648, HL.

British and Commonwealth Holdings plc v Barclays Bank plc [1996] 1 All ER 381, [1996] 1 WLR 1, CA.

Burton v Palmer [1980] 2 NSWLR 878, NSW CA.

Caffoor (Trustees of the Abdul Gaffoor Trust) v Comr of Income Tax, Colombo [1961] 2 All ER 436, [1961] AC 584, [1961] 2 WLR 794, PC.

Cairns v MacDiarmid (Inspector of Taxes) [1982] STC 226; *affd* [1983] STC 178, CA.

Charterhouse Investment Trust Ltd v Tempest Diesels Ltd [1986] BCLC 1.

Chinn v Collins (Inspector of Taxes), Chinn v Hochstrasser (Inspector of Taxes) [1981] 1 All ER 189, [1981] AC 533, [1981] 2 WLR 14, HL.

Comr of Inland Revenue v Wattie [1998] STC 1160, [1999] 1 WLR 873, PC.

Craven (Inspector of Taxes) v White, IRC v Bowater Property Developments Ltd, Baylis (Inspector of Taxes) v Gregory [1988] 3 All ER 495, [1989] AC 398, [1988] 3 WLR 423, HL.

Customs and Excise Comrs v Faith Construction Ltd [1989] 2 All ER 938, [1990] 1 QB 905, [1989] 3 WLR 678, CA.

Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes) [1992] 2 All ER 275, [1992] 1 AC 655, [1992] 2 WLR 469, HL; *rvsg in part* [1991] STC 136, [1991] 1 WLR 341, CA; *rvsg* [1989] STC 705, [1989] 1 WLR 1222.

Floor v Davis (Inspector of Taxes) [1978] 2 All ER 1079, [1978] Ch 295, [1978] 3 WLR 360, CA; *rvsd* [1979] 2 All ER 677, [1980] AC 695, [1979] 2 WLR 830, HL.

Furniss (Inspector of Taxes) v Dawson [1984] 1 All ER 530, [1984] AC 474, [1984] 2 WLR 226, HL.

Gilbert v Comr of Internal Revenue (1957) 248 F 2d 399, US Ct of Apps (2nd Cir).

Helvering (Comr of Internal Revenue) v Gregory (1934) 69 F 2d 809, US Ct of Apps (2nd Cir); *affd* (1935) 293 US 465, US SC.
Hyett (Inspector of Taxes) v Lennard [1940] 3 All ER 133, [1940] 2 KB 180.
IRC v Burmah Oil Co Ltd [1982] STC 30, HL.
IRC v Duke of Westminster [1936] AC 1, [1935] All ER Rep 259, HL.
IRC v McGuckian [1997] 3 All ER 817, [1997] 1 WLR 991, HL; *rvsg* [1994] STC 88, Ir CA.
IRC v Plummer [1979] 3 All ER 775, [1980] AC 896, [1979] 3 WLR 689, HL.
IRC v Wesleyan and General Assurance Society [1946] 2 All ER 749, CA; *affd IRC v Wesleyan and General Assurance Society* [1948] 1 All ER 555, HL.
IRC v Willoughby [1997] 4 All ER 65, [1997] 1 WLR 1071, HL.
NMB Holdings Ltd v Secretary of State for Social Security (2000) Times, 10 October, QBD.
Norglen Ltd (in liq) v Reeds Rains Prudential Ltd, Circuit Systems Ltd (in liq) v Zuken-Redac (UK) Ltd [1998] 1 All ER 218, [1999] 2 AC 1, [1997] 3 WLR 1177, HL.
Ramsay (W T) Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling [1981] 1 All ER 865, [1982] AC 300, [1981] 2 WLR 449, HL.
Snook v London and West Riding Investments Ltd [1967] 1 All ER 518, [1967] 2 QB 786, [1967] 2 WLR 1020, CA.
Southern Railway of Peru Ltd v Owen (Inspector of Taxes) [1956] 2 All ER 728, [1957] AC 334, [1956] 3 WLR 389, HL,
Sun Insurance Office v Clark (Surveyor of Taxes) [1912] AC 443, [1911–13] All ER Rep 495, HL.

Appeal

The Crown appealed with permission of the Appeal Committee of the House of Lords given on 16 June 1999 from the order of the Court of Appeal (Peter Gibson, Pill and Mummery LJJ) on 23 October 1998 ([1998] STC 1131) allowing an appeal by the respondent taxpayer, Westmoreland Investments Ltd (WIL), from the order of Carnwath J on 24 July 1997 ([1997] STC 1103) allowing the Crown's appeal from the decision of the Special Commissioners (D A Shirley and T H K Everett) on 11 December 1996 ([1997] STC (SCD) 69) allowing WIL's appeal from the refusal by the inspector of taxes (Iain Graham Brander MacNiven) of its claims to treat as charges on income for the purposes of s 338 of the Income and Corporation Taxes Act 1988 three payments of accrued interest made by WIL to its owner, the Electricity Supply Pension Scheme, in 1988, 1989 and 1990. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

Christopher McCall QC and *Michael Furness* (instructed by the *Solicitor of Inland Revenue*) for the Crown.
David Milne QC and *Adrian Shipwright* (instructed by *Ashurst Morris Crisp*) for WIL.

Their Lordships took time for consideration.

8 February 2001. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD. My Lords,

[1] On this appeal the Commissioners of Inland Revenue pray in aid what is loosely called the *Ramsay* principle. This is a reference to the decision in *W T Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300. So it is necessary first to remind oneself what the House decided in that case.

An initial point to note is that the very phrase 'the *Ramsay* principle' is potentially misleading. In the *W T Ramsay* case the House did not enunciate any new legal principle. What the House did was to highlight that, confronted with new and sophisticated tax avoidance devices, the courts' duty is to determine the legal nature of the transactions in question and then relate them to the fiscal legislation (see [1981] 1 All ER 865 at 873, [1982] AC 300 at 326 per Lord Wilberforce).

[2] The *Ramsay* case brought out three points in particular. First, when it is sought to attach a tax consequence to a transaction, the task of the courts is to ascertain the legal nature of the transaction. If that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded. Courts are entitled to look at a pre-arranged tax avoidance scheme as a whole. It matters not whether the parties' intention to proceed with a scheme through all its stages takes the form of a contractual obligation or is expressed only as an expectation without contractual force.

[3] This development had already been foreshadowed in the dissenting judgment of Eveleigh LJ in *Floor v Davis (Inspector of Taxes)* [1978] 2 All ER 1079, [1978] Ch 295 and in decisions of the House in *IRC v Plummer* [1979] 3 All ER 775, [1980] AC 896 and *Chinn v Collins (Inspector of Taxes)*, *Chinn v Hochstrasser (Inspector of Taxes)* [1981] 1 All ER 189, [1981] AC 533. In *Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530 at 542, [1984] AC 474 at 526, Lord Brightman set out his understanding of the rationale of this approach in these terms:

> 'In a preplanned tax saving scheme, no distinction is to be drawn for fiscal purposes, because none exists in reality, between (i) a series of steps which are followed through by virtue of an arrangement which falls short of a binding contract, and (ii) a like series of steps which are followed through because the participants are contractually bound to take each step seriatim. In a contractual case the fiscal consequences will naturally fall to be assessed in the light of the contractually agreed results ... *Ramsay* says that the fiscal result is to be no different if the several steps are preordained rather than precontracted.'

[4] Second, this is not to treat a transaction, or any step in a transaction, as though it were a 'sham', meaning thereby, that it was intended to give the appearance of having a legal effect different from the actual legal effect intended by the parties: see the classic definition of Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 1 All ER 518 at 528, [1967] 2 QB 786 at 802. Nor is this to go behind a transaction for some supposed underlying substance. What this does is to enable the court to look at a document or transaction in the context to which it properly belongs.

[5] Third, having identified the legal nature of the transaction, the courts must then relate this to the language of the statute. For instance, if the scheme has the apparently magical result of creating a loss without the taxpayer suffering any financial detriment, is this artificial loss a loss *within the meaning of the relevant statutory provision*? Thus, in the *Ramsay* case the taxpayer company sought to create an allowable loss to offset against a chargeable gain it had made on a sale–leaseback transaction. It sought to do so without suffering any financial detriment, by embarking on and carrying through a scheme which created both a loss which was allowable for tax purposes and a matching gain which was not chargeable. In rejecting the efficacy of this contrived 'loss-creating' scheme, Lord Wilberforce ([1981] 1 All ER 865 at 873, [1982] AC 300 at 326) observed that a loss which comes and goes as part of a preplanned, single continuous operation 'is not such a loss

(or gain) as the legislation is dealing with'. In *IRC v Burmah Oil Co Ltd* [1982] STC 30 at 37 Lord Fraser of Tullybelton described this passage as the ratio of the decision in the *Ramsay* case.

[6] As noted by Lord Steyn in *IRC v McGuckian* [1997] 3 All ER 817 at 825, [1997] 1 WLR 991 at 1000, this is an exemplification of the established purposive approach to the interpretation of statutes. When searching for the meaning with which Parliament has used the statutory language in question, courts have regard to the underlying purpose that the statutory language is seeking to achieve. Likewise, Lord Cooke of Thorndon ([1997] 3 All ER 817 at 829–830, [1997] 1 WLR 991 at 1005) regarded the *Ramsay* case as an application to taxing Acts of the general approach to statutory interpretation whereby, in determining the natural meaning of particular expressions in their context, weight is given to the purpose and spirit of the legislation.

[7] The *Ramsay* principle or, as I prefer to say, the *Ramsay* approach to ascertaining the legal nature of transactions and to interpreting taxing statutes, has been the subject of observations in several later decisions. These observations should be read in the context of the particular statutory provisions and sets of facts under consideration. In particular, they cannot be understood as laying down factual prerequisites which must exist before the court may apply the purposive, *Ramsay* approach to the interpretation of a taxing statute. That would be to misunderstand the nature of the decision in the *Ramsay* case. Failure to recognise this can all too easily lead into error. In particular, the much quoted observation of Lord Brightman in *Furniss'* case [1984] 1 All ER 530 at 543, [1984] AC 474 at 527, seems to have suffered in this way. Lord Brightman described as the 'limitations of the *Ramsay* principle' that there must be a preordained series of transactions, or a single composite transaction, containing steps inserted which have no business purpose apart from the avoidance of a liability to tax. Where those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes.

[8] My Lords, I readily accept that the factual situation described by Lord Brightman is one where, typically, the *Ramsay* approach will be a valuable aid. In such a situation, when ascertaining the legal nature of the transaction and then relating this to the statute, application of the *Ramsay* approach may well have the effect stated by Lord Brightman. But, as I am sure Lord Brightman would be the first to acknowledge, the *Ramsay* approach is no more than a useful aid. This is not an area for absolutes. The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case. Further, as I have sought to explain, the *Ramsay* case did not introduce a new legal principle. It would be wrong, therefore, to set bounds to the circumstances in which the *Ramsay* approach may be appropriate and helpful. The need to consider a document or transaction in its proper context, and the need to adopt a purposive approach when construing taxation legislation, are principles of general application. Where this leads depends upon the particular set of facts and the particular statute. I have already mentioned where this led in the *Ramsay* case. In *Furniss'* case it led to the conclusion that, within the meaning of the Finance Act 1965, the disposal of shares was in favour of Wood Bastow and not, as the taxpayer contended, in favour of Greenjacket.

The present case

[9] On the present appeal the relevant question is whether the transactions between the taxpayer, Westmoreland Investments Ltd (WIL), and the sole shareholders of its parent company, the trustees of the Electricity Supply Pension

Scheme (the scheme), constituted payments of interest within the meaning of s 338 of the Income and Corporation Taxes Act 1988. WIL suffered badly in the commercial property slump of the 1970s. It borrowed heavily from the scheme trustees. By the late 1980s it owed the trustees over £70m, including more than £40m accrued interest. Its liabilities greatly exceeded its assets. All the liabilities were due to the scheme trustees.

[10] As matters stood, WIL was valueless. But it had one potential asset: its substantial accrued interest liability. Under s 338 payments of interest, other than interest on bank loans, may be set against profits, and any unused excess may be carried forward under s 75 of the 1988 Act. If WIL could pay to the scheme trustees the £40m arrears of interest, the company would have value as a company with substantial established tax losses. Others might be interested in acquiring WIL, and using it as a vehicle for making profits. The purchaser of WIL could transfer income-producing assets to WIL and take advantage of WIL's losses to shelter against tax any future profits on which tax would otherwise be payable.

[11] But first WIL had to pay the arrears of interest to the scheme trustees. Obviously, WIL was quite unable to make any such payments out of its own resources, or to borrow money for this purpose from a third party. So, the trustees of the scheme, to whom WIL was indebted, passed money round in a circle. The genesis of the scheme, and details of its implementation in three instalments, are set out in the judgment of Peter Gibson LJ ([1998] STC 1131 at 1137–1139). For present purposes it suffices to note that the trustees loaned the necessary money to WIL; WIL used this in paying the outstanding arrears of interest to the trustees, having deducted tax for which it accounted to the Revenue; and the trustees, as the trustees of a tax-exempt superannuation scheme, reclaimed this tax from the Revenue.

[12] The Special Commissioners (D A Shirley and T H K Everett) found that the steps involved in these transactions were genuine ([1997] STC (SCD) 69). There was no question of any of the steps being sham. Carnwath J ([1997] STC 1103) held in favour of the Crown. The payments of interest in 1988 to 1990, made wholly out of money borrowed from the trustees, were not payments of interest for the purpose of s 338 of the 1988 Act, and the commissioners were wrong to allow them as charges on income. The Court of Appeal, comprising Peter Gibson, Pill and Mummery LJJ, reversed the judge's decision.

[13] My Lords, I confess that during the course of this appeal I have followed the same road to Damascus as Peter Gibson LJ. Like him, my initial view, which remained unchanged for some time, was that a payment comprising a circular flow of cash between borrower and lender, made for no commercial purpose other than gaining a tax advantage, would not constitute payment within the meaning of s 338. Eventually, I have found myself compelled to reach the contrary conclusion. My reasons are as follows.

[14] Section 338(1) of the 1988 Act provides, in short, that charges on income shall be allowed as deductions against profits in computing the corporation tax of a company. 'Charges on income' are defined in s 338(2) as 'payments of any description mentioned in subsection (3) below'. So far as relevant, sub-s (3) provides that 'the payments referred to in subsection (2)(a) above are—(a) any yearly interest'. Prima facie, payment of interest in s 338 has its normal legal meaning, and connotes simply satisfaction of the obligation to pay. In the present case, WIL's obligation to pay the accrued interest to the trustees was discharged by satisfaction. Thus, if the Revenue are to succeed, 'payment' in s 338 must bear some other meaning. Ultimately, applying in full the purposive *Ramsay* approach

to interpretation, I can find no justification for giving 'payment' in s 338 some other meaning. Moreover, I am unable to see what that other meaning could be.

[15] I must elaborate a little. In the ordinary case the source from which a debtor obtains the money he uses in paying his debt is immaterial for the purpose of s 338 of the 1988 Act. It matters not whether the debtor used cash-in-hand, sold assets to raise the money, or borrowed money for the purpose. Does it make a difference when the payment is made with money borrowed for the purpose from the very person to whom the arrears of interest are owed? In principle, I think not. Leaving aside sham transactions, a debt may be discharged and replaced with another even when the only persons involved are the debtor and the creditor. Once that is accepted, as I think it must be, I do not see it can matter that there was no business purpose other than gaining a tax advantage. A genuine discharge of a genuine debt cannot cease to qualify as a payment for the purpose of s 338 by reason only that it was made solely to secure a tax advantage. There is nothing in the language or context of s 338 to suggest that the purpose for which a payment of interest is made is material.

[16] This is not surprising. Payments of interest, other than interest on a bank loan, have the advantageous tax consequence of constituting charges on income. But, hand-in-hand with this, they have the consequence that tax must be deducted from the payment and paid to the Revenue. In the ordinary course, therefore, an exchange of cheques between creditor and debtor does not give rise to a tax advantage. The tax benefit of being able to treat the payment as a charge on income is offset by the obligation to account to the Revenue for tax on the payment. This being so, there is no basis on which Parliament can be taken to have intended that payment in s 338 should bear some special meaning which would exclude the case where the interest debt is satisfied with money borrowed for the purpose from the creditor.

[17] This is confirmed by noting that this, indeed, is not the feature which makes the WIL transactions themselves unattractive to the Revenue. The feature which makes the WIL transactions unattractive to the Revenue is different. It is the ability of the scheme trustees to reclaim the tax deducted by WIL from the payments. But that is the consequence of the tax-exempt status of the scheme. The concept of payment in s 338(3)(a) of the 1988 Act cannot vary according to the tax status of the person to whom the interest is owed.

[18] For these reasons, and those set out in the speech of my noble and learned friend Lord Hoffmann, I would dismiss this appeal. I also agree with Lord Hoffmann's reasons for rejecting the three subsidiary points on which the Revenue sought to place some reliance. WIL's cross-appeal does not arise.

LORD HOFFMANN. My Lords,

The issue

[19] The question in this appeal is whether certain payments of interest made by a property investment company named Westmoreland Investments Ltd (WIL) in the years 1988 to 1990 were 'charges on income' within the meaning of s 338 of the Income and Corporation Taxes Act 1988 and therefore allowable deductions in computing its profits or losses for the purposes of corporation tax. I speak of them as payments in the sense that there is no dispute that WIL transferred money to the lender and that its liability for interest was thereby discharged. As between the parties, the interest was paid. But the dispute between WIL and the Crown is whether the interest was 'paid' within the meaning of s 338.

It arises because WIL paid the interest out of money which it had been lent by the lender for the specific purpose of enabling it to pay. The interest liability was replaced by a liability for an additional capital sum. The transaction was circular: WIL borrowed capital and paid it back as interest. And the only purpose of the transaction was to produce an allowable deduction for corporation tax. The Crown says that this does not count as a payment for the purposes of the 1988 Act. It must be disregarded under the principle in *W T Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300. The main issue in this appeal is therefore the meaning, scope and applicability of that principle. The Crown also says that WIL's claim is defeated by three specific anti-avoidance provisions in the 1988 Act. I shall deal with these after considering the main point.

The statutory provisions

[20] My Lords, I set out first the relevant provisions of s 338 as it stood at the relevant time. It has since been substantially amended:

> '(1) ... in computing the corporation tax chargeable for any accounting period of a company any charges on income paid by the company in the accounting period, so far as paid out of the company's profits brought into charge to corporation tax, shall be allowed as deductions against the total profits for the period ...
>
> (2) ... "charges on income" means for the purposes of corporation tax—(a) payments of any description mentioned in subsection (3) below ...
>
> (3) Subject to subsections (4) to (6) below, the payments referred to in subsection 2(a) above are—(a) any yearly interest ... and (b) any other interest ... payable in the United Kingdom on an advance from a bank carrying on a bona fide banking business in the United Kingdom ... and for the purposes of this section any interest payable by a company as mentioned in paragraph (b) above shall be treated as paid on its being debited to the company's account in the books of the person to whom it is payable.'

[21] A company is therefore allowed a deduction in respect of bank interest immediately it is debited in the books of the bank. It does not matter whether the liability has been discharged or not. But other yearly interest is deductible only when it has been paid. Why the distinction? It reflects the difference in the way in which the Crown recovers tax from the recipient of the interest. In the ordinary case of yearly interest, the person who pays must deduct the tax and account to the Revenue (see s 349(2) of the 1988 Act). But this rule does not apply to banks (see s 349(3)(a) of that Act). A person who pays interest to a bank does not deduct tax. The interest is part of the bank's trading income and must be brought into account in the computation of profits when it falls due and is debited to the borrower in its books. In both cases, therefore, the provisions of ss 338 and 349 synchronise the payer's right to a deduction and the Crown's right to treat the interest as a taxable receipt of the payee.

The facts

[22] My Lords, the relevant facts can be briefly summarised. WIL was owned by the Electricity Supply Pension Scheme (the scheme), an approved superannuation scheme which is exempt from income tax. In the early 1970s it used WIL as a vehicle for some very ill-advised property investments. These were financed by money lent to WIL by the scheme. After the final liquidation of its properties in

1988, WIL had virtually no assets and a huge indebtedness to the scheme. This included over £40m arrears of interest.

[23] It might have been thought that the scheme had no option but to allow WIL to go quietly into liquidation. But even in its moribund state, WIL was not without its attractions. There was at the time a market in companies with established tax losses. If profit-earning assets were transferred to such companies, they could avoid tax until they had exhausted the right of set-off against losses carried forward from the earlier years. People were prepared to pay for tax loss companies, which were on offer at a very substantial discount to the expected savings they could provide. The difficulty for the scheme was that although WIL's losses were only too real, they were partially represented in the company's accounts by unpaid arrears of interest. Under s 338 of the 1988 Act, these sums became deductable only when paid. But WIL had no money with which to pay the interest and no assets upon which money could be raised.

[24] The scheme therefore lent WIL the money with which to pay the interest. On 28 January 1988 it lent £20m, repayable 'as and when the company is able' with interest at 2% over base rate. On the same day WIL paid the scheme £14,760,600 net of tax (representing a gross payment of £20,220,000 interest) and accounted to the Revenue for £5,459,400 tax. If nothing more had happened, the Crown would no doubt have viewed matters with equanimity. Any deduction allowed to WIL, giving rise to established losses which could be set off against such profits as might be earned at some future date, would have been more than compensated by a solid and immediate payment of tax in the same amount. But the scheme was exempt from income tax and therefore entitled to reclaim the tax from the Revenue. On 17 October 1989 and 3 January 1990 the exercise was repeated. The scheme made loans to WIL which it immediately used to pay arrears of interest due under the earlier loans, accounting to the Revenue for tax which was then reclaimed by the scheme.

[25] As a result of these transactions, the scheme was able to find a purchaser for the shares and loan debts of WIL. On 20 December 1990 a development company bought the shares for a nominal sum and the indebtedness of over £100m for 2p in the pound. The scheme realised £2m for assets which otherwise would have been worth nothing.

The findings of the Special Commissioners

[26] The Special Commissioners ([1997] STC (SCD) 69 at 82) made the following findings:

> 'We find that all the loans made to the taxpayer company from 1980 onwards were real loans and the taxpayer company used them for real purposes, viz the discharge of real earlier outstanding loans and the payment of real accrued interest, temporary investment in part and the payment of income tax in pursuance of the statutory obligation in that behalf ... We do not find that the interest-free loans made by the scheme in 1988–89 and 1989–90 were different in character from the earlier loans ... as Mr Milne QC submits on behalf of the taxpayer company, the object of the refinancing was to crystallise the actual loss by paying interest which hitherto had merely been accrued and had not been paid. There is no question but that that accrued interest was real.'

The commissioners therefore held that the interest had been 'paid' within the meaning of s 338(1) of the 1988 Act and gave rise to an allowable deduction.

The case for the Crown

[27] Mr McCall QC, who appeared for the inspector of taxes, said he did not challenge the findings of the commissioners that the loans and payments were real in the sense that the interest debt was discharged and replaced by a loan. The transactions were not a pretence. But they had no commercial purpose. They were purely for the purpose of avoiding tax and therefore fell within the *Ramsay* principle. Under that principle, they should be disregarded. Whatever might be their legal effect as between the parties, the absence of a commercial purpose meant that they did not count as payments within the meaning of s 338.

The Ramsay case: a principle of construction?

[28] Everyone agrees that the *W T Ramsay* case is a principle of construction. The House of Lords said so in *IRC v McGuckian* [1997] 3 All ER 817, [1997] 1 WLR 991. But what is that principle? Mr McCall formulated it as follows in his printed case:

> 'When a Court is asked (i) to apply a statutory provision on which a taxpayer relies for the sake of establishing some tax advantage (ii) in circumstances where the transaction which is said to give rise to the tax advantage is, or forms part of, some pre-ordained, circular, self-cancelling transaction (iii) which transaction though accepted as perfectly genuine (ie not impeached as a sham) was undertaken for no commercial purpose other than the obtaining of the tax advantage in question then (unless there is something in the statutory provisions concerned to indicate that this rule should not be applied) there is a rule of construction that the condition laid down in the statute for the obtaining of the tax advantage has not been satisfied.'

[29] My Lords, I am bound to say that this does not look to me like a principle of construction at all. There is ultimately only one principle of construction, namely to ascertain what Parliament meant by using the language of the statute. All other 'principles of construction' can be no more than guides which past judges have put forward, some more helpful or insightful than others, to assist in the task of interpretation. But Mr McCall's formulation looks like an overriding legal principle, superimposed upon the whole of revenue law without regard to the language or purpose of any particular provision, save for the possibility of rebuttal by language which can be brought within his final parenthesis. This cannot be called a principle of construction except in the sense of some paramount provision subject to which everything else must be read, like s 2(2) of the European Communities Act 1972. But the courts have no constitutional authority to impose such an overlay upon the tax legislation and, as I hope to demonstrate, they have not attempted to do so.

The Ramsay case: the fountainhead

[30] As is well known, the *Ramsay* case was concerned with a tax avoidance scheme designed to manufacture a capital loss to set off against a capital gain. The question before the House was whether a transaction by which the taxpayer company acquired certain shares for £185,034 and almost immediately sold them for £9,387 gave rise to a 'loss accruing on a disposal of an asset' within the meaning of s 23(1) of the 1965 Act. Both the acquisition and sale of the shares formed part of a preplanned series of transactions by which the alleged loss was exactly balanced by a gain which was alleged to fall within an exemption from the charge. The aggregate effect was that the taxpayer suffered no loss except the payment of a fee to the promoters of the scheme.

[31] It was not disputed that the transaction included a genuine purchase of the shares for £185,034 and a genuine sale of the same shares for £9,387. The taxpayer company said that that was the end of the matter. To look at the transaction as a whole would be to commit the heresy condemned by Lord Tomlin in *IRC v Duke of Westminster* [1936] AC 1 at 19, [1935] All ER Rep 259 at 267 as the 'doctrine that the Court may ignore the legal position and regard what is called "the substance of the matter" '. At first, the Revenue agreed. Its attack on the scheme concentrated on whether the counter-balancing gain really was outside the charge to tax. In the House of Lords, however, Mr Millett QC argued that no loss within the meaning of the Finance Act 1965 had accrued at all. The House accepted the argument. Lord Wilberforce said (the *Ramsay* case [1981] 1 All ER 865 at 871, [1982] AC 300 at 323) that while Lord Tomlin's statement was a 'cardinal principle', it did not require a court to 'look at a document or a transaction in blinkers'. The capital gains tax was—

> '... a tax on gains (or, I might have added, gains less losses), it is not a tax on arithmetical differences. To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, *is not such a loss (or gain) as the legislation is dealing with* is in my opinion well, and indeed essentially, within the judicial function.' (See [1981] 1 All ER 865 at 873, [1982] AC 300 at 326; my emphasis.)

[32] My Lords, it is worth pausing at this point to examine the characteristically compressed reasoning in a little more detail. A loss which arises at one stage of an indivisible process and cancelled out at a later stage of the same process is 'not such a loss ... as the legislation is dealing with'. The tax was not imposed 'on arithmetical differences'. In that case, what kind of loss was the legislation dealing with? The contrast being made throughout Lord Wilberforce's speech is between juristic or arithmetical realities on the one hand and commercial realities on the other. He is construing the words 'disposal' and 'loss' to refer to commercial concepts which are not necessarily confined by the categories of juristic analysis. In the *Ramsay* case, a director, or an accountant concerned to present a true and fair view of the taxpayer company's dealings, would not have said that the company had entered into a transaction giving rise to a loss which happened to have been offset by a corresponding gain. There had never been any commercial possibility that the transactions would not have cancelled each other out. Therefore, notwithstanding the juristic independence of each of the stages of the circular transaction, the commercial view would have been to lump them all together, as the parties themselves intended, and describe them as a composite transaction which had no financial consequences. The innovation in the *Ramsay* case was to give the statutory concepts of 'disposal' and 'loss' a commercial meaning. The new principle of construction was a recognition that the statutory language was intended to refer to commercial concepts, so that in the case of a concept such as a 'disposal', the court was required to take a view of the facts which transcended the juristic individuality of the various parts of a preplanned series of transactions.

Commercial concepts in tax legislation

[33] There is nothing new about terms used in tax legislation (or, for that matter, any legislation) being construed as referring to business or commercial concepts

which may not be capable of being held within the confines of purely juristic analysis. A good example is the term 'profits or gains of the year of assessment' which forms the basis of the charge to tax under Case I of Sch D (see s 60 of the 1988 Act). In *Sun Insurance Office v Clark (Surveyor of Taxes)* [1912] AC 443 at 455, [1911–13] All ER Rep 495 at 499, Viscount Haldane said: 'It is plain that the question of what is or is not profit or gain must primarily be one of fact, and of fact to be ascertained by the tests applied in ordinary business.'

[34] It is thus the statute itself which applies the tests of ordinary business. And for present purposes, the significant feature of applying a test of ordinary business is that it may require an aggregation of transactions which transcends their juristic individuality. In *Southern Railway of Peru Ltd v Owen (Inspector of Taxes)* [1956] 2 All ER 728, [1957] AC 334 the question was whether, in calculating its profits or gains for a year of assessment, a company could make a provision for severance pay contingently payable to its employees. The Revenue argued that each contract of employment had to be separately examined and no liability could be taken into account unless it had fallen due. Lord Radcliffe rejected this approach:

> 'The answer to the question what can, or cannot, be admitted into the annual account is not provided by any exact analysis of the legal form of the relevant obligation. In this case, as in *Sun Insurance Office* v. *Clark (Surveyor of Taxes)* ([1912] AC 443, [1911–13] All ER Rep 495), you get into a world of unreality if you try to solve your problem in that way, because where you are dealing with a number of similar obligations that arise from trading, although it may be true to say of each separate one that it may never mature, it is the sum of the obligations that matters to the trader, and experience may show that, while each remains uncertain, the aggregate can be fixed with some precision.' (See [1956] 2 All ER 728 at 738–739, [1957] AC 334 at 357.)

[35] My Lords, it seems to me that what Lord Wilberforce was doing in the *Ramsay* case was no more (but certainly no less) than to treat the statutory words 'loss' and 'disposal' as referring to commercial concepts to which a juristic analysis of the transaction, treating each step as autonomous and independent, might not be determinative. What was fresh and new about the *Ramsay* case was the realisation that such an approach need not be confined to well-recognised accounting concepts such as profit and loss but could be the appropriate construction of other taxation concepts as well.

The American doctrine

[36] Lord Wilberforce, while cautioning against a facile transposition of American decisions on different statutes, approved the approach of Judge Learned Hand in one of his many judgments dealing with tax avoidance schemes (see *Gilbert v Comr of Internal Revenue* (1957) 248 F 2d 399). Perhaps the seminal judgment was in *Helvering (Comr of Internal Revenue) v Gregory* (1934) 69 F 2d 809, affirmed (1935) 293 US 465, which concerned a scheme of great simplicity. The taxpayer was a stockholder in a corporation which held some shares which she wished to realise without paying tax on the gains. Instead of having the corporation sell the shares directly to the buyer, she caused it to incorporate a subsidiary and exchange the shares for an allotment of shares in the subsidiary. The subsidiary was put into liquidation and distributed the shares to the stockholder as a dividend. She then sold them to the buyer. She claimed that the exchange of shares fell within the tax exemption for a 'reorganization' of capital. On the other hand, the exchange was

real enough to constitute a realisation of the gain, so that no further gain was realised on the distribution to her. In the Court of Appeals (Second Circuit) Judge Learned Hand said that the transfer to the subsidiary did not fall within the terms of the statutory exemption:

> '... we cannot treat as inoperative the transfer of ... shares by [A] [or] the issue of shares by [B] of its own shares ... [B] had a juristic personality ... All these steps were real, and, *their only defect was that they were not what the statute means.*' (See (1934) 69 F 2d 809 at 811; my emphasis.)

[37] What, in that case, did the statute mean? The Supreme Court of the United States affirmed the decision in a single judgment delivered by Sutherland J 'Reorganization', he said, meant a reorganisation of the business of a corporation, having some business purpose. An exemption from tax could not be construed as applicable to a transaction with no business purpose except to obtain the exemption from tax.

IRC v Duke of Westminster

[38] In the *Ramsay* case both Lord Wilberforce and Lord Fraser of Tullybelton, who gave the other principal speech, were careful to stress that the House was not departing from the principle in *IRC v Duke of Westminster* [1936] AC 1, [1935] All ER Rep 259. There has nevertheless been a good deal of discussion about how the two cases are to be reconciled. How, if the various juristically discrete acquisitions and disposals which made up the scheme were genuine, could the House collapse them into a composite self-cancelling transaction without being guilty of ignoring the legal position and looking at the substance of the matter?

[39] My Lords, I venture to suggest that some of the difficulty which may have been felt in reconciling the *Ramsay* case with the *Duke of Westminster*'s case arises out of an ambiguity in Lord Tomlin's statement that the courts cannot ignore 'the legal position' and have regard to 'the substance of the matter'. If 'the legal position' is that the tax is imposed by reference to a legally defined concept, such as stamp duty payable on a document which constitutes a conveyance on sale, the court cannot tax a transaction which uses no such document on the ground that it achieves the same economic effect. On the other hand, if the legal position is that tax is imposed by reference to a commercial concept, then to have regard to the business 'substance' of the matter is not to ignore the legal position but to give effect to it.

The real world

[40] The speeches in the *Ramsay* case and subsequent cases contain numerous references to the 'real' nature of the transaction and to what happens in 'the real world'. These expressions are illuminating in their context, but you have to be careful about the sense in which they are being used. Otherwise you land in all kinds of unnecessary philosophical difficulties about the nature of reality and, in particular, about how a transaction can be said not to be a 'sham' and yet be 'disregarded' for the purpose of deciding what happened in 'the real world'. The point to hold on to is that something may be real for one purpose but not for another. When people speak of something being a 'real' something, they mean that it falls within some concept which they have in mind, by contrast with something else which might have been thought to do so, but does not. When an economist says that real incomes have fallen, he is not intending to contrast real incomes with imaginary incomes. The contrast is specifically between incomes

which have been adjusted for inflation and those which have not. In order to know what he means by 'real', one must first identify the concept (inflation adjustment) by reference to which he is using the word.

[41] Thus in saying that the transactions in the *Ramsay* case were not sham transactions, one is accepting the juristic categorisation of the transactions as individual and discrete and saying that each of them involved no pretence. They were intended to do precisely what they purported to do. They had a legal reality. But in saying that they did not constitute a 'real' disposal giving rise to a 'real' loss, one is rejecting the juristic categorisation as not being necessarily determinative for the purposes of the statutory concepts of 'disposal' and 'loss' as properly interpreted. The contrast here is with a commercial meaning of these concepts. And in saying that the income tax legislation was intended to operate 'in the real world', one is again referring to the commercial context which should influence the construction of the concepts used by Parliament.

IRC v Burmah Oil Co Ltd

[42] There is no doubt that the *Ramsay* case was widely regarded as some form of judicial legislation and the concerns of taxpayers about its true scope of and its relationship with the *Duke of Westminster*'s case were not set at rest by what some regarded as the proclamation of a revolutionary credo by Lord Diplock in *IRC v Burmah Oil Co Ltd* [1982] STC 30 at 32–33:

> 'It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume, that *Ramsay*'s case did not mark a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transaction (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable ... [T]he approach to tax avoidance schemes of this character sanctioned by *Ramsay (W T Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300) entitles your Lordships to ignore the intermediate circular book entries and to look at the end result ...'

[43] The *Burmah Oil* case also concerned the question of whether the company had suffered a loss for the purposes of capital gains tax. As in the *Ramsay* case, it had produced a loss by a circular series of transactions which had no business purpose. A subsidiary owed it a substantial sum which it could not repay. As a bad debt on capital account, this would not have been an allowable loss. Burmah therefore invested the same amount in shares in the subsidiary, which used the money to repay the debt and then went into liquidation. Burmah recovered nothing on its share investment and claimed that it had thereby suffered a loss. The House of Lords held that this was not a loss caused by a disposal within the meaning of the 1965 Act. The transaction left Burmah no worse off than it had been before and merely purported to convert a bad debt into an allowable loss.

[44] My Lords, in retrospect the *Burmah Oil* case is an entirely straightforward application of the construction which the *Ramsay* case gave to the concept of a disposal giving rise to a loss in the capital gains tax legislation, namely that it meant a loss in commercial terms and not a series of preplanned transactions which had no business purpose. From this construction it followed that, as Lord Diplock said, the House would 'ignore the intermediate circular book entries and ... look at the end result'. Lord Diplock would have been the first to acknowledge

that his remarks should be read in context. To 'ignore' the intermediate stages of the transaction and look at the end result is something which follows logically from the decision to construe 'disposal' and 'loss' in a commercial sense which transcends the individuality of the 'book entries'. It is that decision, to give the statutory language such a construction, which I would regard as 'the *Ramsay* principle'. But I think that there may have been a tendency to construe Lord Diplock's statement of the consequences of applying the *Ramsay* principle to the particular provisions with which the House was concerned as if it were itself a general principle, applicable to all tax legislation. Of course such a construction could also be applied to other provisions of the taxing Acts, but this would depend upon their language and purpose. At any rate, the generalising tendency which I have described seems to me the most likely explanation of the proposition which Mr McCall has claimed to be the *Ramsay* principle in this appeal.

Furniss (Inspector of Taxes) v Dawson

[45] My Lords, in *Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530, [1984] AC 474 the *Ramsay* construction, which in the *Ramsay* case itself and the *Burmah Oil* case had been used to interpret the concept of a disposal giving rise to a loss, was deployed for a different purpose. The difference is occasionally described by saying that whereas the *Ramsay* case was a circular transaction, *Furniss'* case was a linear transaction. The difference can conveniently be encapsulated in these metaphors, but I think it is more illuminating to concentrate on the question which the legislation required the House to answer. To explain what this was, it is first necessary to give a brief account of the facts. The Dawsons wanted to sell their shares in the family business to a company called Wood Bastow Holdings Ltd. But they wanted to postpone the payment of capital gains tax. So they formed an Isle of Man company (Greenjacket) and exchanged their shares in the company owning the business for an allotment of shares in Greenjacket. The advantage of this transaction was that by para 6 of Sch 7 to the 1965 Act, a disposal of shares to Greenjacket in exchange for an allotment of its shares was treated as a reorganisation of share capital and by para 4 of the same Schedule a disposal of shares forming part of a reorganisation was not treated as a disposal for the purposes of capital gains tax. By a preplanned transaction, Greenjacket then sold the shares to Wood Bastow for cash. But the Revenue claimed that there had been no 'real' disposal to Greenjacket. It was merely a preplanned stage in a disposal from the Dawsons to Wood Bastow and fell outside the exception for a reorganisation of share capital.

[46] Thus, while the question in the *Ramsay* case had been whether there was a disposal giving rise to a loss, the question in *Furniss'* case was whether the disposal had been to one person rather than another. But the House decided that the *Ramsay* construction, involving, as I have said, a commercial characterisation of the relevant concept, could be equally applied to the latter question. Greenjacket was merely an artificially introduced intermediate party which was never intended to own the shares for more than an instant. Commercially, therefore, the transaction was a transfer by the Dawsons to Wood Bastow in exchange for a payment to Greenjacket. In answering the statutory question: 'To whom was the disposal made?' the fact that the shares were routed through Greenjacket was irrelevant.

[47] The consequence of adopting this construction was spelled out by Lord Brightman (*Furniss'* case [1984] 1 All ER 530 at 543, [1984] AC 474 at 527) in a passage which paraphrased what Lord Diplock had said in the *Burmah Oil* case and has

since been quoted many times. He stated the conditions under which the commercial nature of the transaction as a whole would transcend the juristic individuality of its parts: a

> 'First, there must be a preordained series of transactions, or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i e business) end. The composite transaction does, in the instant case: it achieved a sale of the shares in the operating companies by [the taxpayer] to Wood Bastow. It did not in *Ramsay*. Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax, not "no business *effect*". If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.' (Lord Brightman's emphasis.) b c

[48] My Lords, this statement is a careful and accurate summary of the effect which the *Ramsay* construction of a statutory concept has upon the way the courts will decide whether a transaction falls within that concept or not. If the statutory language is construed as referring to a commercial concept, then it follows that steps which have no commercial purpose but which have been artificially inserted for tax purposes into a composite transaction will not affect the answer to the statutory question. When Lord Brightman said that the inserted steps are to be 'disregarded for fiscal purposes', I think that he meant that they should be disregarded for the purpose of applying the relevant fiscal concept. In *Furniss'* case, this was the concept of a disposal by one person to another. For that purpose, and for that purpose only, the disposal to Greenjacket was disregarded. But that does not mean that it was treated, even for tax purposes, as if it had never happened. The payment by Wood Bastow was undoubtedly to Greenjacket and so far as this might be relevant for tax or any other purposes, it could not be disregarded. d e f

[49] For present purposes, however, the point I wish to emphasise is that Lord Brightman's formulation in *Furniss'* case, like Lord Diplock's formulation in the *Burmah Oil* case, is not a principle of construction. It is a statement of the consequences of giving a commercial construction to a fiscal concept. Before one can apply Lord Brightman's words, it is first necessary to construe the statutory language and decide that it refers to a concept which Parliament intended to be given a commercial meaning capable of transcending the juristic individuality of its component parts. But there are many terms in tax legislation which cannot be construed in this way. They refer to purely legal concepts which have no broader commercial meaning. In such cases, the *Ramsay* principle can have no application. It is necessary to make this point because, in the first flush of victory after the *Ramsay* case, the *Burmah Oil* case and *Furniss'* case, there was a tendency on the part of the Revenue to treat Lord Brightman's words as if they were a broad spectrum antibiotic which killed off all tax avoidance schemes, whatever the tax and whatever the relevant statutory provisions. g h j

[50] The distinction between commercial and legal concepts has also been drawn in other areas of legislation. So, for example, the term 'financial assistance' in s 151 of the Companies Act 1985 has been construed as a commercial concept, involving an inquiry into the commercial realities of the transaction (see *Burton v Palmer* [1980] 2 NSWLR 878 at 889–890, *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* [1986] BCLC 1). But the same is not necessarily true of other

terms used in the same section, such as 'indemnity'. As Aldous LJ said in *British and Commonwealth Holdings plc v Barclays Bank plc* [1996] 1 All ER 381 at 395, [1996] 1 WLR 1 at 14:

> 'It was submitted that as the words "financial assistance" had no technical meaning and their frame of reference was the language of ordinary commerce, the word "indemnity" should be similarly construed. The fallacy in that submission is clear. The words "financial assistance" are not words which have any recognised legal significance whereas the word "indemnity" does. It is used in the section as one of a number of words having a recognised legal meaning.'

I would only add by way of caution that although a word may have a 'recognised legal meaning', the legislative context may show that it is in fact being used to refer to a broader commercial concept.

IRC v McGuckian

[51] In *IRC v McGuckian* [1997] 3 All ER 817, [1997] 1 WLR 991 a Republic of Ireland company called Ballinamore had substantial distributable reserves. The shareholders, Mr and Mrs McGuckian, wanted to receive this money but not to pay income tax on the dividend. So they entered into a scheme by which they first transferred their shares to an offshore trustee called Shurltrust. By a series of preplanned transactions, it then assigned the right to receive the dividend to a United Kingdom company called Mallardchoice in consideration of the payment of a sum equal to 99% of the expected dividend. Ballinamore then declared the dividend and paid it to Mallardchoice, which immediately paid 99% to Shurltrust.

[52] The statutory question was whether Shurltrust had received income or capital. If it was income, the effect of various tax avoidance provisions concerning the transfer of assets abroad was that the payment would be deemed to be income of the McGuckians. If it was capital, the McGuckians would not be liable for tax. The McGuckians said that if Shurltrust had simply received the dividend, it would of course have been income. But Shurltrust did not receive the dividend. It received a payment from Mallardchoice which was a capital payment for an assignment of its right to income.

[53] The Revenue's argument, relying upon the formulation in *Furniss'* case, was that the assignment should be disregarded. The Northern Ireland Court of Appeal ([1994] STC 88) said (not, if I may respectfully say so, without justification) that one could not simply 'disregard' the assignment. The payment of the money by Mallardchoice to Shurltrust was the consideration for the assignment and an integral part of that transaction. If the assignment had to be disregarded, one could not explain how Shurltrust had received any money at all.

[54] It seems to me that the Crown caused unnecessary difficulties for itself in *IRC v McGuckian* by failing to notice that the question was different from that in *Furniss'* case and therefore did not necessarily respond to precisely the same analysis. In *Furniss'* case the question was the identity of the disponee. In *IRC v McGuckian* it was the nature of the payment received by Shurltrust—capital or income? In the former case, it is reasonable to speak of the middle stage of a chain of disposals being 'disregarded'. In the latter case, it makes much less sense. The question was not whether the assignment should be disregarded but whether, from a commercial point of view, it amounted to an exchange of income for capital. Such exchanges usually have a commercial reality: the purchase or sale of an annuity, for example, is an exchange of capital for an income stream, involving a transfer of risk. But the transaction in *IRC v McGuckian* was nothing

more than an attempt to re-label a sum of money. The fact that the assignment had no commercial purpose did not mean that it had to be disregarded. But it failed to perform the alchemy of transforming the receipt of a dividend from the company into the receipt of a capital sum from someone else. For the purpose of the fiscal concept at stake, namely the character of the receipt as income derived from the company, it made no difference.

[55] My Lords, I think that it was for these reasons that their Lordships in *IRC v McGuckian* went back to Lord Wilberforce's analysis in the *Ramsay* case and tried to identify the principle of construction in play. Lord Steyn said ([1997] 3 All ER 817 at 825, [1997] 1 WLR 991 at 1000) that the decision marked a shift away from literalism to a 'broad purposive interpretation' and from 'formalistic insistence on examining steps in a composite scheme separately' to 'a more realistic legal analysis'. Lord Cooke of Thorndon suggested that it was—

> 'an application to taxing Acts of the general approach to statutory interpretation whereby, in determining the natural meaning of particular expressions in their context, weight is given to the purpose and spirit of the legislation.' (See [1997] 3 All ER 817 at 829–830, [1997] 1 WLR 991 at 1005.)

[56] My Lords, these are valuable insights and I respectfully suggest that particular attention should be paid to the way Lord Cooke dealt with the criteria stated by Lord Brightman in *Furniss'* case:

> '... Lord Brightman spoke of certain limitations (a preordained series of transactions including steps with no commercial or business purpose apart from the avoidance of a liability to tax). The present case does fall within these limitations, but it may be as well to add that, if the ultimate question is always the true bearing of a particular taxing provision on a particular set of facts, the limitations cannot be universals. Always one must go back to the discernible intent of the taxing Act. I suspect that advisers of those bent on tax avoidance ... do not always pay sufficient heed to the theme in the speeches in *Furniss'* case ... to the effect that the journey's end may not yet have been found.' (See [1997] 3 All ER 817 at 830, [1997] 1 WLR 991 at 1005.)

[57] I would only add that it is not only tax avoiders who may not pay sufficient heed to the necessity of concentrating on the application of the particular taxing provision to the particular facts. The Revenue sometimes also fails to do so. The journey's end may be different because the journey itself is not the same.

The limits of the Ramsay case

[58] The limitations of the *Ramsay* principle therefore arise out of the paramount necessity of giving effect to the statutory language. One cannot elide the first and fundamental step in the process of construction, namely to identify the concept to which the statute refers. I readily accept that many expressions used in tax legislation (and not only in tax legislation) can be construed as referring to commercial concepts and that the courts are today readier to give them such a construction than they were before the *Ramsay* case. But that is not always the case. Taxing statutes often refer to purely legal concepts. They use expressions of which a commercial man, asked what they meant, would say 'You had better ask a lawyer'. For example, stamp duty is payable upon a 'conveyance or transfer on sale' (see para 1(1) of Sch 13 to the Finance Act 1999). Although slightly expanded by a definition in para 1(2), the statutory language defines the document subject to duty essentially by reference to external legal concepts such as 'conveyance'

and 'sale'. If a transaction falls within the legal description, it makes no difference that it has no business purpose. Having a business purpose is not part of the relevant concept. If the 'disregarded' steps in *Furniss'* case had involved the use of documents of a legal description which attracted stamp duty, duty would have been payable.

[59] Even if a statutory expression refers to a business or economic concept, one cannot disregard a transaction which comes within the statutory language, construed in the correct commercial sense, simply on the ground that it was entered into solely for tax reasons. Business concepts have their boundaries no less than legal ones. Thus in two of the cases considered in *Craven (Inspector of Taxes) v White, IRC v Bowater Property Developments Ltd, Baylis (Inspector of Taxes) v Gregory* [1988] 3 All ER 495, [1989] AC 398 the House was unanimously of the view that although there had been an initial disposal with no commercial purpose, except to lay the ground for an avoidance of tax if and when there should be a further disposal to a third party, the transactions were so separate in fact as well as in law as to make it impossible to treat them, even in a commercial sense, as a single disposal to the third party. The lapse of time between the two transactions, the lack of contemplation of any specific later disposal at the time of the first transaction, were commercial realities. The division of opinion in the House over how the third transaction should be categorised did not detract from the agreement that it had to fall within the statutory language.

[60] Likewise the use of business concepts like 'income' and 'capital' may give the taxpayer a choice of structuring a commercial transaction so as to come within one concept or the other. As Lord Greene MR said in a celebrated passage in *IRC v Wesleyan and General Assurance Society* [1946] 2 All ER 749 at 751:

> 'In dealing with income tax questions it frequently happens that there are two methods at least of achieving a particular financial result. If one of those methods is adopted, tax will be payable. If the other method is adopted, tax will not be payable. It is sufficient to refer to the common case where property is sold for a lump sum payable by instalments. If a piece of property is sold for £1,000 and the purchase price is to be paid in ten instalments of £100 each, no tax is payable. If, on the other hand, the property is sold in consideration of an annuity of £100 a year for ten years, tax is payable. The net result, from the financial point of view, is precisely the same in each case, but one method of achieving it attracts tax and the other method does not.'

[61] It follows that a transaction which, for the avoidance of tax, has been structured to produce, say, capital, and does produce capital in the ordinary commercial sense of that concept (unlike the payment in *IRC v McGuckian*) cannot be 'recharacterised' as producing income (see *Comr of Inland Revenue v Wattie* [1998] STC 1160, [1999] 1 WLR 873).

Tax mitigation and tax avoidance

[62] My Lords, it has occasionally been said that the boundary of the *Ramsay* principle can be defined by asking whether the taxpayer's actions constituted (acceptable) tax mitigation or (unacceptable) tax avoidance. In *IRC v Willoughby* [1997] 4 All ER 65 at 73, [1997] 1 WLR 1071 at 1079 Lord Nolan described the concept of tax avoidance as 'elusive'. In that case, the House had to grapple with what it meant, or at any rate what its 'hallmark' was, because the statute expressly provided that certain provisions should not apply if the taxpayer could show that he had not acted with 'the purpose of avoiding liability to taxation'.

The same question arises on the interpretation of the anti-avoidance provisions to which Lord Cooke referred in *IRC v McGuckian* [1997] 3 All ER 817 at 830, [1997] 1 WLR 991 at 1005. But when the statutory provisions do not contain words like 'avoidance' or 'mitigation', I do not think that it helps to introduce them. The fact that steps taken for the avoidance of tax are acceptable or unacceptable is the conclusion at which one arrives by applying the statutory language to the facts of the case. It is not a test for deciding whether it applies or not. If I may be allowed to repeat what I said in *Norglen Ltd (in liq) v Reeds Rains Prudential Ltd, Circuit Systems Ltd (in liq) v Zuken-Redac (UK) Ltd* [1998] 1 All ER 218 at 226, [1999] 2 AC 1 at 13–14:

> 'If the question is whether a given transaction is such as to attract a statutory benefit, such as a grant or assistance like legal aid, or a statutory burden, such as income tax, I do not think that it promotes clarity of thought to use terms like stratagem or device. The question is simply whether upon its true construction, the statute applies to the transaction. Tax avoidance schemes are perhaps the best example. They either work (*IRC v Duke of Westminster* [1936] AC 1, [1935] All ER Rep 259) or they do not (*Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530, [1984] AC 474). If they do not work, the reason, as my noble and learned friend Lord Steyn pointed out in *IRC v McGuckian* [1997] 3 All ER 817 at 825, [1997] 1 WLR 991 at 1000, is simply that upon the true construction of the statute, the transaction which was designed to avoid the charge to tax actually comes within it. It is not that the statute has a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes.'

The present case: the appeal to Carnwath J

[63] My Lords, after what I fear was a lengthy analysis of the *Ramsay* principle I return to the present appeal. Carnwath J ([1997] STC 1103), who allowed an appeal from the Special Commissioners (D A Shirley and T H K Everett in [1997] STC (SCD) 69), said that the case was very much like the *Burmah Oil* case. In that case, the transaction left Burmah no worse off than it had been before and merely purported to convert a bad debt into an allowable loss. Similarly in this case, said Carnwath J, the transaction made no difference to the scheme or WIL but merely purported to convert an unpaid interest debt into a payment which could be deducted. In so doing, he treated the passage in the speech of Lord Diplock which I have already quoted (and the similar passage in the speech of Lord Brightman in *Furniss'* case) as being of general application, irrespective of the nature of the concept to which the statute refers.

[64] My Lords, I can see that one could read these passages in such broad terms. But I do not think that it would be consistent with treating the *Ramsay* case as a principle of construction. In my opinion, what the *Burmah Oil* case decided was that the statutory concept of a loss accruing upon a disposal has a business meaning and that the 'disposal' and 'loss' suffered by Burmah did not fall within it. To apply this reasoning to the present case, it would be necessary to construe the concept of payment in s 338 of the 1988 Act as having some business meaning other than the simple discharge of a debt. Otherwise one is not giving effect to the statutory language.

The Court of Appeal

[65] The Court of Appeal unanimously (Peter Gibson, Pill and Mummery LJJ) allowed the appeal ([1998] STC 1131). Peter Gibson LJ said (at 1144) that the question of whether the interest in this case had been 'paid' could not be solved by using the same technique as had been used to decide whether there had been a 'loss' in the *Burmah Oil* case:

> 'In other areas where fiscal legislation has provided for payment as an act significant for tax purposes and payment, within the meaning which the law would ordinarily give to it, has occurred, the courts have been reluctant to accept that the *Ramsay* principle required the fact of payment to be ignored ...'

[66] He referred to *Cairns v MacDiarmid (Inspector of Taxes)* [1982] STC 226 at 242 and *Customs and Excise Comrs v Faith Construction Ltd* [1989] 2 All ER 938, [1990] 1 QB 905. I shall return to these cases later. Peter Gibson LJ said there was nothing in the 1988 Act to suggest that 'paid' should be construed to mean anything more than that the interest obligation had been discharged, wherever the money had come from. Pill LJ delivered a concurring judgment and Mummery LJ agreed.

The concept of payment

[67] My Lords, payment of a debt such as interest ordinarily means an act, such as the transfer of money, which discharges the debt. It is accepted that in this case the interest debt was indeed discharged. So why did this not count as payment for the purposes of the 1988 Act? One of the difficulties which I have with the argument for the Crown is that I find the alternative concept of payment for which it contends completely elusive. It is easy to understand a commercial sense of a loss which treats as irrelevant the fact that one part of a composite transaction produced a loss which was never intended to be more than momentary and theoretical. But what is the commercial concept of payment of a debt which treats as irrelevant the fact that the debt has been discharged? Mr McCall does not contend that payment must involve a negative cash flow which is not compensated by a cash flow in the opposite direction. He accepts, for example, that many commercial refinancing operations discharge old debts and create new ones without any cash flow either way. Nor is there any apparent policy to be found in s 338 of the 1988 Act which would require a negative cash flow. Otherwise, why should bank interest be deductible without any payment at all? As I have already said, the only apparent reason for the insistence on payment of yearly interest is that payment gives rise to an obligation to deduct tax. In the present case, WIL complied with that obligation. The Crown's real complaint is that the scheme, as an exempt fund, was able to reclaim the tax. But this cannot be remedied by giving the word 'paid' a different meaning in the case of a payment to an exempt lender. The word must mean the same, whatever the status of the lender.

[68] What the Crown finds objectionable is the circularity of the cash flow combined with the fact that the transaction took place entirely for tax purposes. And I accept that for the purposes of some concepts used in tax legislation, these two features would stamp the transaction as something different from that contemplated by the legislature. For example, I have no doubt that Langley J was right when he recently decided in *NMB Holdings Ltd v Secretary of State for Social Security* (2000) Times, 10 October that a payment of bonuses to directors in the form of platinum sponge held in a bank, accompanied by arrangements under

which they could immediately sell it for cash to the bank, was not a 'payment in kind' which fell to be disregarded for the purpose of national insurance contributions. In commercial terms the directors were paid in money. It is obvious that such a transaction was not what the Social Security (Contributions) Regulations 1979, SI 1979/591 contemplated as a payment in kind. But there can be equally little doubt that the bonuses were 'paid' and, in the absence of some contrary context, I can see no reason not to treat them as paid when the directors were credited with platinum sponge and the employer's obligation to pay them was discharged.

The authorities

[69] My Lords, like Peter Gibson LJ in the Court of Appeal, I think that WIL's case is supported by the authorities in which the concept of payment in a tax case has been considered. *Cairns'* case concerned an artificial scheme in which the taxpayer (Mr Cairns) claimed to have paid £5,000 'annual interest' on a loan of £37,740 from his employer, Rossminster. The loan was in fact intended to last no more than four days. Mr Cairns gave Rossminster a cheque for £5,000 in exchange for its cheque for £37,740. Nourse J and the Court of Appeal ([1983] STC 178) held that the payment was not 'annual interest' within the meaning of s 75(1) of the Finance Act 1972. But the Crown also raised before Nourse J the question of whether the £5,000 could be said to have been 'paid'. He said (at 242):

> 'It is accepted by the Crown that the agreement between the taxpayer and Rossminster was not a sham, but a genuine transaction having the legal effect which it was expressed to have. On that footing I cannot see that the taxpayer ceased to "pay" the £5,000 merely because he did so conditionally on receiving the £37,740 in exchange. If counsel for the Crown's argument was correct it might have surprising results in its application to other genuine transactions. For example, there must be many loans where interest is payable in advance and where there is either, as there was in this case, an exchange of cheques or, perhaps more frequently, a payment by the lender to the borrower of a net amount representing principal less the first instalment of interest. It would be very strange if in either of those cases there was not a payment of interest for the purposes of s 75(1), and to say that there was not would in my judgment attach to the word "pays" a significance which in the context it cannot possibly bear.'

The other case to which Peter Gibson LJ referred was the *Faith Construction* case. The question there was whether builders had received a 'payment' in respect of a supply of services within the meaning of s 5(1) of the Value Added Tax Act 1983. That section provided that a supply of services was deemed to take place when the supplier received payment in respect of it. The facts were that in early 1984 a building company had entered into an agreement to erect a building but had not yet begun work. It was then announced in the March budget that with effect from 1 June 1984 the rate of value added tax (VAT) on building services would be increased from zero to the standard rate. To avoid payment of VAT, the customer paid the builder in advance. The builder then lent the money back to the customer on terms that it would be repayable only against architect's certificates for work done. The Commissioners of Customs and Excise, relying on the *Ramsay* case, argued that there had been no payment within the meaning of the 1983 Act or that if it had been, it was for the purposes of tax avoidance and should be 'disregarded'. The Court of Appeal said that there was no reason to construe 'payment' in s 5(1) as meaning anything other than payment in discharge of the

customer's obligation to pay for the services. Properly analysed, that obligation had been discharged and replaced by an obligation to repay money lent. Bingham LJ said:

> 'If we were entitled to disregard the legal effect of what was done here and give effect to the underlying substance, it might be possible to say that these payments were not really payments because they were made for the purpose of avoiding value added tax and without any (or any other) commercial justification. But that is an approach which Lord Tomlin's well-known speech in *IRC v Duke of Westminster* ([1936] AC 1 at 19–21, [1935] All ER Rep 259 at 267–268) roundly condemned where the transaction in question is genuine and I do not understand the principle there laid down, described as "cardinal" by Lord Wilberforce in *W T Ramsay Ltd v IRC* (*W T Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865 at 871, [1982] AC 300 at 323), to have been diluted or abrogated by later decisions. If the payments are to be disregarded the Crown would, I think, have to show them to be a sham, and this it has not sought to do. If, as I have concluded, these were in law good contractual payments, then I do not think we are entitled to disregard their legal effect and treat them as something else.' (See [1989] 2 All ER 938 at 946, [1990] 1 QB 905 at 921.)

In other words, Bingham LJ was saying that 'payment' in s 5(1) of the 1988 Act was a legal concept and did not have some other commercial meaning. In my opinion the same is true of 'paid' in s 338 of the 1988 Act.

Specific tax avoidance provisions

[70] The Revenue rely in the alternative upon three provisions which they say nullify the effect of the payment of interest. On all three I am in full agreement with the Court of Appeal and can therefore be very brief.

(a) Section 338(5)(a) of the 1988 Act

[71] This provides that a payment of interest under s 338(3) of the 1988 Act shall not be treated as a charge on income if it is 'not ultimately borne by the company'. There appears to be no case in which the meaning of this provision has been considered. It seems to contemplate some arrangement by which the burden of the interest payment is transferred to someone else. But there was no such arrangement in this case. The burden of the interest payment never shifted from WIL. The Revenue submits that there was no burden because the interest payment was cancelled by the loan. This amounts to collapsing the two transactions and treating the interest as never having been paid at all. But this would be contrary to the findings of fact. Once it is accepted that the interest was paid, it seems to me that the burden of payment could only have been borne by WIL.

(b) Section 75(3) of the 1988 Act

[72] This provides that charges on income in a given accounting period can be carried forward to succeeding accounting periods only if they were paid 'wholly and exclusively for purposes of the company's business'. The Revenue says that the interest payments were not paid for the purposes of the company's business but to make it more attractive to a purchaser. It was conceded that the loans upon which the interest was payable had been borrowed wholly and exclusively for the purposes of the company's business. The commissioners said that one did not need to inquire into the purpose for which the taxpayer paid a legitimate debt

which he had incurred for the purposes of his business. It is sufficient that the debt has been so incurred (see *Hyett (Inspector of Taxes) v Lennard* [1940] 3 All ER 133, [1940] 2 KB 180). Like the Court of Appeal, I can see no error in this reasoning.

(c) Section 787(1) of the 1988 Act

[73] This denies relief for payment of interest to a person who has paid pursuant to a scheme—

> 'such that the sole or main benefit that might be expected to accrue to that person from the transaction under which the interest is paid was the obtaining of a reduction in tax liability by means of any such relief.'

[74] The Revenue say that the interest was paid under a transaction from which the sole or main benefit which would accrue to WIL was the obtaining of a reduction in tax liability. Again, I have little to add to what the Court of Appeal said on this point. In my opinion it is plain that the 'transaction under which the interest was paid' is the original loan and not the arrangements which enabled WIL to pay it.

[75] I would dismiss the appeal. For the reasons given by my noble and learned friend Lord Hope of Craighead, I would also dismiss the cross-appeal.

LORD HOPE OF CRAIGHEAD. My Lords,

[76] I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons which he has given I too would dismiss the appeal.

[77] The transaction with which your Lordships are concerned in this case, when taken as a whole, has an odd aspect and it invites careful scrutiny. The movement of funds from the Electricity Supply Pension Scheme (the scheme) to Westmoreland Investments Ltd (WIL), which it owned, as capital and back again to the scheme as interest, was undoubtedly circular. And each step in the transaction was obviously preordained. Its purpose was to create a tax benefit to WIL without any loss to the scheme, which was exempt from income tax. But for the exempt status which the scheme enjoyed, the lender would have had to bear tax on the interest paid to it by WIL. For this reason the capital which WIL was able to obtain from the scheme was unlikely to have been available to it from another source. Nevertheless the question which has to be resolved depends on the meaning of the words used in the statute which are said to allow the deduction. It is one of statutory interpretation. I would approach it without any preconceived notions as to whether this is a case of tax mitigation or of tax avoidance. The only relevant questions are: (1) the question of law: what is the meaning of the words used by the statute? and (2) the question of fact: does the transaction, stripped of any steps that are artificial and should be ignored, fall within the meaning of those words?

[78] Section 338(1) of the Income and Corporation Taxes Act 1988 provides that there shall be allowed as deductions for the relevant accounting period 'any charges on income paid by the company in the accounting period, so far as paid out of the company's profits brought into charge to corporation tax'. Subsection (2)(a) of that section provides that 'charges on income' means for the purposes of corporation tax 'payments' of any description mentioned in sub-s (3). Subsection (3)(a) states that the payments referred to in sub-s (2) include 'any yearly interest'. Those are the provisions on which WIL's claim to an allowable deduction in the end depends. There is no question in this case of the taxpayer company having

to demonstrate that it has sustained a 'loss' or achieved a 'gain' in circumstances where the result of the transaction was to leave it in no different position from that which it was in before. Had that been the question, the issue, as in *W T Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300, would have been whether at the end of the day there was a real loss or a real gain. But those are not the concepts which are used in the statutory provisions that are in issue in this case. They do not depend upon an assessment of the result of the transaction. They depend upon the taxpayer being able to demonstrate that a charge on income has been 'paid' by the company.

[79] The Special Commissioners ([1997] STC (SCD) 69) found as a fact that the loans which were made by the scheme to WIL were real loans. It is clear that, but for the loans, WIL could not have afforded to pay the interest which it owed to the scheme. Nevertheless the fact is that the loans were made and the interest was paid. WIL's claim is therefore based upon transactions which have been found by the commissioners to be genuine. There was no step that falls to be ignored because it was artificial. It cannot be said that there was no business or commercial reason for the interest to be paid. The payment reduced the amount of WIL's accrued liability to pay interest. It was received as interest in the hands of the payee. WIL's obligation to pay interest to that extent was discharged. Nothing was inserted into the transaction to make it appear to be different from what it was. It was a payment of yearly interest which was paid out of the company's profits for the relevant accounting period.

[80] The question that has to be addressed in these circumstances relates, as Lord Steyn said in *IRC v McGuckian* [1997] 3 All ER 817 at 826, [1997] 1 WLR 991 at 1001, to the fiscal effectiveness of the transaction entered into by the taxpayer. The answer to the question is to be found in the words used by the statute. A course of action that was designed to defeat the intention of Parliament would fall to be treated as tax avoidance and dealt with accordingly. But one must discover first what the statute means. The ordinary principles of statutory construction must then be applied to the words used by Parliament which describe the effect of the transaction for tax purposes.

[81] On this approach the case does not seem to me, in the end, to give rise to any real difficulty. The words 'paid' and 'payment' are to be construed according to their ordinary meaning. The question whether a payment has been made is a question of fact. That question has been answered by the findings made by the commissioners. The evidence established to their satisfaction that a loan was in fact made by the scheme to WIL and that WIL used that loan to pay interest to the scheme. The interest was a charge on income because it was a payment of a description mentioned in s 338(3) of the 1988 Act. That point having been established, the rule in s 338(1) determines the fiscal effectiveness of the transaction for the purposes of WIL's liability to corporation tax.

[82] There remains for disposal WIL's cross-appeal. It was directed to WIL's alternative argument that an agreement which it entered into with the inspector of taxes under s 54 of the Taxes Management Act 1970 for the year ended 31 March 1988 determined not only the question what tax was payable in respect of the period covered by the assessment under appeal but also the amount of charges on income which were available for carry forward to subsequent accounting periods. Carnwath J ([1997] STC 1103 at 1133) rejected this argument. In the Court of Appeal ([1998] STC 1131), Peter Gibson LJ (at 1147) said that it was unnecessary in the light of his conclusion on the inapplicability of the *Ramsay* principle for him to deal with it. However, he thought it right to say, having heard full argument

on the point, that in his judgment the judge was plainly right in rejecting the argument for the reasons given by him.

[83] WIL returned to this issue in your Lordships' House. It is not an issue on which WIL need now rely, in view of your Lordships' decision that the appeal must be dismissed. Nevertheless the point was once again fully argued. I should like to make the following observations about it in order to explain briefly why I would dismiss the cross-appeal.

[84] Section 54 of the 1970 Act provides:

> 'Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the Commissioners, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the Commissioners had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.'

[85] In his letter of 29 September 1989, which he wrote under the heading 'Year ended 31 March 1988', the inspector of taxes said:

> 'I have carefully considered the further information and your contentions and I am now prepared to accept your computation. The appeal is therefore determined under section 54 TMA 1970 in the sum of nil profits chargeable to Corporation Tax.'

[86] Mr Milne QC submitted that it was important to bear in mind the context in which this agreement was reached. Section 75 of the 1988 Act required the figure of management expenses and charges on income to be determined for the accounting period in which they were incurred. One of the purposes of this exercise was to identify the amount of the excess to be carried forward to the succeeding accounting period. A determination of the amount of management expenses and charges on income for one accounting period automatically resulted in any excess being treated as expenses of management for the next. It would be absurd if, despite its determination by agreement for one accounting period, that figure had to be relitigated each year. Except in cases of manifest error, both parties to the s 54 agreement should be bound by the agreement that they had made.

[87] The effect of a s 54 agreement is, however, to be found in the words of the statutory provision under which it is made. Section 54 of the 1970 Act states that the like consequences shall ensue for all purposes as would have ensued if the commissioners had determined the appeal. The procedure for appeals forms part of the process which has been laid down by the statute for the assessment and collection of tax. Section 30A of the 1970 Act (as inserted by ss 196, 199 and Sch 19 to the Finance Act 1994) provides that after the notice of assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts. Section 31 of the 1970 Act enables an appeal to be brought against an assessment within 30 days after it was issued to the General Commissioners or the Special Commissioners. Section 46(2) of the 1970 Act has been amended by reg 2(1) and Sch 1 to the General and Special Commissioners (Amendment of Enactments) Regulations 1994, SI 1994/1823.

As so amended it provides that, save as otherwise provided in the Taxes Acts or in regulations under s 56B of the 1970 Act, the determination of the General Commissioners or the Special Commissioners in any proceedings under the Taxes Acts shall be final and conclusive. The effect of s 54 is to attach the same finality to the settling of appeals by agreement under that section as attaches to the determination of the appeal by the General Commissioners or the Special Commissioners.

[88] In *Caffoor (Trustees of the Abdul Gaffoor Trust) v Comr of Income Tax, Colombo* [1961] 2 All ER 436, [1961] AC 584 the Board of Review constituted under the Ceylon Income Tax Ordinance 1932 had decided on an appeal by the appellants in respect of an assessment for the year 1949–1950 that trust income was exempt from income tax on the ground that the trust was of a public character established solely for charitable purposes. When assessments to income tax were again made on the trust for the years 1950–1951 to 1954–1955, it was held that the respondent was not estopped by the decision of the Board of Review from challenging the appellants' claim to exemption for subsequent years. Lord Radcliffe, who delivered the judgment of the Board, said:

> 'The critical thing is that the dispute which alone can be determined by any decision given in the course of these proceedings is limited to one subject only, the amount of the assessable income for the year in which the assessment is challenged. It is only the amount of that assessable income that is concluded by an assessment or by a decision on an appeal against it ... Although, of course, the process of arriving at the necessary decision is likely to involve the consideration of questions of law, turning on the construction of the ordinance or of other statutes or on the general law, and the tribunal will have to form its view on those questions, all these questions have to be treated as collateral or incidental to what is the only issue that is truly submitted to determination ...' (See [1961] 2 All ER 436 at 441, [1961] AC 584 at 598.)

[89] I would apply that reasoning to the present case. The Ceylon Ordinance was closely modelled on the legislation that applies in the United Kingdom. The purpose of an appeal under s 31 of the 1970 Act is to challenge the amount charged to tax by an assessment. The finality that attaches to the determination of the appeal by the General Commissioners or by the Special Commissioners or to the settling of the appeal by agreement relates only to the amount chargeable under that assessment. The question as to the amount of any reliefs carried forward to subsequent periods remains open for examination as the assessment for each subsequent period is issued. This is because the Taxes Acts do not provide any means by which that amount may be determined conclusively, whether by appeal or by agreement, for any period other than that to which the assessment relates.

[90] For these reasons I would hold that an agreement made under s 54 of the 1970 Act has no wider effect upon the position of either party than that which has been provided for by the statute. As Carnwath J ([1997] STC 1103 at 1133) indicated, the issue turns simply and solely upon the machinery which the Taxes Acts provide for determining the amount in question between the commissioners and the taxpayer. That machinery is limited to determining conclusively the amount of tax chargeable for the year of assessment. It does not enable such determinations to be made, either on appeal or by agreement, as to the amounts of tax chargeable in future years.

LORD HUTTON. My Lords,

[91] I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Nicholls of Birkenhead and Lord Hoffmann. I agree that the appeal of the Crown should be dismissed for the reasons which they give, and I add a few observations of my own on the application of the *Ramsay* principle (see *W T Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300) to the present case.

[92] The submission of the Crown is that, applying the *Ramsay* principle, there have been no payments of yearly interest within the meaning of s 338(1) and (3) of the Income and Corporation Taxes Act 1988 because all that has taken place is a preordained artificial circulation of funds, which had no commercial purpose apart from the gaining of a tax advantage. Accordingly the payments should be disregarded and do not constitute payments within the meaning of s 338.

[93] I consider that an essential element of a transaction to which the *Ramsay* principle is applicable is that it should be artificial. The requirement that there must be artificiality, and the importance of distinguishing between the real world and the world of make-belief, between a real gain (or loss) and a contrived and unrealistic gain (or loss), have been stressed in a number of judgments of the House where the application of the *Ramsay* principle has been considered. In his judgment in the *W T Ramsay* case Lord Wilberforce said:

> 'The capital gains tax was created to operate in the real world, not that of make-believe. As I said in *Aberdeen Construction Group Ltd v Inland Revenue Comrs* ([1978] 1 All ER 962 at 996, [1978] AC 885 at 893), it is a tax on gains (or, I might have added, gains less losses), it is not a tax on arithmetical differences.' (See [1981] 1 All ER 865 at 873, [1982] AC 300 at 362.)

In *IRC v Burmah Oil Co Ltd* [1982] STC 30 at 39 Lord Fraser of Tullybelton stated:

> 'If the argument for Burmah is right, this would be one more case in which the taxpayer had achieved the apparently magic result of creating a tax loss that was not a real loss. In my opinion they have not achieved that result because, in the same way as in *Ramsay's* case, when the scheme was carried through to completion there was here no real loss and no loss in the sense contemplated by the legislation.'

The same theme was stated by Lord Goff of Chieveley in *Craven (Inspector of Taxes) v White, IRC v Bowater Property Developments Ltd, Baylis (Inspector of Taxes) v Gregory* [1988] 3 All ER 495 at 530, [1989] AC 398 at 519:

> 'What the courts have established, however, is that certain tax avoidance schemes, although not shams in the sense of not being what they purport to be, are nevertheless unacceptable because they embrace transactions which are not "real" disposals or do not generate "real" losses (or gains) and so are held not to attract certain fiscal consequences which would normally be attached to disposals or losses (or gains) under the relevant statute.'

Lord Goff reiterated this theme in *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] 2 All ER 275 at 295, [1992] 1 AC 655 at 681:

> 'Unacceptable tax avoidance typically involves the creation of complex artificial structures by which, as though by the wave of a magic wand, the taxpayer conjures out of the air a loss, or a gain, or expenditure, or whatever it may be, which otherwise would never have existed. These structures are

> designed to achieve an adventitious tax benefit for the taxpayer, and in truth are no more than raids on the public funds at the expense of the general body of taxpayers, and as such are unacceptable.'

And in his speech in *IRC v McGuckian* [1997] 3 All ER 817 at 823, [1997] 1 WLR 991 at 1005 Lord Browne-Wilkinson laid emphasis on the need to identify artificial steps and said that under the *Ramsay* principle—

> 'the statutory provisions are to be applied to the substance of the transaction, disregarding artificial steps in the composite transaction or series of transactions inserted only for the purpose of seeking to obtain a tax advantage. The question is not what was the effect of the insertion of the artificial steps but what was its purpose. Having identified the artificial steps inserted with that purpose and disregarded them, then what is left is to apply the statutory language of the taxing Act to the transaction carried through, stripped of its artificial steps.'

[94] Therefore I turn to the facts of this case to see whether the Crown can contend that the payments of interest claimed as allowances by Westmoreland Investments Ltd (WIL) are artificial or unreal or conjured out of the air. In my opinion they are not because the obligation undertaken by WIL to pay interest on the sums it had been lent by the scheme trustees was a genuine one which existed in the real world.

[95] The Special Commissioners ([1997] STC (SCD) 69 at 82) found that—

> 'all the loans made to the taxpayer company from 1980 onwards were real loans and the taxpayer company used them for real purposes, viz the discharge of real earlier outstanding loans and the payment of real accrued interest ...'

Therefore by undertaking to pay the interest WIL had incurred the economic burden which Parliament intended should give rise to the allowances given by s 338 of the 1988 Act, and I consider that WIL was entitled to take steps to obtain the advantage which Parliament gave to it in respect of that burden. As Lord Templeman said in the *Ensign Tankers* case ([1992] 2 All ER 275 at 291, [1992] 1 AC 655 at 676), 'the taxpayer is entitled to any reduction in tax which Parliament has attached to each transaction'. This was not a case, as in *IRC v McGuckian*, where a taxpayer was on the point of incurring a tax liability and took an artificial step to avoid the liability: rather this was a case where WIL had incurred a genuine loss for tax purposes and then took a step to enable it to claim the tax allowance for that loss. Accordingly I am in respectful agreement with Peter Gibson LJ that:

> 'In the present case the accrued interest liability was real and always possessed the potentiality of being converted into a charge on income by payment. What occurred was the crystallisation of the tax loss through payment of the accrued interest.' (See [1998] STC 1131 at 1143.)

[96] The fact that in order to pay the accrued interest so as to claim the allowances given by s 338 of the 1988 WIL had to use money lent to it by the trustees of the scheme who had lent it the capital sums on which the interest was to be paid, does not mean, in my opinion, that the payment of the interest was not a genuine payment. In the *Ensign Tankers* case, Millett J stated:

> 'Money raised by borrowing belongs to the borrower; it is as much his money as any other money of his. Expenditure is incurred by the taxpayer whatever the source of the finance with which he intends to meet it.' (See [1989] STC 705 at 769–770, [1989] 1 WLR 1222 at 1241.)

And in *Customs and Excise Comrs v Faith Construction Ltd* [1989] 2 All ER 938 at 946, [1990] 1 QB 905 at 921 Bingham LJ said:

> 'If the payments are to be disregarded the Crown would, I think, have to show them to be a sham, and this it has not sought to do. If, as I have concluded, these were in law good contractual payments, then I do not think we are entitled to disregard their legal effect and treat them as something else.'

[97] Therefore I consider that the payment of interest by WIL was a real payment and not an artificial transaction, and accordingly that the *Ramsay* principle is not applicable to it. Accordingly I would dismiss the appeal.

LORD HOBHOUSE OF WOODBOROUGH.

[98] My Lords, I agree that this appeal should be dismissed for the reasons given by my noble and learned friend Lord Hoffmann.

Appeal dismissed.

Dilys Tausz Barrister.

Levy v Legal Services Commission

COURT OF APPEAL, CIVIL DIVISION
PETER GIBSON, WALLER AND JONATHAN PARKER LJJ
31 OCTOBER, 10 NOVEMBER 2000

Family proceedings – Orders in family proceedings – Costs orders – Whether order for costs in family proceedings a provable debt in bankruptcy – Insolvency Rules 1986, rr 6.5(4)(d), 12.3(2)(a).

Insolvency – Petition – Creditor's petition – Debts provable in bankruptcy – Whether order for costs in family proceedings a provable debt in bankruptcy – Circumstances in which bankruptcy order can be made on basis of non-provable debt – Insolvency Act 1986 – Insolvency Rules 1986, rr 6.5(4)(d), 12.3(2)(a).

The appellant, L, was ordered to pay his former wife's costs in ancillary relief proceedings in which they had both been legally aided. Those costs formed the basis of a statutory demand served on L by the Legal Aid Board (now the Legal Services Commission). The district judge dismissed L's application to have the demand set aside, and the commission subsequently presented a bankruptcy petition against L. On appeal to the judge, L relied on r 12.3(2)(a)[a] of the Insolvency Rules 1986, which provided, inter alia, that 'any obligation arising under an order made in family proceedings' was not a provable debt in bankruptcy. L contended that the costs order was such an obligation, that a failure to comply with the demand would not lead to the making of a bankruptcy order, that the demand was therefore pointless and that accordingly it ought to be set aside under the ground set out in r 6.5(4)(d)[b] of the 1986 rules, namely that 'the court was satisfied, on other grounds [i e other than those set out in the preceding provisions of r 6.5(4)], that the demand ought to be set aside'. The judge held that r 12.3(2)(a) applied only to substantive relief such as orders for lump sum and periodical payments, that it did not therefore extend to costs orders in family proceedings and that accordingly such orders were provable debts. He further held that the court had a jurisdiction in exceptional circumstances to make a bankruptcy order on the basis of a non-provable debt, that the question of special circumstances could not be determined until the petition was heard and that it would therefore be premature to set aside the demand even if the costs order were not a provable debt. Accordingly, he dismissed the appeal, and L appealed to the Court of Appeal.

Held – On the true construction of r 12.3(2)(a) of the 1986 rules, an order for costs in family proceedings was not a provable debt in bankruptcy. There was no scope whatever for construing the words 'any obligation arising under an order made in family proceedings' in that provision as excluding a particular type of obligation arising under an order made in family proceedings. Such a construction would involve rewriting the rule. Moreover, there was much to be said for the view that it was logical that costs orders in family proceedings should be treated in the same way as lump sum orders. Apart from anything else, if the party in

a Rule 12.3, so far as material, is set out at p 898 *e*, post
b Rule 6.5, so far as material, is set out at p 898 *b*, post

whose favour financial provision was made in matrimonial proceedings (whether or not that party was legally aided) had to prove in the bankruptcy of the unsuccessful party for the costs of the proceedings, there had to be a risk that the overall financial balance between the parties, intended to be reflected in the court order, might be significantly distorted. It followed that in the instant case the judge had erred in his construction of r 12.3(2)(a). Furthermore, there was no basis for the judge's 'wait and see' approach to the question of setting aside the statutory demand. Although the Insolvency Act 1986 plainly allowed a creditor with a non-provable debt to present a bankruptcy petition based upon that debt, and the court therefore had jurisdiction to make a bankruptcy order on such a petition, the only circumstance in which the exercise of that wholly anomalous jurisdiction could, perhaps, be envisaged was where a supporting creditor with a provable debt obtained a change of carriage order. In the instant case, the commission had not suggested that there were any special circumstances which might persuade the court to make a bankruptcy order on a petition based on the statutory demand. The case fell fairly and squarely within r 6.5(4)(d) which, like the other provisions of r 6.5(4), was designed to prevent the presentation of bankruptcy petitions with no real prospect of success. Accordingly, the appeal would be allowed and the statutory demand set aside (see p 902 *j* to p 903 *b*, p 904 *b*, p 905 *a* to *j* and p 906 *c* to *e g*, post).

Dictum of Sir John Vinelott in *Re a debtor (No 44810 of 1996), JP v a debtor* [1999] 2 BCLC 571 at 582 approved.

Dictum of Chadwick J in *Russell v Russell* [1999] 2 FCR 137 at 143 disapproved.

Notes

For provable debts in bankruptcy, see 3(2) *Halsbury's Laws* (4th edn reissue) para 479.

For the Insolvency Act 1986, see 4 *Halsbury's Statutes* (4th edn) (1998 reissue) 721.

For the Insolvency Rules 1986, rr 6.5, 12.3, see 4 *Halsbury's Statutory Instruments* (1998 issue) 482, 566.

Cases referred to in judgments

Debtor (No 44810 of 1996), Re a, JP v a debtor [1999] 2 BCLC 571.
Galloppa v Galloppa [1999] BPIR 352.
Mordant, Re, Mordant v Halls [1997] 2 FCR 378.
Russell v Russell [1999] 2 FCR 137.
Woodley v Woodley (No 2) [1993] 4 All ER 1010, [1994] 1 WLR 1167, CA.

Cases also cited or referred to in skeleton arguments

Debtor, Re a (No 1 of 1987, Lancaster), ex p the debtor v Royal Bank of Scotland plc [1989] 2 All ER 46, [1989] 1 WLR 271, CA; *affg* [1988] 1 All ER 959, [1988] 1 WLR 419.
Debtor v Law Society (No 5883 of 1979) [1981] CA Transcript 35.
Wheatley v Wheatley [1999] 2 FLR 205.

Appeal

By notice dated 31 May 2000, Raymond Harvey Levy appealed with permission of Peter Gibson LJ granted on 25 May 2000 from the order of Evans-Lombe J on 4 February 2000 ([2000] 1 FCR 642) dismissing his appeal from the order of District Judge Hewetson made in the St Albans County Court on 20 September 1999 dismissing his application to set aside a statutory demand served on him by the

respondent, the Legal Services Commission (the LSC) (then called the Legal Aid Board), in the sum of £62,732, such sum representing the taxed costs of ancillary relief proceedings between Mr Levy and his former wife, which he had been ordered to pay by Thorpe J on 19 October 1994, and interest on those costs. The facts are set out in the judgment of Jonathan Parker LJ.

Marcia Shekerdemian (instructed by *Rosenblatts*) for Mr Levy.
Nicola Rushton (instructed by *Cawdrey Kaye Fireman & Taylor*) for the LSC.

Cur adv vult

10 November 2000. The following judgments were delivered.

JONATHAN PARKER LJ (giving the first judgment at the invitation of Peter Gibson LJ).

INTRODUCTION

1. This is an appeal by the applicant in the proceedings, Mr Raymond Levy, against an order made by Evans-Lombe J on 4 February 2000 ([2000] 1 FCR 642) dismissing Mr Levy's appeal from an order made by District Judge Hewetson-Brown on 20 September 1999. The district judge had in turn dismissed an application by Mr Levy to set aside a statutory demand served on him by the Legal Services Commission (under its then name the Legal Aid Board). I shall refer to the Legal Services Commission hereafter as the LSC. The LSC is the respondent in the proceedings and the respondent to this appeal. Evans-Lombe J refused permission to appeal against his order, but permission was subsequently granted by Peter Gibson LJ.

THE BACKGROUND

2. By an order dated 19 October 1994 made in ancillary relief proceedings between Mr Levy and his former wife Mrs Jacqueline Levy, Thorpe J ordered (among other things) that Mr Levy pay Mrs Levy's costs of the proceedings. Both Mr and Mrs Levy were assisted persons for the purposes of the Legal Aid Act 1988. The costs payable by Mr Levy under the order were subsequently taxed at £51,876·48. On 4 June 1999 the LSC served a statutory demand on Mr Levy in respect of these costs, with interest. The total sum so demanded (including interest) was £62,732·53.

3. Regulation 91(1) of the Civil Legal Aid (General) Regulations 1989, SI 1989/339, provides (so far as material) as follows:

> '(1) Where in any proceedings to which an assisted person is a party—(a) … or (b) an order … is made for the payment of costs to the assisted person, the [LSC] may take such proceedings in its own name as may be necessary to enforce or give effect to such an order …'

4. It is common ground that, pursuant to reg 91(1)(b), the LSC is entitled to serve the statutory demand in its own name and to present a bankruptcy petition based upon it.

5. On 16 July 1999 Mr Levy applied to set aside the statutory demand under rr 6.4 and 6.5 of the Insolvency Rules 1986, SI 1986/1925. On 20 September 1999 the district judge dismissed that application. Mr Levy appealed against the district judge's order. On 8 October 1999, no payment having been made on account of the sum demanded, the LSC presented a bankruptcy petition against Mr Levy. The petition was subsequently adjourned, first to await the outcome of the appeal

before Evans-Lombe J, and then to await the outcome of this appeal. No creditor has given notice of support.

6. On 4 February 2000 Evans-Lombe J dismissed Mr Levy's appeal.

7. Under r 6.5(4) of the 1986 rules the court may set aside a statutory demand if:

> '... (a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand; or (b) the debt is disputed on grounds which appear to the court to be substantial; or (c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either Rule 6.1(5) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or (d) the court is satisfied, on other grounds, that the demand ought to be set aside.'

8. Mr Levy's case is that the statutory demand should be set aside pursuant to r 6.5(4)(d), on the ground that his obligation to pay the costs in respect of which the demand is made is not a provable debt in his bankruptcy, and that the statutory demand is accordingly pointless since his failure to comply with it will not lead to the making of a bankruptcy order.

9. Rule 12.3 of the rules, under the heading 'Provable debts', provides as follows (so far as material):

> '(1) Subject as follows, in ... bankruptcy, all claims by creditors are provable as debts against ... the bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages.
>
> (2) The following are not provable—(*a*) in bankruptcy, any fine imposed for an offence, and *any obligation arising under an order made in family proceedings* or under a maintenance assessment made under the Child Support Act 1991; (*b*) ... "Fine" and "family proceedings" have the meanings given by section 281(8) of the Act ...' (My emphasis.)

10. It is common ground that the ancillary relief proceedings in which the order for costs was made were 'family proceedings' for the purposes of r 12.3(2)(a) of the rules. However, there is an issue between the parties as to whether Mr Levy's obligation to pay Mrs Levy's costs of those proceedings is an 'obligation arising under an order made in family proceedings' within the meaning of r 12.3(2)(a). Mr Levy's case is that it is, and that accordingly the obligation is not a provable debt in his bankruptcy. The LSC, on the other hand, contends that on its true construction r 12.3(2)(a) does not include orders for costs made in family proceedings, with the consequence that Mr Levy's obligation in relation to costs is a provable debt in his bankruptcy.

11. If Mr Levy's contention that his costs obligation is not a provable debt is correct, a further issue arises as to whether that is a sufficient ground for setting aside the statutory demand under r 6.5(4)(d).

THE HEARING BEFORE THE DISTRICT JUDGE

12. Before the district judge, counsel then appearing for Mr Levy accepted that the court may, in special circumstances, make a bankruptcy order on a petition based on a non-provable debt, but he submitted that where (as in the instant case) the creditor is not asserting the existence of any such special circumstances as would justify the court in taking that course there is no sensible purpose in allowing the matter to proceed and that the statutory demand should be set aside.

13. The district judge dismissed Mr Levy's application, concluding that Mr Levy's costs obligation was not an obligation 'arising under an order made in family proceedings' for the purposes of r 12.3(2)(a). He expressed his conclusion thus:

> 'The obligation arises pursuant to the [LSC]'s statutory contract with the wife's solicitors to conduct a piece of litigation. The fact that that piece of litigation happens to be family proceedings is purely incidental and irrelevant. The [LSC]'s claim arises out of that statutory contract, not the order.'

THE HEARING BEFORE EVANS-LOMBE J

14. Evans-Lombe J rejected the district judge's analysis, but dismissed Mr Levy's appeal on different grounds (see [2000] 1 FCR 642). He held firstly that, assuming Mr Levy's costs obligation to be a non-provable debt (ie to be an 'obligation arising under an order made in family proceedings' for the purposes of r 12.3(2)(a) of the rules), it would nevertheless be premature to set aside the statutory demand on that ground since the court hearing the petition might, if satisfied as to the existence of special circumstances justifying such a course, make a bankruptcy order on the petition notwithstanding that the petition is based on a non-provable debt. (This aspect of the case has been referred to in argument as 'the Timing Question'). Evans-Lombe J held secondly that in any event, on the true construction of r 12.3, the expression 'any obligation arising under an order made in family proceedings' in r 12.3(2)(a) is limited to substantive obligations (eg lump sum orders or orders for periodical payments) and does not include orders for costs, with the consequence that Mr Levy's costs obligation is a provable debt. (This aspect of the case has been referred to in argument as 'the Construction Question').

15. The judge approached the timing question on the footing that the expression 'any obligation arising under an order made in family proceedings' in r 12.3(2)(a) has the widest meaning, and includes Mr Levy's costs obligation. After referring to the judgment of Chadwick J in *Russell v Russell* [1999] 2 FCR 137, in which Chadwick J concluded that although the court had jurisdiction to make a bankruptcy order on a petition based on a non-provable debt it would only exercise that jurisdiction in special circumstances, and to a judgment of mine in *Galloppa v Galloppa* [1999] BPIR 352, the judge continued as follows:

> '11. This decision [ie *Russell v Russell* [1999] 2 FCR 137] together with the judgment of Jonathan Parker J in the *Galloppa* case (*Galloppa v Galloppa* [1999] BPIR 35) is clear authority for the proposition that an order in family proceedings may form a valid petitioning debt for the purposes of a bankruptcy petition. It may be that when the petition comes to be heard, at which point the court may be informed of the other debts for which the debtor is liable, the Bankruptcy Court may conclude that it is inappropriate to make a bankruptcy order based on a non-provable petitioning debt. Alternatively, as happened in the *Russell* case, it may decide to do so because of special circumstances such as the existence of other provable debts of the debtor. It should not be overlooked that where a solvent husband declines to pay a sum ordered to be paid by him in family proceedings, an administration of his estate in bankruptcy can still be of use to a wife notwithstanding she cannot prove in respect of orders for matrimonial support. The effect of the bankruptcy order is to deliver the husband's affairs to be administered by a trustee in bankruptcy who, having paid his creditors, will produce a surplus available to be garnisheed by the wife. 12. Not until a petition is presented and comes to be heard will it be

known whether "special circumstances" exist justifying the making of a bankruptcy order notwithstanding that the petitioning debt is based on an order in family proceedings. It seems to me, therefore, that the challenge mounted by Mr Levy to the statutory demand was an inappropriate challenge to make at the stage of statutory demand although clearly appropriate if the amount of that demand was subsequently used to base a bankruptcy petition when such petition came to be heard. In my judgment the district judge would have been justified in dismissing the application to set aside the statutory demand on this ground and for this reason his order should stand.' (See [2000] 1 FCR 642 at 648.)

16. The judge then turned to the construction question. In this connection he referred once again to the judgment of Chadwick J in *Russell v Russell*.

17. In *Russell v Russell* the wife presented a bankruptcy petition based on an indebtedness arising under an order made in family proceedings for payment of a lump sum and costs. Chadwick J held that notwithstanding that the order for payment of a lump sum was on any basis a non-provable debt, special circumstances existed in that case which justified the making of a bankruptcy order. So far as the costs element of the order was concerned, it appears that the question whether r 12.3(2)(a) of the rules applies to orders for costs was not specifically argued before Chadwick J. However, in the course of his judgment Chadwick J said ([1999] 2 FCR 137 at 143): '... there can be no doubt that the costs order was a provable debt.'

18. Later in his judgment in *Russell v Russell*, Chadwick J referred, without further comment, to the fact that the Legal Aid Board had lodged a proof in respect of costs. It seems clear, therefore, that although the point was not developed before him, Chadwick J considered that orders for costs in family proceedings do not fall within the expression 'any obligation under an order made in family proceedings' in r 12.3(2)(a) of the rules, and are accordingly provable debts.

19. After referring to *Russell v Russell*, Evans-Lombe J quoted an observation to the opposite effect by Sir John Vinelott in *Re a debtor (No 44810 of 1996), JP v a debtor* [1999] 2 BCLC 571. In the course of his judgment in that case, Sir John Vinelott said (at 582):

'Although Chadwick J refers to the fact that a proof had been lodged by the [LSC] in respect of costs, I do not think that this passage can be read, as was suggested by Mrs Shekerdemian who appeared for the husband, as a decision, that an order for costs made in proceedings for ancillary relief is capable of ranking for a dividend. Prima facie, such a liability arises under an order made in matrimonial proceedings as much as an order to pay a lump sum or for periodic payments to the extent of accrued arrears. The point was not raised before Chadwick J. I have not heard argument as to whether the [LSC] would be in a better position than a wife in whose favour an order has been made.'

20. Evans-Lombe J then continued:

'14. 12.3 of the 1986 Rules is the product of the reform of bankruptcy legislation flowing from the *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8556) (the Cork Report) and which is now contained in the Insolvency Act 1986 and the 1986 Rules. Under the Bankruptcy Act 1914 the definition of provable debts was contained in s 30 which, by sub-s (3), subject to the exceptions contained in the other subsections or s 30 made

provable "all debts and liabilities, present or future, certain or contingent" to which the debtor was subject at the date of the receiving order or became subject thereafter before his discharge. Subsection (6) of s 30 provided, as an exception to the general rule in sub-s (3), debts of which the value or liability was, in the opinion of the court, incapable of being fairly estimated. Claims arising from family proceedings are not specifically mentioned. A series of decisions dealing with claims resulting from family proceedings established the principle that, whereas lump sum orders were provable as being defined indebtedness, sums becoming due under periodical payments orders were not.' (See [2000] 1 FCR 642 at 649.)

21. The judge then quoted a passage from the judgment of Balcombe LJ in *Woodley v Woodley (No 2)* [1993] 4 All ER 1010 at 1021, [1994] 1 WLR 1167 at 1178, in which Balcombe LJ said he could see good policy grounds (the quotation in the judge's judgment as handed down wrongly reads: '... *no* policy grounds') for saying that a lump sum order made in family proceedings should (like damages for personal injuries) be both provable in bankruptcy and yet not be released on discharge. The judge noted that these sentiments were echoed by Sir Donald Nicholls V-C in *Re Mordant, Mordant v Halls* [1997] 2 FCR 378.

22. The judge then continued (at 650–651):

'17. The question therefore becomes one of whether it is possible to construe r 12.3(2)(a) of the 1986 Rules as not including a debt arising from an order for costs in family proceedings notwithstanding the width of the words *"any obligation"* used in the subsection. To do so it is necessary to give the subsection a purposive construction, namely that the purpose of the section was to exclude from proof in bankruptcy orders giving substantive relief such as lump sum orders and periodical payments orders but not costs orders consequent on any proceedings pursuant to which the substantive orders were made. After some hesitation I have come to the conclusion that such a construction, though placing a special meaning on the word "obligation", is possible, that I should follow the lead of Chadwick J in the *Russell* case and not that of Sir John Vinelott in *Re a Debtor (Re a debtor (No 44810 of 1996), JP v a debtor* [1999] 2 BCLC 571) and that I should construe the section accordingly. There is, perhaps, some significance in the fact that the subrule also excludes from proof "any fine imposed for an offence" but not any costs ordered by the court imposing the fine, and an assessment under the Child Support Act 1991 without mentioning costs. Applying the sui generis [sic] rule of construction, it is possible to argue that orders for costs in Family proceedings should not therefore fall within the subrule. Where it is possible to discern a statutory purpose in altering the law so as to make all debts arising from substantive obligations resulting from orders in family proceedings not provable, it is very difficult to discern a statutory purpose in selecting orders for costs in family proceedings from amongst all other orders for costs so as to make them not provable. 18. On this second ground it seems to me that the order of the district judge can be upheld.' (My emphasis.)

23. The judge accordingly dismissed Mr Levy's appeal.

THE ARGUMENTS ON THIS APPEAL

24. In support of this appeal, Miss Marcia Shekerdemian of counsel (for Mr Levy) submits that the judge was wrong in relation both to the timing question and to the construction question.

25. Miss Shekerdemian turned first to the construction question, since if it be the case that Mr Levy's costs obligation is a provable debt, then there can be no grounds for setting aside the statutory demand and the timing question will not arise.

26. Miss Shekerdemian's short submission on the construction question is that it is simply not possible to construe the words 'any obligation arising under an order made in family proceedings' in r 12.3(2)(a) of the rules in a restrictive sense, so as to exclude a particular category of obligation arising under an order made in family proceedings, namely an order for costs. In any event, she submits, even if it were open to the court to ignore the clear meaning of the rule and adopt a 'purposive' approach to its construction, there is no logical reason why a lump sum order should be non-provable whereas a costs order made in family proceedings should be provable. She submits further that there is no scope in the instant case for the application of any such rule of construction as the judge sought to apply.

27. As to the timing question, Miss Shekerdemian felt constrained to accept that the court has jurisdiction to make a bankruptcy order on a petition which is based on a non-provable debt, for the reasons which Chadwick J gave in *Russell v Russell*. At the same time, she submitted that it is difficult if not impossible to identify the kind of special circumstances which would justify the court in taking such a course; and that even if Chadwick J was correct in concluding that the circumstances which he found to exist in *Russell v Russell* were sufficient for that purpose, it is not suggested by the LSC that similar circumstances exist in the instant case.

28. Miss Nicola Rushton of counsel (for the LSC) adopted the reasoning of the judge on both the construction question and the timing question.

29. As to the construction question, Miss Rushton submits that there is a qualitative difference between orders made in family proceedings which make financial provision for one party or the other, and orders for payment of the costs of family proceedings. Orders for costs made in family proceedings are not (she submits) made by way of provision for the payee party; they are merely designed to reimburse the payee party pro tanto in respect of his or her legal costs. She submits that this distinction in quality between financial provision on the one hand and costs orders in family proceedings on the other lies at the heart of the policy consideration which (as she submits) dictates that words in r 12.3(2)(a) which are, on their face, wholly general words, are to be construed in a restrictive sense.

30. On the footing that, contrary to her submission on the construction question, Mr Levy's costs obligation is non-provable, Miss Rushton then turned to the timing question. She submits that it is not for the LSC at the statutory demand stage to establish special circumstances such as would or might justify the court hearing the petition in making a bankruptcy order. She submits that the judge was right to say, in effect, wait and see, since only when the petition comes to be heard will it be known whether the requisite special circumstances exist justifying the making of a bankruptcy order.

CONCLUSIONS

The construction question

31. I can, for my part, see no scope whatever for construing the words 'any obligation arising under an order made in family proceedings' (I stress the word '*any*') in r 12.3(2)(a) of the rules as excluding a particular type of obligation arising

under an order made in family proceedings. To my mind, such a construction would involve rewriting the rule. Moreover, even if the terms in which the rule is expressed allowed some scope for a 'purposive' construction such as is suggested by Miss Rushton (which in my judgment they do not), I am far from satisfied that it is illogical for costs orders in family proceedings to be treated for bankruptcy purposes in the same way as lump sum orders. On the contrary, there seems to me to be much to be said for the view that it is logical that they should be treated in the same way. Apart from anything else, if the party in whose favour financial provision is made in matrimonial proceedings (whether or not that party is legally aided) has to prove in the bankruptcy of the unsuccessful party for the costs of the proceedings, there must be a risk that the overall financial balance between the parties intended to be reflected in the court order may be significantly distorted.

32. As to the judge's intended reference to the ejusdem generis rule, I confess that I am unable to identify in r 12.3(2) any genus which might serve to bring that rule into play. Nor, for that matter, can I discern any context elsewhere in the Insolvency Act 1986 or the rules which compels a construction of r 12.3(2)(a) which is contrary to the plain meaning of the words used.

33. I accordingly conclude that Chadwick J's indication in *Russell v Russell* (an indication given without the benefit of detailed argument) to the effect that costs orders in family proceedings create provable debts was incorrect, and that Sir John Vinelott's preliminary view to the contrary is correct. It follows that in my judgment Evans-Lombe J reached the wrong conclusion on the construction question.

The timing question

34. On any footing, a bankruptcy order made on a petition which is based on a non-provable debt is an anomaly, since (as Chadwick J pointed out in *Russell v Russell*) the trustee has, by definition, no functions to perform in relation to the petitioner. His function is to get in, realise and distribute the bankrupt's estate in accordance with the provisions of Ch IV of the 1986 Act (see ibid s 305(2) of that Act), and s 324 of the 1986 Act provides that whenever he has sufficient funds in hand for the purpose he shall, subject to a retention to cover expenses, 'declare and distribute dividends among the creditors in respect of bankruptcy debts *which they have respectively proved*'. Consequently, a creditor with a non-provable debt will receive no distributions in the bankruptcy, and the trustee will owe no duties towards him. It would therefore seem surprising if the 1986 Act confers jurisdiction on the court to make a bankruptcy order on a petition based on a non-provable debt. However, as I indicated earlier, Miss Shekerdemian felt constrained to accept that the 1986 Act does give the court such jurisdiction. Was she right to do so?

35. As Chadwick J pointed out in *Russell v Russell* [1999] 2 FCR 137 at 142, s 264 of the 1986 Act provides that a bankruptcy petition may be presented against an individual by one of the individual's 'creditors'. 'Creditor' is defined in s 383 of that Act as meaning (so far as material):

> '(a) in relation to a bankrupt ... a person to whom any of the bankruptcy debts is owed ... (b) in relation to an individual to whom a bankruptcy petition relates ... a person who would be a creditor in the bankruptcy if a bankruptcy order were made on that petition.'

36. Section 382(1) of the 1986 Act defines 'bankruptcy debt' as meaning (so far as material): '... (a) any debt or liability to which he is subject at the commencement of the bankruptcy ...'

37. It is to be noted that that definition makes no distinction between provable and non-provable debts. A non-provable debt is a debt to which the bankrupt is subject at the commencement of his bankruptcy, and thus falls within the definition. Hence in the instant case Mr Levy's costs obligation is a 'bankruptcy debt', entitling Mrs Levy (and, by virtue of reg 91(1) of the regulations, the LSC) to present a bankruptcy petition based upon it.

38. I therefore agree with Chadwick J in *Russell v Russell* that since the 1986 Act plainly allows a creditor with a non-provable debt to present a bankruptcy petition based upon that debt, it must follow that the court has jurisdiction under the 1986 Act to make a bankruptcy order on such a petition. Accordingly in my judgment Miss Shekerdemian was right to accept that that jurisdiction exists.

39. In what circumstances, then, will the jurisdiction be exercised? In *Russell v Russell*, Chadwick J referred to the need for 'special circumstances'. He said (at 144):

> 'In the absence, therefore, of some special circumstances it seems to me that, as a matter of discretion, it will not usually be appropriate to make a bankruptcy order on a petition presented by a wife in respect of a debt which arises under a lump sum order made in family proceedings.'

40. He went on to conclude that special circumstances existed in that case justifying the making of a bankruptcy order. He identified three such special circumstances, as follows:

> 'First, this is a husband who has been found by the court to have been less than frank in disclosing to the court particulars of his income and capital. Secondly, this is a debtor who has failed to pay the costs ordered to be paid in [other proceedings]. Thirdly, this debtor has failed to pay the costs which have been taxed in the matrimonial proceedings ...'

41. It is apparent from the nature of the special circumstances which he identified that Chadwick J regarded misconduct by the debtor as a relevant factor in determining whether a bankruptcy order should be made on a petition based on a non-provable debt. For my part, I find it difficult to see why misconduct by the debtor should be relevant in this context. However badly or irresponsibly the debtor may have behaved, the position still remains that the petitioning creditor has no financial interest in the bankruptcy process. Nor, in my judgment, does the debtor's failure or refusal to pay other debts (whether provable or non-provable) constitute a 'special circumstance' in this context. If the debts are non-provable, then non-payment of them is a matter outside the bankruptcy regime; if they are provable, then the creditor concerned has his remedy.

42. To my mind, the fact that the debtor may have so misconducted his affairs that it may be said that he (in effect) deserves to be made bankrupt cannot justify the making of a bankruptcy order on a petition based on a non-provable debt.

43. It was suggested in argument (indeed it was suggested by Evans-Lombe J in the passage from his judgment which I quoted earlier, in which he refers to an administration of Mr Levy's estate in bankruptcy still being of use to Mrs Levy notwithstanding that she cannot prove in the bankruptcy) that a petitioning creditor with a non-provable debt may nevertheless have a legitimate interest in initiating a bankruptcy if there is a prospect of a surplus being available after all proving creditors have been paid in full. In my judgment, however, it would be an abuse of the bankruptcy process to have recourse to it for that purpose. The fundamental purpose of the bankruptcy regime is the distribution of the bankrupt's estate rateably among proving creditors: that is its raison d'être. To seek to use

the bankruptcy regime for the purpose of establishing a surplus after the proving creditors have been paid in full is, in my judgment, to seek to use it for a collateral purpose and is not permissible.

44. In what circumstances, then, might the court be persuaded to exercise its jurisdiction to make a bankruptcy order on a petition based on a non-provable debt? Since the jurisdiction exists, I have to accept that there may be wholly exceptional cases where the court will be persuaded, in its discretion, to do so. I confess, however, that I find it extremely difficult to foresee the circumstances in which that may occur, since, for reasons already given, the jurisdiction itself seems to me to be wholly anomalous. As at present advised, the only situation in which I can envisage that there might be a possibility of the court making a bankruptcy order on a petition based on a non-provable debt is where a supporting creditor with a provable debt obtains a change of carriage order pursuant to r 6.31 of the rules. The effect of such an order is that, in contrast to the situation where a supporting creditor is substituted as petitioner and the petition is amended accordingly, the petition remains unamended but the creditor who has obtained the change of carriage order has the carriage of the petition in place of the petitioning creditor. But I am far from saying that a change of carriage order would necessarily be made in such circumstances, or that, if it were to be made, the court hearing the petition would necessarily make a bankruptcy order.

45. Subject to that possibility (if it be such) I find myself unable to envisage any circumstances in which the court could properly make a bankruptcy order on a petition based on a non-provable debt.

46. Returning to the instant case, and to the timing question, as I noted earlier the LSC does not suggest that any 'special circumstances' exist in the instant case such as might persuade the court to make a bankruptcy order on a petition based on the statutory demand. That being the case, I can see no reason why the statutory demand should be allowed to stand and the bankruptcy process to continue. It seems to me that r 6.5(4)(d) of the rules is designed to meet just such a situation. Subparagraphs (a), (b) and (c) of sub-r (4) are all directed at cases in which there is no real prospect of a bankruptcy order being made on a petition based on the indebtedness the subject of the statutory demand, and sub-para (d) is in my judgment similarly directed. The philosophy underlying the jurisdiction to set aside a statutory demand appears plainly from the terms of r 6.5(4). It is to prevent the presentation of bankruptcy petitions which have no real prospect of success. In my judgment, the instant case falls fairly and squarely within r 6.5(4)(d).

47. I accordingly conclude that there is no basis in the instant case for the 'wait and see' approach adopted by the judge, and that the statutory demand should be set aside pursuant to r 6.5(4)(d) of the rules.

48. I would therefore allow this appeal.

WALLER LJ.

49. I agree that the appeal should be allowed for the reasons given by Jonathan Parker and Peter Gibson LJJ.

PETER GIBSON LJ.

50. I agree that this appeal must be allowed. As we are differing from the judge, I add a few words of my own on each of the two points on which the judge decided the case.

The construction question

51. The short question which arises is whether 'any obligation arising under an order made in family proceedings' in r 12.3(2)(a) of the Insolvency Rules 1986, SI 1986/1925, includes an obligation arising under an order for costs made in family proceedings. It is common ground that there is no other case in which the point was both in issue and argued. In *Russell v Russell* [1999] 2 FCR 137 at 143 Chadwick J was clearly of the view that a costs order made in family proceedings did create a provable debt. In *Re a debtor (No 44810 of 1996), JP v a debtor* [1999] 2 BCLC 571 at 582 Sir John Vinelott was no less clearly of the opposite view.

52. Like Jonathan Parker LJ I prefer the view of Sir John Vinelott, who, as the former chairman of the Insolvency Rules Committee when the insolvency rules were drafted, was particularly knowledgeable in this area.

53. The purposive construction which the judge applied rests on the purpose attributed by him to r 12.3(2)(a) of the 1986 rules, viz to exclude from the bankruptcy obligations under matrimonial orders giving substantive relief. But the validity of that depends on whether that limited purpose can properly be extracted from the language of the rule. I have to say that I do not understand how the judge could discern that to be the purpose when the only guide to that purpose, the actual language used, is that *any* obligation arising under an order made in family proceedings is not to be a provable debt. That does not seem to me to allow the court to exclude some obligations arising under such an order. Further I do not see why those drafting r 12.3(2)(a) could not properly take the view that when substantive obligations under orders made in family proceedings are to be excluded from provable debts, so should costs orders made in those proceedings. They may well affect materially the ability of the spouse to meet the substantive obligations. The fact that it is the Legal Services Commission (LSC) which is seeking in this case to enforce the costs order cannot make any difference to the construction of r 12.3(2)(a), which must have the same meaning whether or not the party awarded the costs is legally aided.

54. Nor do I think that the judge was right to find justification for his construction in the application of the ejusdem generis rule. That rule applies when an enumeration of particular things having some common characteristic is followed by general words (eg 'A, B, C and other D'), the general words being construed as limited by that common characteristic. But here one has merely a particular thing, 'any fine', followed not by general words but by another particular thing, 'any obligation', which is further limited by having to be either 'under an order made in family proceedings' or 'under a maintenance assessment'. I see no scope for the application of the rule.

55. I therefore conclude that an obligation in respect of costs which arises under an order made in family proceedings falls within r 12.3(2)(a) and is not a provable debt.

The timing question

56. The question whether Mr Levy's challenge to the statutory demand is premature is one on which the judge neither heard nor invited any argument. And yet the judge's affirmative answer to that question formed the first ground on which he decided the appeal from the district judge. I think it regrettable that the judge's decision was based on a point on which Mr Levy was given no opportunity to make submissions.

57. It was the judge's view that the challenge to the statutory demand was an inappropriate challenge to make at the stage when the statutory demand was

made 'although clearly appropriate if the amount of that statutory demand was used to base a bankruptcy petition when such petition came to be heard'. As I understand him, the judge was accepting that the fact that the debt was not provable was a valid objection to any bankruptcy order being made. Somewhat inconsistently, the judge earlier appeared to suggest that a wife as creditor with a non-provable debt might properly be interested in obtaining a bankruptcy order as its effect was to deliver the husband's affairs to be administered by a trustee in bankruptcy who having paid the creditors would produce a surplus available to be garnisheed by the wife.

58. The statutory scheme to my mind is plain: a bankruptcy order is designed to vest the debtor's assets in the trustee to enable the trustee to pay the provable and proved debts of the debtor (s 324 of the Insolvency Act 1986). A non-provable debt is entirely outside the statutory scheme. I own to finding it puzzling that the 1986 Act contemplates that a non-provable debt is a bankruptcy debt (as defined in s 382 of that Act; see in particular s 281(5)(b)). But, that being so, it would appear that Chadwick J was right in *Russell v Russell* to say that a creditor with a non-provable debt may present a bankruptcy petition based upon that debt. However, like Jonathan Parker LJ, I find it extraordinarily difficult to conceive of any circumstances in which the court would make a bankruptcy order on a petition founded on such a debt. And if the court will not make such an order (save in some wholly exceptional circumstance) on the hearing of the petition, it would be strange if it was inappropriate for the debtor to seek to free himself of the threat of bankruptcy by an application to set aside the statutory demand based on such a debt. The presentation of a petition may have seriously adverse effects on the debtor, and in my judgment it would be wrong to deny him the opportunity at the statutory demand stage to avoid that harm by having the statutory demand set aside when it is based on a non-provable debt which is highly unlikely to lead to a bankruptcy order. There is no suggestion that any special circumstances for making a bankruptcy order based on a non-provable debt exist in the present case.

59. In my judgment there is no realistic prospect of a bankruptcy order being made on the non-provable debt on which the LSC's petition is based. The statutory demand should therefore be set aside now.

60. For these as well as the reasons given by Jonathan Parker LJ, with which I am in entire agreement, I would allow the appeal and set aside the order of the judge.

Appeal allowed. Permission to appeal to the House of Lords refused.

Kate O'Hanlon Barrister.

Venables and another v News Group Newspapers Ltd and others

FAMILY DIVISION

DAME ELIZABETH BUTLER-SLOSS P

13–16 NOVEMBER 2000, 8 JANUARY 2001

Confidential information – Disclosure – Injunction against disclosure of information – Claimants murdering young child when ten years old and being detained during Her Majesty's pleasure – Claimants reaching age of 18 and becoming eligible for release – Authorities proposing to give claimants new identities on release – Claimants alleging their lives would be endangered if new identities revealed – Whether court having jurisdiction to protect adult's identity and whereabouts – Human Rights Act 1998, s 12(4), Sch 1, arts 2, 3, 10.

In February 1993, when they were ten years old, the claimants killed a two-year old boy. The circumstances of the killing were particularly shocking and were widely publicised in the media. In November 1993, when they were eleven years old, the claimants were convicted of murder and sentenced to be detained during Her Majesty's pleasure. At the conclusion of the trial, the judge lifted reporting restrictions so that the public might be informed of the names and backgrounds of the claimants, but he imposed injunctions restricting publication of further information about them. Those injunctions were based on jurisdictions which applied only to minors. In August 2000 the claimants reached the age of 18. Shortly afterwards, the Lord Chief Justice made tariff recommendations which rendered it likely that the Parole Board would make a decision in 2001 about the claimants' reintegration into the community. In subsequent proceedings against three newspaper groups, the claimants alleged that there was a real likelihood that the press intended to publish details of their present and future whereabouts and descriptions of their appearances, and that the publication of such details would endanger their lives in view of threats that had been made against them. They therefore sought permanent injunctions protecting, inter alia, information regarding changes in their physical appearances since their detention and the new identities that would probably be given to them on their release into the community. The newspapers contended that the court had no jurisdiction to grant such injunctions in respect of adults. In response, the claimants contended that such a jurisdiction could be found in the law of confidence, taking into account the implementation of the Human Rights Act 1998. They relied on various rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act), including the right to life in art 2[a] and the prohibition against torture or inhuman or degrading treatment in art 3[b]. The newspapers relied on s 12(4)[c] of the 1998 Act which required the court to have particular regard to the right to freedom of expression under art 10[d] of the convention. That right, however, was itself

a Article 2, so far as material, is set out at p 922 *j*, post

b Article 3 is set out at p 923 *d*, post

c Section 12, so far as material, is set out at p 920 *d*, post

d Article 10, so far as material, is set out at p 920 *a* to *c*, post

subject, by virtue of art 10(2), to such 'restrictions ... as are prescribed by law and are necessary in a democratic society' for, inter alia, 'the protection of the ... rights of others' and 'preventing the disclosure of information received in confidence'.

Held – The court had jurisdiction, in exceptional cases, to extend the protection of confidentiality of information, even to the extent of imposing restrictions on the press, where a failure to do so would probably lead to serious physical injury or to the death of the person seeking that confidentiality, and there was no other way to protect him other than by seeking relief from the court. The law of confidence could extend to cover an injunction imposing such restrictions which would therefore be in accordance with law. They would also be proportionate to the legitimate aim of protecting the applicant from serious and possibly irreparable harm. It therefore followed that such restrictions would satisfy the criteria in art 10(2) of the convention, narrowly interpreted. In the instant case, there was a real and serious risk to the rights of the claimants under arts 2 and 3 of the convention. The evidence established that sections of the press would support, and might even initiate, efforts to find the claimants after their release and to expose their identities and addresses. If their new identities were discovered, neither of them would have any chance of a normal life and there was a real and strong possibility that their lives would be at risk. In those exceptional circumstances, it was necessary to place the right of confidence above the right of the media to publish freely information about the claimants. Accordingly, injunctions would be granted against the whole world, protecting, inter alia, any information leading to the identity, or future whereabouts, of the claimants (see p 932 *f g*, p 933 *f g*, p 934 *f j* to p 935 *a*, p 936 *a b*, p 937 *b c*, p 938 *a b h*, p 939 *c* and p 940 *j* post); *Broadmoor Hospital Authority v R* [2000] 2 All ER 727 and *Douglas v Hello! Ltd* [2001] IP & T 391 considered.

Per curiam. In private law cases, although the court must apply the principles of the convention to existing causes of action, it cannot hear a free-standing application based directly on its articles (see p 918 *b*, p 919 *a* and p 943 *a*, post).

Notes

For final injunctions restraining disclosure of confidential information, see 8(1) *Halsbury's Laws* (4th edn reissue) para 492.

For the Human Rights Act 1998, s 12, Sch 1, arts 2, 3, 10, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 510, 522, 524.

Cases referred to in judgment

Abrams v US (1919) 250 US 616, US SC.

A-G v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545, [1990] 1 AC 109, [1988] 3 WLR 776, HL.

A-G v Guardian Newspapers Ltd [1987] 3 All ER 316, [1987] 1 WLR 1248, Ch D, CA and HL.

A-G v Times Newspapers Ltd [1991] 2 All ER 398, [1992] 1 AC 191, [1992] 2 WLR 994, HL.

Broadmoor Hospital Authority v R [2000] 2 All ER 727, [2000] QB 775, [2000] 1 WLR 1590, CA.

Coco v A N Clarke (Engineers) Ltd [1969] RPC 41.

D v National Society for the Prevention of Cruelty to Children [1977] 1 All ER 589, [1978] AC 171, [1977] 2 WLR 201, HL.
Davies v Taylor [1972] 3 All ER 836, [1974] AC 207, [1972] 3 WLR 801, HL.
Douglas v Hello! Ltd [2001] IP & T 391, CA.
G (a minor) (social worker: disclosure), Re [1996] 2 All ER 65, [1996] 1 WLR 1407, CA.
Glaser v UK [2000] 3 FCR 193, ECt HR.
H and ors (minors) (sexual abuse: standard of proof), Re [1996] 1 All ER 1, [1996] AC 563, [1996] 2 WLR 8, HL.
Hunter v Mann [1974] 2 All ER 414, [1974] QB 767, [1974] 2 WLR 742, DC.
Iveson v Harris (1802) 7 Ves 251, 32 ER 102, LC.
Kaye v Robertson [1991] FSR 62, CA.
Keegan v Ireland (1994) 18 EHRR 342, ECt HR.
Kelly v BBC [2001] 1 All ER 323, [2001] 2 WLR 253.
Marks v Beyfus (1890) 25 QBD 494, CA.
Nicholls v BBC [1999] EMLR 791, CA.
Osman v UK (1998) 5 BHRC 293, ECt HR.
R v Central Independent Television plc [1994] 3 All ER 641, [1994] Fam 192, [1994] 3 WLR 20, CA.
R v Chief Constable of the North Wales Police, ex p AB [1997] 4 All ER 691, [1999] QB 396, [1997] 3 WLR 724, DC.
R v Lord Saville of Newdigate, ex p A [1999] 4 All ER 860, [2000] 1 WLR 1855, CA.
R v Secretary of State for the Home Dept, ex p Simms [1999] 3 All ER 400, [2000] 2 AC 115, [1999] 3 WLR 328, HL.
R v Secretary of State for the Home Dept, ex p Venables [1997] 3 All ER 97, [1998] AC 407, [1997] 3 WLR 23, HL; *affg* [1997] 1 All ER 327, [1998] AC 407, [1997] 2 WLR 67, CA.
Spencer (Earl) v UK (1998) 25 EHRR CD 105, E Com HR.
Sunday Times v UK (1979) 2 EHRR 245, ECt HR.
Thompson (tariff recommendations), Re [2001] 1 All ER 737.
Times Newspapers Ltd v MGN Ltd [1993] EMLR 443, CA.
TV3 Network Ltd v Eveready New Zealand Ltd [1993] 3 NZLR 435, NZ CA.
V v UK (1999) 30 EHRR 121, ECt HR.
W (minors) (social worker: disclosure), Re [1998] 2 All ER 801, [1999] 1 WLR 205, CA.
W v Egdell [1990] 1 All ER 835, [1990] Ch 359, [1990] 2 WLR 471, CA.
X CC v A [1985] 1 All ER 53, sub nom *Re X (a minor) (wardship: injunction)* [1984] 1 WLR 1422.
X v Netherlands (1985) 8 EHRR 235, ECt HR.
Z Ltd v A [1982] 1 All ER 556, [1982] QB 558, [1982] 2 WLR 288, CA.

Action

Jon Venables and Robert Thompson, the claimants in proceedings against the defendant newspaper groups, News Group Newspapers Ltd, Associated Newspapers Ltd and MGN Ltd, sought injunctions protecting, inter alia, the new identities that would be given to them on their release from local authority secure units where they had been detained during Her Majesty's pleasure since their convictions for murder in 1993. The facts are set out in the judgment.

Edward Fitzgerald QC and *Ben Emmerson QC* (instructed by *Bhatt Murphy & Co*) for Venables.

Brian Higgs QC and *Julian Nutter* (instructed by *Lloyd Lee Dures*, Liverpool) for Thompson.

Desmond Browne QC and *Adam Wolanski* (instructed by *Farrer & Co*) for the newspaper groups.

Gordon Murdoch QC and *Marcus Scott-Manderson* for the Official Solicitor.

Andrew Caldecott QC and *Stephen Suttle* (instructed by the *Treasury Solicitor*) for the Attorney General.

Mark Shaw (instructed by the *Treasury Solicitor*) for the Secretary of State for the Home Department.

Cur adv vult

8 January 2001. The following judgment was delivered.

DAME ELIZABETH BUTLER-SLOSS P.

(A) INTRODUCTION

1. Jon Venables and Robert Thompson are both 18 years old. They are claimants in the proceedings for injunctions in very unusual circumstances. On 12 February 1993 they killed a little boy of two, James Bulger. They were each ten and a half years old. The facts and the circumstances of the murder were particularly shocking and distressing and were widely publicised in the media. They were convicted of the murder of James Bulger at Preston Crown Court on 24 November 1993. They were then 11 years old. They were sentenced to be detained during Her Majesty's pleasure under s 53(1) of the Children and Young Persons Act 1933. They were placed in separate secure units where they have remained throughout their detention. Each unit is a local authority home operated by separate local authorities.

2. Each claimant attained the age of 18 during August 2000. Four newspaper groups made an application by summons to the High Court, dated 24 July 2000, asking for clarification of the injunctions as a result of the impending majority of the claimants. The claimants made it clear that they intended to seek to continue the injunctions after they attained the age of 18. In accordance with the order of Morland J, the matter came before me on 27 July 2000. I adjourned the application to enable all the relevant parties to be represented and extended the injunctions until the completion of the adjourned hearing.

3. The two claimants have now issued proceedings in the Queen's Bench Division which were transferred to the Family Division to be tried by me. The defendants are three large news groups, News Group Newspapers, Associated Newspapers and MGN, but they do not represent the newspaper industry nor the media generally. The other parties are the Attorney General who has, through Mr Caldecott QC, made submissions and the Official Solicitor as amicus curiae, on behalf of whom Mr Murdoch QC made submissions, particularly with regard to the interests of children. The Secretary of State did not intervene. He was represented before me by Mr Shaw, who provided me with written evidence and oral information, which have been very helpful. He did not, however, make any submissions on behalf of the Secretary of State. The submissions of all advocates were made on the basis of the written statements and I heard no oral evidence. I heard some submissions in chambers, and gave a judgment in chambers, which remains private. I reserved my decision on the applications made in the claims. I indicated that I would give a judgment setting out my decision on the issues of

principle, and that if I were to grant injunctions I would hear further submissions on the form of the order. a

The tariff

4. The tariff set by the trial judge, Morland J, was eight years for each claimant. It was increased by Lord Taylor CJ to ten years and by the Secretary of State for the Home Department to 15 years. On an application for judicial review by both b claimants, on 12 June 1997 the House of Lords quashed the 15-year tariff set by the Secretary of State for the Home Department; see *R v Secretary of State for the Home Dept, ex p Venables* [1997] 3 All ER 97, [1998] AC 407. Both claimants made applications to the European Court of Human Rights in Strasbourg. On 16 December 1999, the European Court held that the United Kingdom was in c breach of art 6(1) and that the tariff in such cases should be set by the judiciary and not by the Secretary of State; see *V v UK* (1999) 30 EHRR 121.

5. The Secretary of State made an oral statement to Parliament on 13 March 2000 in which he indicated that he would bring forward legislation, and that, for existing cases, he proposed a fresh review of tariffs in line with the principles in the judgment of the European Court. He said that existing detainees, whose d tariffs had not yet expired, should make any representations that they wished to make to the Lord Chief Justice who would make recommendations to him. He would then adopt his recommendation as to the tariff to be set.

6. On 27 July 2000 Lord Woolf CJ issued a practice statement ([2000] 4 All ER 831, [2000] 1 WLR 1655) on life sentences for murder in which he set out the e criteria for the tariff and the procedure. In accordance with that practice statement the Lord Chief Justice made a statement on 26 October 2000 (*Re Thompson (tariff recommendations)* [2001] 1 All ER 737) setting out his recommendations to the Secretary of State for the tariff in respect of each claimant and the reasons for his recommendations. He decided that the tariff period for each claimant should expire on 26 October 2000, the day of his announcement. This recommendation f has the effect that the Parole Board is likely, during the year 2001, to make a decision about the reintegration of the claimants into the community.

Reporting restrictions

7. At the first day of the hearing, 1 November 1993, Morland J imposed g reporting restrictions under s 39 of the 1933 Act to restrain media publicity during the trial. At the conclusion of the trial, after their convictions but before sentence, the judge lifted the reporting restrictions so that the public might be informed of the names and background of each of the claimants. On 26 November 1993, on an application by the News Group to lift reporting restrictions, Morland J said in h his judgment in open court:

> 'It is necessary for me to balance the public interest in lifting reporting restrictions and the interests of the defendants. I lifted the reporting restrictions as set out in my order of 24 November. I did this because the public interest overrode the interest of the defendants following the murder and I j considered that the background in respect of the two boys' family, lifestyle, education and the possible effect of violent videos, on the defendants' behaviour ought to be brought out into the open because there was a need for an informed public debate on crimes committed by young children. However, public interest also demands that they have a good opportunity of

rehabilitation. They must have an opportunity to be brought up in the units in a way so as to facilitate their rehabilitation.'

8. He granted comprehensive injunctions restricting publication of further information about the two boys, with no limit of time, based both under s 39 of the 1933 Act and the inherent jurisdiction of the High Court to deal with children. On the hearing of the judicial review proceedings before the Divisional Court on 19 April 1996, Pill LJ granted injunctions restraining publication of reports referred to in those proceedings.

Form of the injunctions applied for

9. The injunctions sought by the two claimants in their claims, which have been amended several times, are not in identical terms. Broadly, however, they both seek injunctions designed to cover four main areas: (i) protection of information regarding changes in their physical appearance since their detention; (ii) protection of their new identity when they are released into the community; (iii) protection of information about their existing placement; and (iv) protection of all specific information relating to their time in the secure units between February 1993 and August 2000.

(B) ISSUES BEFORE THE COURT

10. The basis upon which the claimants seek relief by way of injunctions is also not precisely the same, but I have decided to look at the broad issues rather than set out separately the case of each claimant. The major issues before the court are the following. (i) Is there jurisdiction to grant an injunction in respect of an adult to protect his identity and whereabouts and other relevant information? The issue of jurisdiction raises the question of the effect of the implementation of the Human Rights Act 1998. One aspect concerns the applicability of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the convention) to the present case, since these are private proceedings. The court is, of course, itself a public authority. (ii) If there is jurisdiction, is there a real possibility that either of the claimants would be at risk of serious physical injury, or even death, if injunctions were not granted? (iii) In the exceptional circumstances of this case, ought the court to exercise its equitable jurisdiction and make the orders applied for: (a) for the long-term future; (b) for the present and immediate future; and (c) for the past?

Subsidiary issues relate to the extent to which they are entitled to keep confidential historical information about their past life in the secure units, and whether injunctions can or should be granted to protect this information. This also raises questions as to the extent to which the judgment of the editor over the decision whether to publish would be a sufficient safeguard, or the voluntary code accepted by the press and applied by the Press Complaints Commission.

11. Mr Fitzgerald QC for Venables and Mr Higgs QC for Thompson submitted that the court has jurisdiction to protect individuals in the exceptional position of each of the claimants after the age of 18 and that such protection should last indefinitely. The submission that the court has jurisdiction to grant injunctions was also advanced by Mr Caldecott QC for the Attorney General and was supported by Mr Murdoch QC for the Official Solicitor. I turn now to a more detailed description of the submissions advanced to the court.

On behalf of the claimants

12. Mr Fitzgerald submitted that there was before the court clear evidence of a specific, preventable, serious and continued threat to the lives of the claimants. There was a real likelihood that the press and in particular the defendants intended to publish details of the claimants' present and future whereabouts and descriptions of their appearance and that it would endanger his client's life, safety and interfere directly with the implementation of his current treatment and his future reintegration into the community. He supported the submissions on behalf of the Attorney General that the law of confidence extended to the present situation. He also relied upon his other grounds for founding jurisdiction to grant injunctions. The court was under a positive obligation to grant injunctions to protect the claimants and in the unique circumstances of these claimants some way must be found to prevent their identities being made public knowledge. He sought by injunctions to cover the past detention, the present situation in the secure units and the future after their release. Mr Higgs supported those submissions.

On behalf of the newspapers

13. Mr Desmond Browne QC reminded me that I had said, in my earlier judgment, that the newspapers he represented acted sensibly and responsibly in coming to court. He also reminded me that hard cases make bad law. He submitted that there was no cause of action disclosed by any of the grounds set out in the claims. There was a presumption in favour of freedom of expression, which was a primary right in a democracy. The speech of Lord Steyn in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 408, [2000] 2 AC 115 at 126 supported him. There was a positive obligation on a public authority to ensure proper protection of rights under the convention. It was not a question of a balancing exercise by the court. A balancing exercise would presume that the scales started in equal balance. That was not the correct approach. He relied on the speech of Lord Templeman in *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316 at 356, [1987] 1 WLR 1248 at 1297, the judgment of Hoffmann LJ in *R v Central Independent Television plc* [1994] 3 All ER 641 at 652, 653, [1994] Fam 192 at 203, 204 and the judgment of Munby J in *Kelly v BBC* [2001] 1 All ER 323 at 337, [2001] 2 WLR 253 at 264.

14. To restrain the freedom of the press there must be a pressing social need for the restriction, convincingly established by proper concrete evidence and the restrictions must be proportionate to the legitimate aim pursued. The court had to be satisfied that the restriction was necessary on the specific facts of the case and the necessity was not to be found in the present case. He set out possible circumstances in which the injunctions sought would prevent proper reporting of matters of public interest and concern, such as the possible reoffending of either claimant or their potential threat to public safety. That the court was not the only public authority concerned with the future of the claimants, for instance there was also the police. He questioned whether there was continuing evidence of genuine threats. If there were truly threats it was the responsibility of the authorities to deal with the threat and not by way of injunction against the press.

15. If either of the claimants was tracked by a journalist it should be left to the judgment of the editor whether or not to publish the information. The court should trust the press to exercise restraint. He referred to several instances where the press was asked by the court not to publish and did not do so, without the necessity for an order. An example was to be found in *Broadmoor Hospital Authority v R* [2000] 2

All ER 727, [2000] QB 775. The Protection from Harassment Act 1997 was an available remedy if there was excessive intrusion into the lives of the claimants.

16. He said that the situation of the claimants was not unique. If injunctions were granted in the present case, they would become a precedent for the future, for example if Myra Hindley were ever released. Another possible application might be to restrain publication of the identity of paedophiles. He referred to the decision of the Court of Appeal in *R v Chief Constable of the North Wales Police, ex p AB* [1997] 4 All ER 691, [1999] QB 396, in which the court refused to grant injunctions to prevent the chief constable from revealing to the owner of a caravan site the past convictions of two paedophiles living on the site. The situation of the claimants was not akin to that of informants, where a long-established public interest immunity protects their right to immunity, for example, *Marks v Beyfus* (1890) 25 QBD 494. The case of *Nicholls v BBC* [1999] EMLR 791 did not assist the claimants, as the applicant in that case had a contractual right to the concealment of his identity and was in the position of an informer. There should not be injunctions to protect the anonymity of adults, otherwise it would create a situation in which the more detestable the crime, the greater the claim to anonymity. Open justice would be imperilled and the right of the public to know about killers would be frustrated. This was a detestable crime. The claimants did not have the rights of those with spent convictions but they would have the advantage of being put in a similar position. The granting of a new identity was to allow a convicted prisoner to live a lie.

17. The editorial in the News of the World on 29 October 2000 was not to be taken as a threat to publish if the identity of one of the claimants was disclosed. Mr Browne pointed to the fact that famous people did not generally get protection; see for instance, *Kaye v Robertson* [1991] FSR 62 where the Court of Appeal held that there was no actionable right of privacy in English law in circumstances where journalists had invaded and then photographed the claimant in his hospital bed. The court should apply standard principles and not succumb to siren calls that something needs to be done. If, however, the court did grant injunctions, they must be clear and precise and no wider than absolutely necessary to achieve the legitimate aim; see Sir Thomas Bingham MR in *Times Newspapers Ltd v MGN Ltd* [1993] EMLR 443 at 447.

18. An injunction ought not to be contra mundum (against the world at large) and there was no jurisdiction to do so other than under the peculiar administrative jurisdiction of the High Court in respect of minors. He relied upon the passage in the judgment of Lord Eldon LC in *Iveson v Harris* (1802) 7 Ves 251, 32 ER 102, that an injunction cannot be granted except against a party to the suit. That has always been taken as law. In any event, publication of the injunctions against his clients would act in a similar way and have that effect. It was not necessary to grant injunctions to protect past confidential information, which was covered by the existing right to confidentiality.

On behalf of the Attorney General and Official Solicitor

19. In the submissions on behalf of the Attorney General, Mr Caldecott submitted that as a general proposition there was a strong and proper interest in knowing the identity of those who committed serious and detestable crimes. He pointed to the special position of freedom of expression in English law reinforced by the 1998 Act, subject to exceptions. The fact that information was confidential in character was not decisive. It would, therefore, require special circumstances for

information as to the identity of an offender to be withheld from the public after the offender attained the age of 18. The key to these proceedings was whether such circumstances existed in the present case. a

20. There was an existing law of confidence and it covered identification information which the claimants sought to have protected. He relied upon the speech of Lord Goff of Chieveley in *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 658, [1990] 1 AC 109 at 281 (see para 31 below). Questions of b reasonableness affected both what may be protected and the application of the 'public interest' defence. Since an equitable duty of confidence arose from an obligation of conscience, it must be material to consider whether a reasonable person would recognise public disclosure as not being 'just in all the circumstances'. There did not need to be a formal relationship between the c parties. Having regard to case law and to the values enshrined in art 8 of the convention, it seemed clear that information the disclosure of which would substantially impair a person's private life and imperil his safety must be capable of protection. A restriction was necessary notwithstanding the general public interest in knowing the identity of those responsible for serious crime. The right to life under art 2 was unqualified and failure to provide protection could well be d to act in a way incompatible with the convention.

21. He did not put forward any general principle and each case would have to be considered on its own facts. If information was disclosed which was not generally known, and which was liable to expose the person to whom it related to danger of serious physical harm, it would not be difficult to show that its e disclosure would be to the detriment of that person. He drew attention to *R v Chief Constable of the North Wales Police, ex p AB* [1997] 4 All ER 691 at 699, [1999] QB 396 at 410 where, Lord Bingham of Cornhill CJ expressly acknowledged that in some circumstances the law of confidence might be applicable. The claimants were entitled to the same protection of confidentiality as any other applicant. In the f present case, if their identity or whereabouts were to be detected, it would compromise their new identity.

22. The burden was upon the applicants to prove their case. The requirement of necessity should be satisfied by the claimants in respect of each category of information which was sought to be protected and the orders should not go g wider than strictly necessary. He said that there were compelling reasons in this case for protecting as confidential the identity of the claimants. He submitted that it was not necessary to restrict past information other than that which would identify them now or in the future. It would be necessary to have some restriction on information at their present units. It might be necessary to include a non-solicitation order. The confidential information about care and treatment did not require h injunctions and the other past information did not justify any restriction by the court. The question of whether there should be an injunction 'against the world' was strictly academic since the court could grant one against the defendants and it would be effective against all who had notice of it (see *A-G v Times Newspapers Ltd* [1991] 2 All ER 398, [1992] 1 AC 191). It was arguable that the court's power j to control its own process and to protect the administration of justice might enable the court to invoke the inherent jurisdiction. It would be highly unsatisfactory if, in a case like the present, where the consequences of identification were grave for the claimants and the administration of justice, and where in general terms identification by the media was a possibility to be taken seriously, protection was

only available where the claimants could establish that a particular media outlet intended to identify them. It was important that there should be liberty to apply.

23. He did not support the other arguments put forward by Mr Fitzgerald as founding jurisdiction to make orders. Mr Murdoch, for the Official Solicitor, supported the submissions of Mr Caldecott.

(D) THE LAW

Jurisdiction to grant an injunction

Application of the convention

24. Before turning to the question of whether there is jurisdiction to grant injunctions, the preliminary issue is whether the convention applies to this case. It is clear that, although operating in the public domain and fulfilling a public service, the defendant newspapers cannot sensibly be said to come within the definition of public authority in s 6(1) of the 1998 Act. Consequently, convention rights are not directly enforceable against the defendants; see ss 7(1) and 8 of the 1998 Act. That is not, however, the end of the matter, since the court is a public authority, see s 6(3), and must itself act in a way compatible with the convention, see s 6(1), and have regard to European jurisprudence, see s 2. In a private family law case, *Glaser v UK* [2000] 3 FCR 193, the European Court, sitting as a Chamber, declared admissible an application by a father seeking the enforcement of contact orders made in private law proceedings between him and the mother of his children. They considered the potential breach of the father's rights under arts 8 and 6. The court said (at 208–209 (para 63)):

> 'The essential object of art 8 is to protect the individual against arbitrary interference by public authorities. There may however be positive obligations inherent in an effective "respect" for family life. These obligations may involve the adoption of measures designed to secure respect for family life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific steps, (see among other authorities, *X and Y v Netherlands* (1985) 8 EHRR 235 (para 23), and, mutatis mutandis, *Osman v UK* (5 BHRC 293 at 321 (para 115))). In both the negative and ... positive contexts, regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties, and the state's margin of appreciation (see, among other authorities, *Keegan v Ireland* (18 EHRR 342 at 362 (para 49))).'

25. The court held that, in that case, the authorities, including the courts, struck a fair balance between the competing interests and did not fail in their responsibilities to protect the father's right to respect for family life. This decision underlines the positive obligations of the courts including, where necessary, the provision of a regulatory framework of adjudicatory and enforcement machinery in order to protect the rights of the individual. The decisions of the European Court in *Glaser*'s case and *X v Netherlands* (1985) 8 EHRR 235, seem to dispose of any argument that a court is not to have regard to the convention in private law cases. In *Douglas v Hello! Ltd* [2001] IP & T 391 at 425 (para 133) Sedley LJ held that s 12(4) of the 1998 Act—

'puts beyond question the direct applicability of at least one article of the convention as between one private party to litigation and another—in the jargon, its horizontal effect.'

26. In the light of the judgments in *Douglas'* case, I am satisfied that I have to apply art 10 directly to the present case.

27. That obligation on the court does not seem to me to encompass the creation of a free-standing cause of action based directly upon the articles of the convention, although that proposition is advanced by Mr Fitzgerald as a fall-back position, if all else fails. The duty on the court, in my view, is to act compatibly with convention rights in adjudicating upon existing common law causes of action, and that includes a positive as well as a negative obligation.

The jurisdictional basis for an injunction

28. It is accepted by all the parties, and it is clearly right, that the basis upon which the injunctions were granted by Morland J on 26 November 1993 no longer exists. He based his decision on the inherent jurisdiction of the Family Division of the High Court to protect minors, and on the statutory provisions in s 39 of the 1933 Act. If there is any jurisdiction to grant injunctions it has to be found elsewhere. The principal submission in favour of the existence of the court's power is based upon the law of confidence, taking into account the implementation of the 1998 Act. If the route to the jurisdiction to grant injunctions for the benefit of adults can properly be found within the principles of confidentiality, it would not be necessary to embark, other than briefly, upon the interesting but potentially more speculative routes put forward by Mr Fitzgerald.

29. At common law, injunctions may be granted in support of equitable rights and this includes injunctions to restrain breach of confidence. In *Broadmoor Hospital Authority v R* [2000] 2 All ER 727 at 731–735, [2000] QB 775 at 785–789, Lord Woolf MR set out the jurisdiction of the court to grant an injunction. He cited with approval a passage from Spry *Equitable Remedies* (5th edn, 1997) p 323:

'The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate.'

Lord Woolf referred to two types of injunction that have emerged in the last 30 years or so, the Mareva, or freezing injunction, and the injunction to restrain proceedings in a foreign court. He endorsed the observation of Cooke P in *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435 at 438: '... the remedy of injunction should be available whenever required by justice.'

The issue in the *Broadmoor* case, which does not arise here, was whether the hospital authority had standing to make an application for an injunction. In the

present case, if there is jurisdiction to grant injunctions, the claimants clearly have standing to seek the remedy.

The jurisdiction based on confidence

30. As I have already said, in my view, the claimants in private law proceedings cannot rely upon a free-standing application under the convention. In their submissions, the claimants, supported by the Attorney General and the Official Solicitor, relied upon the common law right to confidence. The tort of breach of confidence is a recognised cause of action. Megarry J in *Coco v Clark* [1969] RPC 41 at 47, identified three essentials of the tort of breach of confidence. The evidence must have 'the necessary quality of confidence about it'. The information 'must have been imparted in circumstances importing an obligation of confidence'. There must be an 'unauthorised use of the information to the detriment of the party communicating it'.

31. In *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 658, [1990] 1 AC 109 at 281, Lord Goff said:

> 'I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others ... in the vast majority of cases ... the duty of confidence will arise from a transaction or relationship between the parties ... But it is well-settled that a duty of confidence may arise in equity independently of such cases ...'

32. He raised three limiting principles:

> '...that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it. I shall be reverting to this limiting principle at a later stage. The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia. There is no need for me to develop this point. The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure ... It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.' (See [1988] 3 All ER 545 at 659, [1990] 1 AC 109 at 282.)

33. The confidentiality sought to be protected in the present case is clearly not trivial. Lord Goff's third limiting principle cannot, I would respectfully suggest, now stand in the light of s 12 of the 1998 Act and art 10(1) of the convention, which together give an enhanced importance to freedom of expression and consequently to the right of the press to publish.

Article 10: freedom of expression

34. Article 10, as applied to the media, is central to this case. It states, so far as it is relevant to these claims:

> 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ... The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

35. In s 12 of the 1998 Act, special provisions are made in relation to applications to restrict freedom of expression. Section 12(4) states: 'The court must have particular regard to the importance of the Convention right to freedom of expression ...'

36. There is no doubt, therefore, that Parliament has placed great emphasis upon the importance of art 10 and the protection of freedom of expression, inter alia for the press and for the media. The 1998 Act and the convention do not, however, establish new law. They reinforce and give greater weight to the principles already established in our case law. In *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 408, [2000] 2 AC 115 at 126, Lord Steyn said:

> 'Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market": *Abrams v US* (1919) 250 US 616 at 630 per Holmes J (dissent). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country: see Stone, Seidman, Sunstein and Tushnett *Constitutional Law* (3rd edn, 1996) pp 1078–1086.'

37. Hoffmann LJ said, in *R v Central Independent Television plc* [1994] 3 All ER 641 at 651–653, [1994] Fam 192 at 202–204:

> 'The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. And publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom.

> Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which "right-thinking people" regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute ... It cannot be too strongly emphasised that outside the established exceptions (or any new ones which Parliament may enact in accordance with its obligations under the convention) there is no question of balancing freedom of speech against other interests. It is a trump card which always wins ... no freedom is without cost and in my view the judiciary should not whittle away freedom of speech with ad hoc exceptions. The principle that the press is free from both government and judicial control is more important than the particular case.'

38. Munby J in *Kelly v BBC* [2001] 1 All ER 323 at 337, [2001] 2 WLR 253 at 264 said:

> '... if those who seek to bring themselves within para 2 of art 10 are to establish "convincingly" that they are—and that is what they have to establish—they cannot do so by mere assertion, however eminent the person making the assertion, nor by simply inviting the court to make assumptions; what is required ... is proper *evidence* ...' (Munby J's emphasis.)

39. In *Sunday Times v UK* (1979) 2 EHRR 245 at 281 (para 65) the European Court said:

> 'The Court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.'

40. However, more recently, in *Douglas v Hello! Ltd* [2001] IP & T 391 at 426–427 (paras 136–137), Sedley LJ said:

> '... by virtue of s 12(1) and (4) [of the 1998 Act] the qualifications set out in art 10(2) are as relevant as the right set out in art 10(1). This means, for example, the reputations and rights of others—not only but not least their convention rights—are as material as the defendant's right of free expression. So is the prohibition on the use of one party's convention rights to injure the convention rights of others. Any other approach to s 12 would in my judgment violate s 3 ... the much-quoted remark of Hoffmann J in *R v Central Independent Television plc* [1994] 3 All ER 641 at 652, [1994] Fam 192 at 203 that freedom of speech "is a trump card which always wins" came in a passage which expressly qualified the proposition as lying "outside the established exceptions (or any new ones which parliament may enact in accordance with its obligations under the convention)". If freedom of expression is to be impeded, in other words, it must be on a cogent ground recognised by law ... s 12 of the 1998 Act requires the court to have regard to art 10 ... this cannot ... give the art 10(1) right to freedom of expression a presumptive priority over other rights. What it does require the court to consider is art 10(2) along with 10(1), and by doing so bring into the frame the conflicting right to privacy. This right, contained in art 8 and reflected in English law, is in turn qualified in both contexts by the right of others to free expression. The outcome, which self evidently has to be the same under both articles, is determined principally by considerations of proportionality.'

41. In his Goodman Lecture, (22 May 1996), Lord Hoffmann referred to his judgment in *R v Central Independent Television plc* and said:

> 'Some people have read that to mean that freedom of speech always trumps other rights and values. But that is not what I said. I said only that in order to be put [in] the balance against freedom of speech, another interest must fall within some established exception which could be justified under Article 10 of the European Convention'.

See also Sedley LJ in *Douglas v Hello! Ltd* [2001] IP & T 391 at 427 (para 137).

42. Mr Desmond Browne submitted that that it was not a balancing operation between the right to freedom of expression against any legitimate aim falling within art 10(2). It would seem to me however that, whether it is called a balancing process or any other description, the conflict that may arise between art 10(1) and art 10(2) has to be resolved and the legitimate aim in restricting freedom of expression within the exceptions in art 10(2) given appropriate weight according to the facts of the individual case. Sedley LJ said in *Douglas v Hello! Ltd* [2001] IP & T 391 at 426 (para 136): '... the qualifications set out in art 10(2) are as relevant as the right set out in art 10(1).'

43. There would not however be such a juggling act in a case which did not fall within the exceptions set out in art 10(2). It is clear however that, to obtain an injunction to restrain the media from publication of information, it requires a strong case. Brooke LJ said in *Douglas'* case [2001] IP & T 391 at 403 (para 49):

> 'Although the right to freedom of expression is not in every case the ace of trumps, it is a powerful card to which the courts of this country must always pay appropriate respect.'

And Sedley LJ said at 427 (para 137): 'If freedom of expression is to be impeded ... it must be on cogent grounds recognised by law.'

44. The onus of proving the case that freedom of expression must be restricted is firmly upon the applicant seeking the relief. The restrictions sought must, in the circumstances of the present case, be shown to be in accordance with the law, justifiable as necessary to satisfy a strong and pressing social need, convincingly demonstrated, to restrain the press in order to protect the rights of the claimants to confidentiality, and proportionate to the legitimate aim pursued. The right to confidence is, however, a recognised exception within art 10(2) and the tort of breach of confidence was the domestic remedy upon which the European Commission, in *Earl Spencer v UK* (1998) 25 EHRR CD 105, declared inadmissible an application by Lord and Lady Spencer on the basis that they had not exhausted their domestic remedies.

45. I turn to the three other articles of the convention which are said by the claimants to be engaged in this case, and which clearly I must consider alongside art 10.

Article 2: right to life

> '1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
> 2. [the exceptions which do not apply]'

46. If the claimants' case is made out, art 2 is clearly engaged. In *Osman v UK* (1998) 5 BHRC 293, the European Court held that the provisions of art 2 enjoined a positive obligation upon contracting states to take measures to secure the right to life. In that case it was the failure of the police to act to protect a family from criminal acts including murder. The European Court said (at 321 (paras 115–116)):

> 'The court notes that the first sentence of art 2(1) enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction ... it must be established ... that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk ...'

Article 3: prohibition of torture

> 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

47. Article 3 is equally potentially applicable, if I am satisfied as to the strength of the claimants' case. Other than in the specified exceptions in art 2, there is to be no derogation from the rights set out in these two articles.

Article 8: right to respect for private and family life

48. Article 8 is also potentially applicable. It states:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

49. In *X v Netherlands* (1985) 8 EHRR 235, the European Court held that, in a case where the prosecutor took no action on a complaint by a father of a sexual assault on his mentally incapacitated daughter of 16, that the state had failed to protect a vulnerable individual from a criminal violation of her physical and moral integrity by another private individual. A violation of art 8 was found. The court said (at 239 (para 23)):

> 'The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.'

50. Sedley LJ said in *Douglas v Hello! Ltd* [2001] IP & T 391 at 425–426 (paras 133–134):

> 'The other point, well made by Mr Tugendhat, is that it is "the convention right" to freedom of expression which both triggers the section (see s 12(1) [of the 1998 Act]) and to which particular regard is to be had. That convention right, when one turns to it, is qualified in favour of the reputation and rights of others and the protection of information received in confidence. In other words you cannot have particular regard to art 10 without having equally particular regard at the very least to art 8 ... [Mr Carr] balked at what Mr Tughendhat submitted, and I agree, was the necessary extension of the subsection's logic. A newspaper, say, intends to publish an article about an individual who learns of it and fears, on tenable grounds, that it will put his life in danger. The newspaper, also on tenable grounds, considers his fear unrealistic ... it seems to me inescapable that s 12(4) makes the right to life, which is protected by art 2 and implicitly recognised by art 10(2), as relevant as the right of free expression to the court's decision; and in so doing it also makes art 17 (which prohibits the abuse of rights) relevant.'

51. Although the Court of Appeal was concerned with an entirely different situation, the observations of Sedley LJ are highly relevant to and helpful in the task facing me in the present case where I have to resolve a potential conflict between art 10 on the one hand and arts 2 and 3 and 8 on the other hand.

(E) THE EVIDENCE

52. I turn now to the evidence upon which the claimants rely in support of the applications for permanent injunctions and the evidence adduced by the defendant newspapers. The most important issue, by far, is the assessment of the risk to each claimant if his identity and whereabouts were to be discovered and published when he leaves his secure unit and lives in the community. If the risk is real and substantial, and, if an injunction can, and should, be granted, then it may also be necessary to protect each claimant's present placement until he is released.

Evidence from the Secretary of State for the Home Department.

53. The Secretary of State provided me with evidence as to the anticipated effects of publicity on the claimants. Mr Le Marechal, head of the section of the Young Offender Group dealing with children detained under s 53(1) (now ss 90–92 of the Powers of Criminal Courts (Sentencing) Act 2000), made a written statement. The statement included a report from the manager of the secure unit where Thompson is placed and reports from the supervising probation officers of Venables and of Thompson. I also received a report from the manager of the secure unit where Venables is placed. The summary of their evidence is as follows. If the identity and present whereabouts of the claimants were disclosed it would affect the units, which are not entirely secure. Each unit has public access and is easy to observe from outside. It would be possible for strangers to come within the perimeter of each unit. That, in turn, would affect movements within the units. There is a greater risk of the claimants being bullied or victimised by other inmates if further restrictions are placed on all of them by reason of press or others visiting the units. A major concern is the possibility of

intrusive publicity identifying either of the claimants. It would also affect the rights of mobility of all inmates including the claimants. The units are working towards the reintegration of the claimants into the community and it is in the public interest that this aim is achieved.

54. The manager of Thompson's secure unit said in his statement that:

> 'In the past we have received quite explicit hate mail for the attention of Robert and staff who care for him, for example, from three ex-army members "to the vermin who killed Jamie Bulger we don't forget we will get the job done".'

55. He set out some unspecific examples of difficulties experienced by staff from approaches by the media seeking information about Thompson by telephone calls, from film crews in the grounds, reporters approaching staff and photographers using zoom lenses to photograph the premises. This raises problems of confidentiality in respect of the work done with the claimants and with the other inmates.

56. Mr Le Marechal stated that, when the tariff period had been served, it was a matter for the Parole Board to determine whether their detention was no longer necessary for the protection of the public. If satisfied on that issue, the Parole Board could direct their release on life licence under s 28(5) of the Crime (Sentences) Act 1997. Under s 31 of the 1997 Act, each claimant would be subject to conditions, including supervision by a probation officer.

57. In their statements, the probation officers assigned to each claimant have expressed their serious concerns about the effectiveness of resettlement if the identities of the claimants become known. They also express the concern that, if their own identities became known, it would have a serious effect upon the ability of the probation service to carry out its statutory function. Although not relevant to the assessment of risk, it is clear that both claimants are extremely frightened about the possibility of being discovered after they leave their secure units.

58. Mr Le Marechal considered that, while the claimants continued to be held in the secure units, it would be necessary to impose reporting restrictions in order to safeguard the claimants from photographs or descriptions of their present adult appearance, or from any information which might become available as to where they would go on their release. He did not think that other restrictions on information about the secure units were necessary. He said at para 22 of his statement:

> '... other life licensees have usually been able successfully to re-integrate into society—however notorious they were at the time of the offence. The claimants are notorious. Indeed in my experience, they are uniquely notorious. I cannot think of any other case—past or present—which has given rise to similar concerns. The court should not think that cases like this are going to arise very often. Unlike most other notorious murderers (whose offences and appearances fade in public consciousness and interest during the course of their long incarceration) the claimants' cases have remained in the public eye ever since they were arrested. Since 1993, the appearance of each has changed beyond recognition. But their new appearances have not been made public. So a reporting restraint in these cases has a better chance of being effective than in many other cases. Were, conversely, their identities

and/or appearances as adults to be made public before they are released, or thereafter, it seems inevitable that they would be recognised anywhere in the United Kingdom with all the attendant difficulties that would entail.'

59. Mr Shaw informed me that, although a decision has not yet formally been made, it is very likely that both claimants will be provided with new identities on release. That would include new names, birth certificates, national insurance numbers, national health cards, passports and so on. I was also told that this would be the first time since the case of Mary Bell in 1980 that new identities would be provided for those convicted of murder. New identities have been provided in the past to 'super grasses', such as in the case of *Nicholls*, but without the application for or grant of injunctions (see *Nicholls v BBC* [1999] EMLR 791 where exceptionally an injunction was granted to the 'super grass'). I was also informed that it was not the practice of the Home Office to disclose the date of release of those detained under s 53, and that in the present case, the Home Office would not make public the date of release.

Venables

60. The solicitor for Venables, Mr Dickinson, who has acted for him since 1994, made four statements, which included information about what he described as relentless inquiries from the media about his client over the years. These inquiries have been from all over the world. He referred to a number of breaches of the existing injunctions. He said that since 1993 there has been a sustained and high level of media interest in the case, and in the claimants, and this shows no signs of diminishing. There remained a high degree of hostility. He exhibited to his first statement a selection of articles from newspapers between the years 1993 to 2000. It was his firm belief that, on his release and for many years thereafter, Venables was at risk of death or serious physical harm. Venables' father, in his statement, referred to the intense media pressure to which his family was subject to at an earlier stage. As a result of this pressure the family had to move on several occasions, his younger children were made wards of court and injunctions were granted for their benefit to restrain publicity.

Thompson

61. The solicitor for Thompson, Mr Lloyd, who has acted for him since 1993, made a statement in which he said that the behaviour of the press in the past poses a real risk to the safety of Thompson to the extent that this had become a matter of life and death. He exhibited a recent article in the Daily Mail (2 November 2000 (see para 63(vii) below)) reporting that vigilantes in North Wales threatened to burn down the home of a woman wrongly suspected of being the mother of one of the claimants. Mrs Thompson made a statement about the impact on her children and herself. They had changed their names and moved home on eight occasions. She accepted that she had co-operated with journalists in the past, but had not done so for a long time. She was very concerned, if the reporting restrictions were lifted, about the effect of publicity upon her family, and upon her son Robert.

Press reports

62. I have been provided, by those representing the claimants and the defendants, with a very large selection of the press coverage of this case over the period 1993 to now, covering the murder, the trial, the subsequent litigation in

the English courts and the European Court, the decision as to the tariff and the proceedings before me. The press cuttings are helpful for two purposes: firstly, to elicit information to assist in the assessment of the extent of the risk to the claimants, which is said to exist if the identities of the claimants are revealed; secondly, to assist in the assessment as to whether the press might report details leading to disclosure of their identity if there were no injunctions in place.

Evidence of risk reported by the press

63. The following newspaper cuttings are, in my view, particularly relevant. (i) The Sun, 27 January 1994. An uncle of the victim said: '... if the judge's recommendation is followed, then the streets won't be safe in eight years time'. (ii) The Sun, 1 February 1994. Following the newspaper's campaign—an article set out that 80,000 telephone calls had been made to the television channel to say Bulger killers must rot in jail. Coupon attached to the article to be sent by readers to the Home Secretary expressing support for the view that the claimants should stay in prison for life. (iii) The Sun, 26 May 1994. The mother of the victim said: 'They aren't safe to walk the streets. We must not give them the chance to do it again'. (iv) Sunday Mirror, 31 October 1999. In an article titled 'Society must be protected from this pair of monsters', Denise Bulger said:

> 'I will do everything in my power to keep them caged and I hope that Jack Straw will back me up. If they ever do get out I have sworn to go looking for them. When I find them they will wish they were dead. I will make sure they know what it is to really suffer ... wherever they go mothers like me will be after their blood.'

(v) Sunday Mirror, 27 August 2000. In an article titled 'Throw away the key':

> '... if Venables and Thompson returned to Liverpool "they would be lynched—and nobody would shed a tear. The pair of them should stay inside for the rest of their natural lives. They took a baby's life. So why should they be allowed a life of their own?"'

(vi) The Guardian, 31 October 2000. In an article titled 'Bulger father vows to hunt killers', Ralph Bulger was reported as having said on GMTV: 'Something's got to be done about it. We can't just stop now, and let these two little animals get released ... I will do all I can to try my best to hunt them down'. Dee Warner, of Mama [a victim's support group, Mothers Against Murder and Aggression] was also quoted:

> '... you could say you shouldn't take the law into your own hands but if the law worked for the victims rather than the criminals there wouldn't be these vigilantes attacks. I couldn't advocate anyone being murdered but I haven't had a child murdered so I am not in a position to say how I would feel.'

(vii) Daily Mail, 2 November 2000. In an article titled 'Bulger vigilantes are terrorising my family' it was reported that vigilantes had threatened to burn down the home of a woman they wrongly suspect is the mother of one of James Bulger's killers. (viii) The Mirror, Friday, 27 October 2000. 'When freed, they will have new identities to shield them from vigilante attacks.' (ix) Daily Mail, Friday, 27 October 2000: '... like Mary Bell ... they are likely to be constantly looking over their shoulders in fear they have been tracked down by vigilantes.'

There has also been press coverage of the family of each claimant, see for example—(x) The People, 28 November 1993: a

> 'Both the Bulger and Matthews families firmly believe the parents of Thompson and Venables should have been in the docks with their sons. "As far as we are concerned they are equally as evil and equally to blame. They should have been charged with murder along with those bastards." Ray said: b "What really hurts us is that Thompson and Venables' parents have tried to make themselves out to be caring in the media. But no normal, loving, caring parent allows their children to play truant, shoplift, terrorise old ladies and kill animals. They were never there to look after them yet they must have known what arrogant, aggressive little bastards they are. If they didn't have any idea just what kind of parents are they?".' c

(xi) Daily Express, 29 November 1993: 'Jamie Killer's runaway father hides in shame.' (xii) Daily Mail, Friday, 27 October 2000: 'Susan [Venables] had remarried but her second husband couldn't cope as their home was besieged by angry people wanting to hang her son.' In addition Mr Pike, to whom I refer in para 65 below, in his statement: d

> '... some sections of the public and the media at the time of the trial and since have reacted strongly against the claimants, their crimes and their being released. It cannot be expected that such strong opinions will not be aired and indeed it would be a curtailment of the freedom of expression to e prevent publication of such opinion.'

Evidence relied upon by the claimants to show the likelihood of press coverage if there were no injunctions.

(xiii) The Sun, 27 October 2000: 'Why we can't tell full story ...' f

> 'Killers Robert Thompson and Jon Venables are protected from public scrutiny thanks to the ruling made after their trial in 1993. The judge, Mr Justice Morland, set out terms for a wide-ranging injunction banning the media from revealing any details about the boys' lives in secure units. It also prevented the press from approaching anyone involved in their rehabilitation, g and outlawed photos taken of them after a certain date. At 18 the boys would normally lose the protection given to juveniles. But their lawyers want the High Court to extend the order for the rest of their lives. The Sun will fight this unprecedented application next month.'

(xiv) News of the World, 29 October 2000, editorial: h

> 'These two brutal killers must be kept in custody until they are CERTAIN not to re-offend. When this happens, it is proposed they be granted anonymity and the full protection of the State—so that it becomes an offence to report anything more about their lives. But the public has a right to know j about them. This is yet another example of the law falling over itself to protect the guilty and ride roughshod over the feelings of their victims. It would also create a ridiculous precedent for all released criminals to demand that their privacy be protected. And that would be the final insult to the memory of poor, murdered James Bulger.'

(xv) The News of the World 'naming and shaming campaign' of paedophiles. (xvi) Daily Mail, 27 October 2000, (see above).

Press coverage of tariff set by Lord Woolf CJ

(xvii) Daily Mail, 27 October 2000: 'As freedom beckons for the murderers of James Bulger, *Has justice betrayed the little boy who was never allowed to grow up?*' 'The mother left with only tears.' 'Before you judge what is written in these pages, you need to recall exactly what they did to little James.' 'Sinister image: James is led away to his death.' 'Now, a splendid new life beckons.' 'They will enjoy full support from the welfare services.' (xviii) The Sun, 27 October 2000:

> 'CRAZY James Bulger's killers tortured the two-year-old to death. Our top judge says they should go free early because jail would expose them to drugs and violence.'

'James' mum: they have got away with MURDER.' 'WE'LL NEVER FORGIVE THEM.'

Evidence from the defendant newspapers

64. For the July hearing, a statement was given on behalf of the News Group Newspapers, in particular The Sun and the News of the World, by Mr Crone, their legal director. He said that the horrific murder, the litigation over the tariff for detention, the tariff decision, the fact and the process of their rehabilitation into the community were all matters of the most intense and legitimate public interest. Newspapers had had the duty to keep their readers informed and the readers had a concomitant right to be informed. The newspapers he represented wished to ensure that they could play their full part in any forthcoming debate on those matters.

65. Mr Pike, solicitor for the defendants, made a statement in support of lifting all injunctions. He said that the circumstances surrounding the death of James Bulger were extraordinary, perhaps without parallel, largely as a result of the age of the claimants at the time combined with the brutal and horrific nature of the crime. He recognised that, such was the nature of the crime, there will always be the likelihood in the future that the Bulger case will be referred to when there is discussion of serious child crime. That would be legitimate and to be expected. He did not accept that the level of media interest was other than proper and legitimate. The rehabilitation process and the education of the claimants were matters of genuine public interest.

66. He set out the position of the Press Complaints Commission Code and stated that it was an industry-wide standard included in contracts of employment entered in to by journalists. The code was taken seriously by the press. The commission censured any paper guilty of breaching the code and he gave the example of the complaint by Lord Spencer; see *Earl Spencer v UK* (1998) 25 EHRR CD 105.

67. In respect of these claimants, there was no evidence of speculative improper journalistic activity in the future. Lifelong anonymity would give the claimants a level of protection as adults to which no other adult would be entitled. He pointed to recognition by Mr Dickinson that over the period the reporting had become more balanced. He did not accept that the breaches alleged had in fact occurred. Some of the information had been provided by either members of the family, or

by the claimants' then solicitors. In any event, none of them had been published by the first or second defendants.

68. He said that the defendants were alive to the public interest in securing the rehabilitation of convicted offenders and they had no desire to abuse their right to freedom of expression or to infringe any legitimate right of the claimants. However, the public had the right to information on the circumstances giving rise to the murder of the child, including the upbringing of the claimants; the appropriate period for them to serve in custody; the care and treatment of the boys whilst in custody—at considerable public expense—the extent of the risk of allowing them back into the community and the process of rehabilitation. His clients were most concerned that no precedent should be created whereby adult criminals, particularly those convicted of serious acts of violence, were given lifetime anonymity. He exhibited to his statement a selection of newspaper articles as examples of press coverage of matters of legitimate public interest.

Judicial observations

69. In *R v Secretary of State for the Home Dept, ex p Venables* [1997] 1 All ER 327 at 353–354, [1998] AC 407 at 439 Hobhouse LJ said:

> 'The murder of James Bulger was a truly horrific crime ... Why this crime provoked an extreme public reaction can be easily understood. The crime itself threatened the security of all mothers of young children. The crime was exceptionally cruel. The crime offended against the assumptions made by most members of the public about the criminal capabilities of pre-adolescent boys. The killing itself attracted enormous publicity as did the ensuing trial and the sentencing process ... The situation in which the Secretary of State and his advisers found themselves was wholly exceptional. A climate of opinion had been built up in which it was very difficult to make an adequate decision on what was required for retribution and deterrence. The situation had become overlaid by a range of public pressures which lost sight of the two defendants as immature individuals and got bound up with when, many years later, it might become publicly acceptable to release the murderers of James Bulger from custody on licence.'

70. Lord Goff ([1997] 3 All ER 97 at 101, [1998] AC 407 at 475) set out, the public concerns over the case. 4,400 letters were received; a petition signed by 278,300 people seeking detention for life, several thousand other letters asking for detention for 25 years and a press campaign by The Sun with coupons responded to by over 20,000 people seeking detention for life. The Home Secretary had taken this information into account in setting the tariff. Lord Goff said:

> 'It is plain from his decision letters that the Secretary of State did indeed have regard, when he made his decision to fix the penal element in the applicants' sentences at 15 years, to the petitions and letters to which I have already referred ... That there was public concern about this terrible case, there can be no doubt. Any humane person must have felt, not only the deepest sympathy for little James Bulger and his family, but horror that two boys as young as the two applicants should have perpetrated such a brutal crime. The Home Secretary hardly needed the media to inform him of this. But events such as this tend to provoke a desire for revenge, and calls for the infliction of the severest punishment upon the perpetrators of the crime.

a This elemental feeling is perhaps natural, though in today's society there is a tendency for it to be whipped up and exploited by the media. When this happens, it can degenerate into something less acceptable. Little credit can be given to favourable responses to a campaign that the two applicants should "rot in jail" for the rest of their lives ...' (See [1997] 3 All ER 97 at 113–114, [1998] AC 407 at 489.)

b 71. Lord Browne-Wilkinson said:

'The murder ... was a cruel and sadistic crime. It is made even more horrific by the fact that the applicants were only 10 years old at the time. It is not surprising that the case has given rise to much public concern and, indeed, outrage.' (See [1997] 3 All ER 97 at 115, [1998] AC 407 at 491.)

c 72. Lord Steyn said:

'The inexpressible grief of the family of the murdered boy will never cease. The family, the local community and society generally are morally outraged.' (See [1997] 3 All ER 97 at 140, [1998] AC 407 at 518.)

d 73. In *V v UK* (1999) 30 EHRR 121 at 131 (para 9), the European Commission in its opinion said:

'The trial was preceded and accompanied by massive national and international publicity. Throughout the criminal proceedings, the arrival of
e the defendants was greeted by a hostile crowd. On occasion, attempts were made to attack the vehicles bringing them to court.'

And at 133 (para 14):

'In his summing-up to the jury the trial judge noted that the witnesses had
f arrived in court in a blaze of publicity and many had faced a bevy of photographers.'

74. In the recommendations of Lord Woolf CJ on the tariff on 26 October 2000, he said that the facts of the murder were exceptionally horrific:

g 'The crime had many aggravating features, including the age of the victim, the period over which the violence stretched and its degrading nature, and what was done with the body of the victim ... [Morland J] considered that there was a very real risk of revenge attacks upon them from others. This risk is confirmed by the information before me.' (See *Re Thompson (tariff recommendations)* [2001] 1 All ER 737 at 738, 739.)

h (F) CONCLUSIONS ON JURISDICTION

75. My conclusions on the application of the principles of English law to the facts of this case, are based on the assumption that the case put forward by the claimants has been established.

j 76. I am, of course, well aware that, until now, the courts have not granted injunctions in the circumstances which arise in this case. It is equally true that the claimants are uniquely notorious. On the basis of the evidence presented to me, their case is exceptional. I recognise also that the threats to the life and physical safety of the claimants do not come from those against whom the injunctions are sought. But the media are uniquely placed to provide the information that would

lead to the risk that others would take the law into their own hands and commit crimes against the claimants.

77. The starting point is, however, the well-recognised position of the press, and their right and duty to be free to publish, even in circumstances described by Hoffmann LJ in *R v Central Independent Television plc* [1994] 3 All ER 641, [1994] Fam 192. As Brooke LJ said in *Douglas'* case (see para 43 above) it is a powerful card to which I must pay appropriate respect. I am being asked to extend the domestic law of confidence to grant injunctions in this case. I am satisfied that I can only restrict the freedom of the media to publish if the need for those restrictions can be shown to fall within the exceptions set out in art 10(2). In considering the limits to the law of confidence, and whether a remedy is available to the claimants within those limits, I must interpret narrowly those exceptions. In so doing and having regard to arts 2, 3 and 8 it is important to have regard to the fact that the rights under arts 2 and 3 are not capable of derogation, and the consequences to the claimants if those rights were to be breached. It is clear that, on the basis that there is a real possibility that the claimants may be the objects of revenge attacks, the potential breaches of arts 2, 3 and 8 have to be evaluated with great care.

78. What is the information sought to be protected and how important is it to protect it? The single most important element of the information is the detection of the future identity of the claimants in the community. All the other matters sought to be protected for the present, and for the future, are bound up in the risk of identification, whether by photographs, or by descriptions of identifying features of their appearance as adults, and their new names, addresses and similar information. That risk is potentially extreme if it became known what they look like, and where they are. The risk might come from any quarter, strangers such as vigilante groups, as well as the parents, family and friends of the murdered child. In the present case, the public authority, the court, has knowledge of the risk to the claimants. Does the risk displace the right of the media to publish information about the claimants without any restriction imposed by the court?

79. As I have set out, art 10(2) recognises the express exception 'for preventing the disclosure of information received in confidence'. None the less, in order for it to be used to restrict freedom of expression, all the criteria in art 10(2), narrowly interpreted, must be met. Taking each limb in turn.

In accordance with the law

80. I am satisfied that, taking into account the effect of the convention on our law, the law of confidence can extend to cover the injunctions sought in this case and, therefore, the restrictions proposed are in accordance with the law. There is a well-established cause of action in the tort of breach of confidence in respect of which injunctions may be granted. The common law continues to evolve, as it has done for centuries, and it is being given considerable impetus to do so by the implementation of the convention into our domestic law. I am encouraged in that view by the observations of Brooke LJ in *Douglas v Hello! Ltd* [2001] IP & T 391 at 405–406 (para 61):

> 'It is well known that this court in *Kaye v Robertson* [1991] FSR 62 said in uncompromising terms that there was no tort of privacy known to English law. In contrast, both academic commentary and extra-judicial commentary by judges over the last ten years have suggested from time to time that a

development of the present frontiers of a breach of confidence action could fill the gap in English law which is filled by privacy law in other developed countries. This commentary was given a boost recently by the decision of the European Commission on Human Rights in *Earl Spencer v UK* (1998) 25 EHRR CD 105, and by the coming into force of the Human Rights Act 1998.'

Keene LJ said:

'... breach of confidence is a developing area of the law, the boundaries of which are not immutable but may change to reflect changes in society, technology and business practice.' (See [2001] IP & T 391 at 433 (para 165).)

81. The duty of confidence may arise in equity independently of a transaction or relationship between parties. In this case it would be a duty placed upon the media. A duty of confidence does already arise when confidential information comes to the knowledge of the media, in circumstances in which the media have notice of its confidentiality. An example is the medical reports of a private individual which are recognised as being confidential. Indeed it is so well-known that medical reports are confidential that Mr Desmond Browne submitted that it was not necessary to protect that information by an injunction. It is also recognised that it is just in all the circumstances that information known to be confidential should not be disclosed to others, in this case by publication in the press (see Lord Goff in *AG v Guardian Newspapers (No 2)*). The issue is whether the information leading to disclosure of the claimants' identity and location comes within the confidentiality brackets. In answering that crucial question, I can properly rely upon the European case law and the duty on the court, where necessary, to take appropriate steps to safeguard the physical safety of the claimants, including the adoption of measures even in the sphere of relations of individuals and/or private organisations between themselves. Under the umbrella of confidentiality there will be information which may require a special quality of protection. In the present case the reason for advancing that special quality is that, if the information was published, the publication would be likely to lead to grave and possibly fatal consequences. In my judgment, the court does have the jurisdiction, in exceptional cases, to extend the protection of confidentiality of information, even to impose restrictions on the press, where not to do so would be likely to lead to serious physical injury, or to the death, of the person seeking that confidentiality, and there is no other way to protect the applicants other than by seeking relief from the court.

Necessary in a democratic society to satisfy a strong and pressing need

82. It is a very strong possibility, if not, indeed, a probability, that on the release of these two young men, there will be great efforts to find where they will be living and, if that information becomes public, they will be pursued. Among the pursuers may well be those intent on revenge. The requirement in the convention that there can be no derogation from the rights under arts 2 and 3 provides exceptional support for the strong and pressing social need that their confidentiality be protected.

Proportionate to the legitimate aim pursued

83. Although injunctions have not been granted in such circumstances in the past, I am satisfied that, to protect information requiring a special quality of

protection, injunctions can be granted. I gain support for that conclusion from the judgment of Lord Woolf MR in the *Broadmoor* case, and the fact that over the past 30 years or so the jurisdiction of the court to grant injunctions, where it has been demonstrated to be necessary and in accordance with general equitable principles, has been exercised. The provision of injunctions to achieve the object sought must be proportionate to the legitimate aim. In this case, it is to protect the claimants from serious and possibly irreparable harm, which would, in my judgment, clearly meet the requirement of proportionality. As I have already said above, there is a positive duty upon the court to take such steps as may be necessary to achieve that aim. In *Osman's* case, the European Court held that a breach of arts 2 and 3 would be established if the authorities knew, or ought to have known, of the existence of a real and immediate risk to the life of an identified individual, from criminal acts of a third party, and they failed to take measures, within the scope of their powers, which might have been expected to avoid that risk. In that case, the authority was the police. In the present case, the authority is this court. I know of the existence of a real risk, which may become immediate if confidentiality is breached.

84. Lord Woolf MR said in *R v Lord Saville of Newdigate, ex p A* [1999] 4 All ER 860 at 872, [2000] 1 WLR 1855 at 1857:

> '...when a fundamental right such as the right to life is engaged, the options available to the reasonable decision-maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification.'

With that warning from Lord Woolf in mind, in my judgment, the appropriate measures to be taken, within the scope of my powers, would be to grant injunctions. This would have the effect of substantially reducing the risk to each of the claimants.

85. I do not see that this extension of the law of confidence, by the grant of relief in the exceptional circumstances of this case, as opening a door to the granting of general restrictions on the media in cases where anonymity would be desirable. In my judgment, that is where the strict application of art 10(2) bites. It will only be appropriate to grant injunctions to restrain the media where it can be convincingly demonstrated, within those exceptions, that it is strictly necessary.

86. I am uncertain, for instance, whether it would be appropriate to grant injunctions to restrict the press in this case if only art 8 were likely to be breached. Serious though the breach of the claimants' right to respect for family life and privacy would be, once the journalists and photographers discovered either of them, and despite the likely serious adverse effect on the efforts to rehabilitate them into society, it might not be sufficient to meet the importance of the preservation of the freedom of expression in art 10(1). It is not necessary, however, for me to come to a conclusion as to the weight of a breach of art 8, since I am entirely satisfied that there is a real and serious risk to the rights of the claimants under arts 2 and 3. Subject, therefore, to my assessment of the strength of the evidence presented to the court, and the possibility that some protection less than injunctions might be proportionate to the need for confidentiality, I find

that, in principle, I have the jurisdiction to grant injunctions to protect the claimants in the present case.

(G) CONCLUSIONS AS TO FUTURE RISK

87. The test of future risk is not to be based upon a balance of probabilities. In *Davies v Taylor* [1972] 3 All ER 836, [1974] AC 207, the House of Lords was considering the possibility of a future reconciliation between the deceased and his estranged wife in a fatal accident claim by her. They held that the issue was not whether it was more probable than not that there would have been a reconciliation, but whether there was a reasonable probability or expectation, rather than a mere speculative possibility, of a reconciliation. There could be a reasonable expectation that something would come about even though the chance of it coming about was less than even.

88. In *Re H and ors (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1, [1996] AC 563, the House of Lords considered the words 'likely to suffer significant harm' in s 31 of the Children Act 1989. Lord Nicholls of Birkenhead rejected the submission of counsel that likely in that context meant probable. He said:

> 'In this context Parliament cannot have been using "likely" in the sense of more likely than not. If the word "likely" were given this meaning, it would have the effect of leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not ... What is in issue is the prospect, or risk, of the child suffering *significant* harm ... In my view, therefore, the context shows that in s 31(2)(a) "likely" is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case.' (See [1996] 1 All ER 1 at 15–16, [1996] AC 563 at 585; Lord Nicholls' emphasis.)

89. The decisions in *Davies'* case and in *Re H*, although each made on facts far removed from the present, are in my view a helpful guide to the assessment I have to carry out in this case. Since the relief sought is to restrict the freedom of expression of the press, I approach the assessment of future risk to each of the claimants on the basis that the evidence supporting the case has to demonstrate convincingly the seriousness of the risk, but in order to assess the future, I cannot by the very nature of the task, have concrete facts upon which to rely, nor can I predict upon the basis of future probability.

90. The evidence, which I have set out above, demonstrates to me the huge and intense media interest in this case, to an almost unparalleled extent, not only over the time of the murder, during the trial and subsequent litigation, but also that media attention remains intense seven years later. Not only is the media interest intense, it also demonstrates continued hostility towards the claimants. I am satisfied from the extracts from the newspapers: (a) that the press have accurately reported the horror, moral outrage and indignation still felt by many members of the public; (b) that there are members of the public, other than the family of the murdered boy, who continue to feel such hatred and revulsion at the shocking crime and a desire for revenge that some at least of them might well engage in vigilante or revenge attacks if they knew where either claimant was living and could identify him. There also remains a serious risk from the Bulger family, and the father was quoted as recently as October 2000 saying that upon

their release he would 'hunt the boys down'; (c) that some sections of the press support this feeling of revulsion and hatred to the degree of encouraging the public to deny anonymity to the claimants. The inevitable conclusion to which I am driven, in particular, by the editorial from the News of the World (one of the newspapers in the first defendant group), is that sections of the press would support, and might even initiate, efforts to find the claimants and to expose their identity and their addresses in their newspapers. I have in mind, for example, the coupon campaign run by the Sun, demanding that the boys remain in detention for life and the recent News of the World campaign 'naming and shaming' paedophiles. The response of some members of the public to emotive newspaper reporting has created highly emotional and potentially dangerous situations. The misidentification of a female member of the public, thought erroneously to be the mother of one of the claimants, was potentially very dangerous and demonstrates the probable reaction of members of the public to the knowledge that one of the claimants and his family were living nearby. I also bear in mind that the media coverage has been international as well as national. The information might be gathered from elsewhere and presented to an English national or local newspaper. Once in the public domain, it is a real possibility, almost a probability, that there would be widespread reporting by the press. If photographs are taken, and they would be likely to be taken, the claimants would find it difficult to settle anywhere safely, at least within the United Kingdom. It would, however, be fair to point out that there have also been, particularly recently, thoughtful and objective articles in the newspapers, and a reasoned debate over the correct period of detention for child offenders who commit appalling murders.

91. The evidence provided by the Secretary of State supported and affirmed much of the reporting in the press. It is most significant that this is only the second time ever that the Home Office has thought it necessary to provide a new identity for child murderers when they leave detention, the other being Mary Bell in 1980. This is a clear indication of the seriousness with which the authorities view the possibility that either claimant may be recognised with the consequences that they fear.

92. The Attorney General and the Official Solicitor both submitted that there is a high risk of serious physical harm and the real possibility that a claimant might be killed if identified. Morland J and Pill LJ felt it necessary to grant injunctions to protect the children during their detention in secure accommodation. In 1993 Morland J considered that there was a very real risk of revenge attacks upon them from others. Lord Woolf CJ in his statement on the tariff in October 2000 confirmed, from the information presented to him on the tariff, that that remained the situation (see [2001] 1 All ER 737 at 739). I heard evidence, in chambers, which supported the conclusion to which Lord Woolf CJ came, that there are solid grounds for concern that, if their identities were revealed on release, there might well be an attack or attacks on the claimants, and that such an attack or attacks might well be murderous.

93. At the moment, the claimants are not at risk. First, the injunctions are still in force. Second, there is no current photograph of either claimant, or any current description of the appearance of either in the public domain. The photographs that are available were taken when they were children and they are now adults. When they are released from detention with new names, so long as they are not identified, they will be living in the community, under life-long supervision, but with the opportunity for rehabilitation and reintegration.

94. I consider it is a real possibility that someone, journalist or other, will, almost certainly, seek them out, and if they are found, as they may well be found, the media would, in the absence of injunctions, be likely to reveal that information in the newspapers and on television, radio, etc. If the identities of the claimants were revealed, journalists and photographers would be likely to descend upon them in droves, foreign as well as national and local, and there would be widespread dissemination of the new names, addresses and appearance of the claimants. From all the evidence provided to me, I have come to the clear conclusion that if the new identity of these claimants became public knowledge it would have disastrous consequences for the claimants, not only from intrusion and harassment but, far more important, the real possibility of serious physical harm and possible death from vengeful members of the public or from the Bulger family. If their new identities were discovered, I am satisfied that neither of them would have any chance of a normal life and that there is a real and strong possibility that their lives would be at risk.

95. The claimants seek injunctions effectively for the rest of their lives. Is the grant of injunctions proportionate to the risk which I have identified? Mr Desmond Browne argued that the editors of the newspapers that he represented could be trusted not to reveal information that would lead to the identity of the claimants. Editorial judgment should be respected and trusted. That brings in the question whether it is necessary, in order to achieve anonymity, to require injunctions. Although I recognise that editors do exercise judgment and restraint in some of the stories they run, I do not consider that editorial restraint can be the answer here. I am prepared to believe that editors of some newspapers might well hesitate to reveal this information. I do not see how editorial judgment would be able to restrain all the newspapers, particularly those now calling for that information to be made available. I also find it difficult to accept the case of the newspapers that they should be trusted not to publish when, at the same time, their counsel submitted that it was wrong for the claimants to have the advantages of anonymity and to be allowed to live a lie. No offer has been made to the court not to publish. On the contrary, I am satisfied from the editorial in the News of the World (29 October 2000), that one newspaper at least would wish to publish information about identity or address if that information became available to them. Once one paper gives the information, all the papers will obviously be likely also to publish all the information they can obtain which remains live news. The judgment of editors cannot be an adequate protection to meet the risk I have identified.

96. The Press Code, as applied by the Press Complaints Commission, is not, in the exceptional situation of the claimants, sufficient protection. Criticism of, or indeed sanctions imposed upon, the offending newspaper after the information is published would, in the circumstances of this case, be too late. The information would be in the public domain and the damage would be done. The Press Code cannot adequately protect in advance. The risk is too great for the court to rely upon the voluntary Press Code. To do so would not be a sufficient response to the principles enunciated in *Osman's* case. I do not consider that the provisions of the 1997 Act would or could be adequate to protect the claimants if their identities became known. Recourse to the courts after the event would be too late—for example because they would have by then, almost certainly, been photographed, and would then be recognised everywhere.

97. These uniquely notorious young men are and will, on release, be in a most exceptional situation and the risks to them of identification are real and substantial. It is therefore necessary, in the exceptional circumstances of this case, to place the right to confidence above the right of the media to publish freely information about the claimants. Although the crime of these two young men was especially heinous, they did not thereby forfeit their rights under English law and under the convention. They have served their tariff period and when they are released, they have the right of all citizens to the protection of the law. In order to give them the protection they need and are entitled to receive, I am compelled to grant injunctions.

(H) THE SCOPE OF THE INJUNCTIONS

Orders contra mundum

98. The submission of the defendants was, that even if there was jurisdiction to grant injunctions against them in this case, there was no jurisdiction to grant those injunctions against the world at large. The general principle was stated by Lord Eldon LC in *Iveson v Harris* (1802) 7 Ves 251 at 257, 32 ER 102 at 104: '... you cannot have an injunction except against a party to the suit'. The injunctive relief granted by Balcombe J in *X CC v A* [1985] 1 All ER 53, [1984] 1 WLR 1422 (the Mary Bell case), was based on the exercise of the court's jurisdiction in wardship. Balcombe J said, in relation to the power to grant an injunction contra mundum:

> 'Let me say at once that, if it were not an exercise of the wardship jurisdiction, I am satisfied that there would be no such power.' (See [1985] 1 All ER 53 at 55, [1984] 1 WLR 1422 at 1425.)

He held that not only would it not be fair to injunct one newspaper from publishing information which could identify the ward by her relationship to the mother, Mary Bell, but that the harm to the ward, which prohibition of publication is intended to prevent, would also be caused by publication in any other newspaper or medium. He referred to *Z Ltd v A* [1982] 1 All ER 556, [1982] QB 558, in which the Court of Appeal held that Mareva injunctions operated against the world at large, or at least against those members of the public who have notice of the existence of the order. He was satisfied that—

> 'If the court can protect proprietary interests in that way, as it clearly can, how much more should it be able to protect the interests of its wards if it is satisfied in a proper case that the interests of the ward require protection in this form?' (See [1985] 1 All ER 53 at 57, [1984] 1 WLR 1422 at 1427.)

99. In the present case I have come to the conclusion that I am compelled to grant injunctive relief for the protection of the claimants in respect of a special category of confidential information. For that information to be revealed by a newspaper or television programme, not a party to these proceedings, would have an equally devastating effect as disclosure by one of the defendant groups. It would cause equal harm. It would also, as Balcombe J recognised in *X CC v A*, be most unjust to the defendants if they were the only newspaper groups to be so restricted. The granting of the injunctions would not, however, have that limited effect. Mr Desmond Browne submitted that, since the decision of the House of Lords in *A-G v Times Newspapers Ltd* [1991] 2 All ER 398, [1992] 1 AC 191, publication of the injunctions against the newspapers would, in practice, act in a similar way,

and have the same effect, as injunctions against the media generally. He argued that it was not, therefore, necessary for the injunctions to be made against the world at large. It seems to me that to accept that position would be to achieve through the back door, that which it is submitted I cannot do through the front. I agree with Mr Caldecott that this is somewhat of an academic exercise. There is a positive duty on the court as a public authority to take steps to protect individuals from the criminal acts of others; see *Osman*'s case.

100. Although the dictum of Lord Eldon LC has been generally followed for nearly 200 years, in light of the implementation of the 1998 Act, we are entering a new era, and the requirement that the courts act in a way that is compatible with the convention, and have regard to European jurisprudence, adds a new dimension to those principles. I am satisfied that the injunctive relief that I grant should, in this case, be granted openly against the world.

Protection of information during period February 1993 to August 2000

101. I have selected those two dates since they represent the period covered by the previous injunctions, on the eighteenth birthdays of each claimant. The extent to which there were breaches of those injunctions, and the contributions of the families of the boys and their legal advisers to the alleged breaches, was in dispute.

102. I formed the view, in July, that there had been a few breaches of the order, not many. With the greater opportunity I have had to hear evidence at the full hearing, I have not come to a different conclusion. I do not consider that it is necessary for me to study each example and adjudicate upon it. Some cannot be resolved on the written evidence. I was, for instance, asked to decide whether a photograph of one of the boys was taken before or after he was placed in secure accommodation. I do not propose to do so since, with a child of eleven or twelve whom I have never seen, it would be a stab in the dark, and not a serious evaluation. I do not consider that these breaches are significant, nor that they should affect my decision whether or not to grant injunctions in the future.

103. The significant fact is that the injunctions were in place, and the media were well aware of their existence. Under this heading I have to consider the impact of the removal of the injunctions over the period of the claimants' detention in secure accommodation. There is not, and there cannot be, a bar to information about them before they were arrested. There is no privilege in childhood. Once the injunctions come to an end, in general there cannot be, in my view, continuing protection of the information that was protected during the life of the injunctions. There may be an exception to that general principle in wardship proceedings, with which I am not now concerned in the present case. Children, like adults, are entitled to confidentiality in respect of certain areas of information. Medical records are the obvious example. In the present case, the information sought to be protected falls broadly into four categories: (i) medical and health information; (ii) information from social workers and other carers; (iii) information from co-detainees; and (iv) identification of the secure units. I shall consider each in turn.

(i) *Health information*

All information about the claimants, whether during their detention or at any other time, whether by records or otherwise, which relates to their medical, psychological, or therapeutic care is, in principle, confidential. That confidentiality

would, in my view, extend to art, or any other form of therapy, and to all those taking part in group therapy, and not only the therapist. As I understood it, all counsel agreed with this proposition; see *Hunter v Mann* [1974] 2 All ER 414 at 417–418, [1974] QB 767 at 772, *W v Egdell* [1990] 1 All ER 835, [1990] Ch 359.

(ii) Information from social workers and carers

In *Re G (a minor) (social worker: disclosure)* [1996] 2 All ER 65 at 68, [1996] 1 WLR 1407 at 1411, I said: 'The information obtained by social workers in the course of their duties is, however, confidential, and covered by the umbrella of public interest immunity.' (See also *Re W (minors) (social worker: disclosure)* [1998] 2 All ER 801, [1999] 1 WLR 205.) I referred in *Re G* to a long line of authority that social services department case records were not to be produced on discovery nor disclosed in court proceedings unless a judge ruled to the contrary; see for instance *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589, [1978] AC 171. I referred also to local authority circulars on confidentiality of personal information held by local authorities. Each secure unit is managed by a local authority. The confidentiality extends to all those having the care of the two claimants in the secure units. Mr Fitzgerald accepted that there was a legitimate public interest in the general information about the regime to which each of the claimants have been subjected. He continued, however, to seek a ban on the publication of historical information during the period covered by the injunctions granted by Morland J, because it pertained to information previously covered by injunctions.

(iii) Information from co-detainees

In my judgment, there is no basis upon which an injunction can in general be granted to prevent a co-detainee from approaching or being approached by a member of the press and speaking about either claimant, save insofar as any revelation was likely to reveal their present appearance or whereabouts or disclose plainly confidential matters. The co-detainee would not, for example, be entitled to provide, and the newspaper cannot publish, information, which is confidential, such as attending therapy sessions together.

(iv) Identification of the secure units

I can see, however, the necessity for providing a period after the release of the claimants during which no information should be made public which might lead to the identification of the units where they have been detained, since that may lead to the identification of their future whereabouts. Such an injunction would be designed to protect the future, and not the past, and it should not be necessary to impose it for more than a limited period. I am not at present certain how long it should be. I incline towards 12 months, but this is a matter upon which it would be helpful to hear further submissions. I should like the help of counsel. As I have already indicated, I should also like the assistance of counsel on the actual wording of the injunctions and the order.

The information to be protected

104. In my judgment, there are compelling reasons to grant injunctions to protect, in the broadest terms, the following information. (i) Any information leading to the identity, or future whereabouts, of each claimant, which includes photographs, description of present appearance and so on. (ii) In order to protect

the claimants on their release from detention, it is necessary to have injunctions to protect their present whereabouts, any information about their present appearance and similar information. That protection must include any efforts by the media to solicit information from past or present carers, staff or co-detainees at their secure units until the claimants' release from detention. (iii) In order further to protect their future identity and whereabouts, no information may be made public or solicited from their secure units that might lead to the identification of the units for a reasonable period after their release. It would seem to me that twelve months from the date of the release of each claimant would be a sufficient period to protect that information, subject to any further argument from counsel. (iv) It is not necessary, in my judgment, to protect other information relating to their period in the secure units when they were under 18 for two reasons. Firstly, the important information, from the medical/health professionals, including therapists and from social workers and other carers and from co-detainees who shared the confidential situations is already covered by confidentiality. Secondly, the other information is not covered by the necessity/imperative to keep it out of the public domain and their time in their secure units is not of itself confidential. There is much, after the twelve month embargo on information, that would be appropriately made public, such as the regime in the units. (v) I recognise the concerns, however, of the claimants as to what is and what is not confidential in the past information. I would be prepared therefore to set out, if requested, a preamble to my order on the information setting out the categories of information which are confidential.

105. I am, of course, aware that injunctions may not be fully effective to protect the claimants from acts committed outside England and Wales resulting in information about them being placed on the internet. The injunctions can, however, prevent wider circulation of that information through the newspapers or television and radio. To that end, therefore, I would be disposed to add, in relation to information in the public domain, a further proviso, suitably limited, which would protect the special quality of the new identity, appearance and addresses of the claimants or information leading to that identification, even after that information had entered the public domain to the extent that it had been published on the internet or elsewhere such as outside the United Kingdom.

I am also aware that the Parole Board will soon be making inquiries and compiling a report for consideration at the Parole Board hearing. It is, in my view, essential that the nature of the inquiries, the content of the report and the hearing itself must be covered by the injunctions.

OTHER GROUNDS RELIED ON TO ESTABLISH JURISDICTION

106. Mr Fitzgerald advanced submissions based on other grounds for the court to assume jurisdiction to grant injunctions.

(A) *Protection of the statutory right to rehabilitation*

107. In *Broadmoor Hospital Authority v R* [2000] 2 All ER 727, [2000] QB 775, the Court of Appeal held that the court had jurisdiction, in suitable circumstances, to grant an injunction to a public body with a statutory responsibility in order to prevent interference with the performance of its public responsibilities and, by a majority, that it could make such an order on the application of the hospital authority. They did not, in fact, grant an injunction in that case. Waller LJ said:

'On the important question of the authority's powers and the circumstances in which it can seek the aid of the court, I respectfully agree with Lord Woolf MR and would adopt his ultimate formulation which is in these terms. "If a public body is given a statutory responsibility which it is required to perform in the public interest, then, in the absence of an implication to the contrary in the statute, it has standing to apply to the court for an injunction to prevent interference with its performance of its public responsibilities and the court should grant such an application when 'it appears to the court to be just and convenient to do so'."' (See [2000] 2 All ER 727 at 740, [2000] QB 775 at 795 (para 55).)

108. Mr Fitzgerald advanced the argument that, in circumstances where the public responsibilities of a public authority were, or were likely to be, interfered with and that public authority refused or failed to take proceedings to obtain an injunction, the beneficiary of those responsibilities had standing to make the application himself. Applied to the present case, if the Home Office or the local authority in charge of the secure unit would not be able properly to carry out at present or in the future the duty to rehabilitate the claimants and to reintegrate them into society because of the actions of the press, then the claimants could bring the proceedings themselves to protect the benefit to them of that rehabilitation.

109. He pointed to the evidence from the Secretary of State about the serious concerns of the secure units and, in particular, of the supervising probation officers, that rehabilitation would be seriously imperilled by disclosure of their appearance and whereabouts, particularly after release. He relied upon the submission of Mr Caldecott, on behalf of the Attorney General; first, that the Home Office or those responsible for the proper care and treatment of the claimants did owe specific duties directed at ensuring the rehabilitation of the claimants and their reintegration into society, both while in their secure units and on their release, during their life-long supervision; second, as I set out earlier, that the information about identification would be likely to render any meaningful reintegration into society unworkable.

110. Mr Caldecott did not, however, support the granting of an injunction on this ground on the application of the claimants. I agree that the Home Office and, during detention, the local authorities, charged with the care of the claimants have duties which include welfare and rehabilitation; see for instance *R v Secretary of State for the Home Dept, ex p Venables* [1997] 3 All ER 97 at 123 and 151, [1998] AC 407 at 499–500 and 530 per Lord Browne-Wilkinson and Lord Hope respectively. I recognise that, if a public authority were unable to carry out its public functions, which were and were intended to be in the interests of the recipients, such interference might be very unjust to the recipients. It does, however, seem to me to be a considerable extension of the, so far, untested remedy approved by Lord Woolf MR and Waller LJ. I have considerable reservations about the basis for granting such an injunction, one problem being its potential ambit width which would be likely, in the present case, to be extended far too widely. In the present case, it is not necessary for me to travel that further distance and I do not propose to do so.

Inherent jurisdiction to grant injunctions to prevent crime and to protect the administration of justice or free-standing claim based upon convention rights

111. Mr Fitzgerald raised further arguments under this heading. He submitted that the court had an inherent jurisdiction to prevent criminal reprisals, which

a arose from the broad inherent jurisdiction to protect the administration of justice. I hope he will forgive me if I do not set them out, since it is not necessary to do so. I have already expressed the conclusion that in private law cases, although the court must apply the convention principles to existing causes of action, it cannot hear free-standing applications based directly on the articles of the convention.

In my judgment, this case stands or falls on the application to it of the law of confidence.

Order accordingly

Celia Fox Barrister.

Barry v Heathcote Ball & Co (Commercial Auctions) Ltd

COURT OF APPEAL, CIVIL DIVISION
PILL LJ AND SIR MURRAY STUART-SMITH
27 JUNE, 27 JULY 2000

Auction – Auction without reserve – Withdrawal of lot by auctioneer – Machines being placed for sale at auction without reserve – Auctioneer withdrawing machines from sale because bidding too low – Whether auctioneer breaching collateral contract to sell machines to highest bidder – Sale of Goods Act 1979, s 57(4).

At an auction held by the defendant auctioneers, the lots for sale included two new engine analyser machines which could be obtained from the manufacturers at a price of £14,521 each, but were being sold, without reserve, by the Customs and Excise in satisfaction of a value added tax (VAT) liability. The auctioneer announced that the machines were to be sold on behalf of the VAT office, and that each was worth £14,000. After unsuccessfully trying to obtain bids of £5,000 and £3,000, the auctioneer asked what bids there were for the machines. The claimant, B, who wished to use the machines in his business, then bid £200 for each of them. When no other bid was made, the auctioneer withdrew the machines from the sale, believing that he could obtain a higher sum later by other means. A few days later, the machines were sold for £750 each after being advertised in a magazine. Subsequently, B brought an action for damages against the auctioneers on the basis that he was the highest bidder. His claim was upheld by the judge who awarded him damages of £27,600, i e the difference between the amount that B had bid and the sum that he would have been required to spend to obtain the machines in the ordinary way. The auctioneers appealed, contending, inter alia, that there was no contract between them and B, and that, in any event, an agent could not be liable on a contract where he acted for a disclosed principal. The auctioneers also challenged the judge's assessment of damages.

Held – Where a lot was auctioned without reserve, the auctioneer would be in breach of contract to the highest bidder if he withdrew the lot from sale. On such an auction, there was a collateral contract between the auctioneer and the highest bidder, consisting of an offer by the auctioneer to sell to the highest bidder and an acceptance of that offer when the bid was made. Consideration for the auctioneer's promise came in two forms, namely a detriment to the bidder, since his bid could be accepted unless and until it was withdrawn, and a benefit to the auctioneer as the bidding was driven up. Moreover, attendance at the sale was likely to be increased if it were known that there was no reserve. Thus on an auction without reserve, the highest bid could not be rejected merely because it was not high enough. Indeed, the withdrawal of the lot from sale would be tantamount to an unlawful bid by the auctioneer on behalf of the seller under s 57(4)[a] of the Sale of Goods Act 1979. It followed that in the instant case the judge's decision on liability had been correct. The size of the award was also correct since, on the evidence, the judge had been entitled to conclude that the value of the machines

a Section 57(4) is set out at p 947 *f g*, post

was £14,000 each, and the correct measure of damages was the difference between the contract price and the market or current price of the goods at the time when they should have been delivered. Accordingly, the appeal would be dismissed (see p 946 *f g*, p 947 *g h*, p 949 *h* to p 950 *a* and *j* to p 951 *f*, post).

Warlow v Harrison [1843–60] All ER Rep 620 applied.

Notes

For auctions, see 9(1) *Halsbury's Laws* (4th edn reissue) para 636.

For the Sale of Goods Act 1979, s 57, see 39 *Halsbury's Statutes* (4th Edn) (1995 reissue) 118.

Cases referred to in judgments

Denton v Great Northern Rly Co (1856) 5 E&B 860, 119 ER 701.
Fenwick v MacDonald, Fraser & Co (1904) 6 F (Ct of Sess) 850.
Harris v Nickerson (1873) LR 8 QB 286.
Johnston v Boyes [1899] 2 Ch 73.
Mainprice v Westley (1865) 6 B&S 420, 122 ER 1250.
Payne v Cave (1789) 3 Term Rep 148, [1775–1802] All ER Rep 492, 100 ER 502.
Thornett v Haines (1846) 15 M&W 367, 153 ER 892.
Warlow v Harrison (1859) 1 E & E 309, [1843–60] All ER Rep 620, 120 ER 925, Ex Ch.

Cases also cited or referred to in skeleton arguments

Harvela Investments Ltd v Royal Trust Company of Canada (CI) Ltd [1985] 2 All ER 966, [1986] AC 207, HL
Olley v Marlborough Court Ltd [1949] 1 All ER 127, [1949] KB 532, CA
Thornton v Shoe Lane Parking Ltd [1971] 1 All ER 686, [1971] 2 QB 163, CA

Appeal

By notice dated 3 September 1999 the defendant, Heathcote Ball & Co (Commercial Auctions) Ltd, appealed with permission of Judge Charles Harris QC from his decision at Northampton County Court on 6 August 1999 giving judgment for the claimant, Paul Barry, in the sum of £27,600 in proceedings brought in respect of the withdrawal from sale of two machines at an auction without reserve held by the defendant. The facts are set out in the judgment of Sir Murray Stuart-Smith.

Vincent Moran (instructed by *Woolley & Co*, Northampton) for the defendant.
Adrian Iles (instructed by *Borneo Linnells*, Milton Keynes) for the claimant.

Cur adv vult

27 July 2000. The following judgments were delivered.

SIR MURRAY STUART-SMITH (delivering the first judgment at the invitation of Pill LJ). This is an appeal from a judgment of Judge Harris QC given at the Northampton County Court on 6 August 1999 in which he gave judgment for the claimant for £27,600 against the defendant. The appeal raises a point of some general interest and importance as to the effect of a sale by auction which is expressed to be 'without reserve'.

The auction was held on 25 June 1997 at the defendant's auction room in Northampton. Mr Cross was the auctioneer. One of the lots for sale consisted of two Alan Smart engine analysers. They were new machines being sold by Customs

and Excise because of some liability that the manufacturers had incurred over VAT payment. The price of new machines from the manufacturers was £14,521 each. Customs and Excise had instructed Mr Cross that the machines were to be sold without reserve and he accepted them for sale on that basis.

The claimant runs a car tuning business. He saw the machines being delivered to the auction house on 20 June. He returned on the viewing day and spoke to Mr Cross who said that they would be sold at noon on 25 June without reserve. The claimant decided they would be useful in his business and decided to bid for them.

The claimant attended the auction house a few minutes before noon. When it came to the lots in question Mr Cross said that the machines were to be 'sold that day' on behalf of the VAT office, that each was worth £14,000, 'ready to plug in and away you go'. He tried to obtain a bid of £5,000 to start with; there was no bid; he tried £3,000; still no response. He then asked what bids there were for the machines, and the claimant bid £200 for each. No other bid was made. In fact Mr Cross had received a bid from his son-in-law for £400 each; but he made no mention of this.

Mr Cross then withdrew the machines from the sale. His explanation was:

> 'I could not see how I could sell for as little as this, even though it was without reserve. I think I am justified in not selling at an auction without reserve if I think I could get more in some other way later. I did not take up [the offer of] £400. I thought they were worth more.'

He told those present that he was not prepared to sell the machines for £200. They were sold a few days later for £1,500 (£750 each) after advertisement in a magazine.

The claimant claimed damages on the basis that he was the highest bidder. The particulars of the damage claimed was the difference between the value of the machines, said to be £28,000 and the bid of £400.

The judge held that it would be the general and reasonable expectation of persons attending at an auction sale without reserve that the highest bidder would and should be entitled to the lot for which he bids. Such an outcome was in his view fair and logical. As a matter of law he held that there was a collateral contract between the auctioneer and the highest bidder constituted by an offer by the auctioneer to sell to the highest bidder which was accepted when the bid was made. In so doing he followed the views of the majority of the Court of Exchequer Chamber in *Warlow v Harrison* (1859) 1 E&E 309, [1843–60] All ER Rep 620.

He also held that this was the effect of condition 1 of the conditions of sale which was in these terms:

> 'The highest bidder to be the purchaser; but should any dispute arise between two or more bidders the same shall be determined by the auctioneers who shall have the right of withdrawing lots.'

The judge concluded that the first sentence meant what it said and the right of withdrawal was conditioned on there being a dispute between bidders, and there was none.

Mr Moran on behalf of the defendant criticises this conclusion on a number of grounds. First he submits that the holding of an auction without reserve does not amount to a promise on the part of the auctioneer to sell the lots to the highest bidder. There are no express words to the effect, merely a statement of fact that the vendor has not placed a reserve on the lot. Such an intention, he

submits, is inconsistent with two principles of law, namely that the auctioneer's request for bids is not an offer which can be accepted by the highest bidder (see *Payne v Cave* (1789) 3 Term Rep 148, [1775–1802] All ER Rep 492) and that there is no completed contract of sale until the auctioneer's hammer falls and the bidder may withdraw his bid up until that time (Sale of Goods Act 1979, s 57(2) which reflects the common law). There should be no need to imply such a promise into a statement that the sale is without reserve, because there may be other valid reasons why the auctioneer should be entitled to withdraw the lot, for example if he suspected an illegal ring or that the vendor had no title to sell.

Secondly Mr Moran submits that there is no consideration for the auctioneer's promise. He submits that the bid itself cannot amount to consideration because the bidder has not promised to do anything, he can withdraw the bid until it is accepted and the sale completed by the fall of the hammer. At most the bid represents a discretionary promise, which amounts to illusory consideration, for example promising to do something 'if I feel like it'. The bid only had real benefit to the auctioneer at the moment the sale is completed by the fall of the hammer. Furthermore the suggestion that consideration is provided because the auctioneer has the opportunity to accept the bid or to obtain a higher bid as the bidding is driven up depends upon the bid not being withdrawn.

Finally Mr Moran submits that where an agent is acting for a disclosed principal he is not liable on the contract (*Bowstead and Reynolds on Agency* (16th edn, 1995) para 9-001 and *Mainprice v Westley* (1865) 6 B&S 420, 122 ER 1250). If therefore there is any collateral contract it is with the principal and not the agent.

These submissions were forcefully and attractively argued by Mr Moran. The authorities, such as they were, do not speak with one voice. The starting point is s 57 of the 1979 Act, which re-enacted the Sale of Goods Act 1893, itself in this section a codification of the common law. I have already referred to the effect of sub-s (2). Subsections (3) and (4) are also important. They provide:

> '(3) A sale by auction may be notified to be subject to a reserve or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.
>
> (4) Where a sale by auction is not notified to be subject to a right to bid by or on behalf of the seller, it is not lawful for the seller to bid himself or to employ any person to bid at the sale, or for the auctioneer knowingly to take any bid from the seller or any such person.'

Although the 1979 Act does not expressly deal with sales by auction without reserve, the auctioneer is the agent of the vendor and unless sub-s (4) has been complied with, it is not lawful for him to make a bid. Yet withdrawing the lot from the sale because it has not reached the level which the auctioneer considers appropriate is tantamount to bidding on behalf of the seller. The highest bid cannot be rejected simply because it is not high enough.

The judge based his decision on the reasoning of the majority of the Court of Exchequer Chamber in *Warlow v Harrison* [1859] 1 E & E 309, [1843–60] All ER Rep 620. The sale was of 'the three following horses, the property of a gentleman, without reserve'. The plaintiff bid 60 guineas for one of the horses; another person, who was in fact the owner, immediately bid 61 guineas. The plaintiff, having been informed that the bid was from the owner declined to bid higher, and claimed he was entitled to the horse. He sued the auctioneer; he based his claim on a plea that the auctioneer was his agent to complete the contract on his behalf. On that plea the plaintiff succeeded at first instance; but the verdict was

set aside in the Court of Queen's Bench. The plaintiff appealed. Although the Court of Exchequer Chamber upheld the decision on the case as pleaded, all five members of the court held that if the pleadings were appropriately amended, the plaintiff would be entitled to succeed on a retrial. Martin B gave the judgment of the majority consisting of himself, Byles J and Watson B. He said:

> 'Upon the facts of the case, it seems to us that the plaintiff is entitled to recover. In a sale by auction there are three parties, viz. the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which of course includes the highest bidder. In this, as in most cases of sales by auction, the owner's name was not disclosed: he was a concealed principal. The name of the auctioneers, of whom the defendant was one, alone was published; and the sale was announced by them to be "without reserve". This, according to all the cases both at law and equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not; *Thornett* v. *Haines* ((1846) 15 M&W 367, 153 ER 892). We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward, or that of a railway company publishing a time table stating the times when, and the places to which, the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him; *Denton* v. *Great Northern Railway Company* ((1856) 5 E&B 860, 119 ER 701). Upon the same principle, it seems to us that the highest bonâ fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think the auctioneer who puts the property up for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so; and that this contract is made with the highest bonâ fide bidder; and, in case of a breach of it, that he has a right of action against the auctioneer.' (See (1859) 1 E & E 309 at 316–317, [1843–60] All ER Rep 620 at 622.)

And he said:

> 'We entertain no doubt that the owner may, at any time before the contract is legally complete, interfere and revoke the auctioneer's authority: but he does so at his peril; and, if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified.' (See (1859) 1 E & E 309 at 317, [1843–60] All ER Rep 620 at 623)

The two other members of the court, Willes J and Bramwell B, reached the same conclusion, but based their decision on breach of warranty of authority.

Although therefore the decision of the majority is not strictly binding, it was the reasoned judgment of the majority and is entitled to very great respect. In *Mainprice v Westley* (1865) 6 B&S 420 at 421, 122 ER 1250 at 1251 the court distinguished *Warlow*'s case on the basis that in *Mainprice*'s case the principal was disclosed, whereas in *Warlow*'s case he was not. The judgment of the court consisting of Cockburn CJ, Blackburn and Shee JJ was given by Blackburn J. On this basis it was held that the agent was not liable. With all respect to the court, it does not seem to me that this was the basis of the decision in *Warlow*'s case; rather that there was a separate collateral contract with the auctioneer; there is no reason why such a contract should not exist, even if the principal is disclosed.

a It is indeed the basis of an action for breach of warranty of authority. Moreover it was in fact clear in *Warlow*'s case that the auctioneer was selling as an agent.

In *Harris v Nickerson* (1873) LR 8 QB 286 the defendant, an auctioneer, advertised a sale by auction of certain lots including office furniture on a certain day and the two following days. But the sale of furniture on the third day was withdrawn. The plaintiff attended the sale and claimed against the defendant for breach of b contract in not holding the sale, seeking to recover his expenses in attending. The claim was rejected by the Court of Queen's Bench. In the course of his judgment Blackburn J said (at 288):

> '... in the case of *Warlow* v. *Harrison*, the opinion of the majority of the judges in the Exchequer Chamber appears to have been that an action would c lie for not knocking down the lot to the highest bonâ fide bidder when the sale was advertised as without reserve; in such a case it may be that there is a contract to sell to the highest bidder, and that if the owner bids there is a breach of the contract ...'

And Quain J said (at 289):

d

> 'When a sale is advertised as without reserve, and a lot is put up and bid for, there is ground for saying, as was said in *Warlow* v. *Harrison*, that a contract is entered into between the auctioneer and the highest bonâ fide bidder ...'

e In *Johnston v Boyes* [1899] 2 Ch 73 at 77, Cozens-Hardy J also accepted the majority view in *Warlow*'s case as being good law.

The only other case to which I need refer is *Fenwick v MacDonald, Fraser & Co* [1904] 6 F (Ct of Sess) 850. The sale was not without reserve because the condition of sale reserved to the owner the right to make one offer for each animal. The Lord Ordinary (Lord Kyllachy) appears to have decided the case both on the f grounds that there was a disclosed principal, following *Mainprice*'s case, and also that it was not a sale without reserve. In the Court of Session Lord Kingsburgh LJ-C agreed with the Lord Ordinary. Lord Young held that because the purchaser could withdraw his bid until the hammer fell, so could the seller. He also considered that the sale was not 'without reserve'. Lord Traynor considered that the law of Scotland had been changed by the 1893 Act which enabled a bid to be g withdrawn until the hammer had fallen. Prior to that date the highest bid had to be accepted. The case however is not satisfactory, since there is no reference in any of the judgments to *Warlow*'s case or the analysis of the reasoning of the majority in that case. Moreover it is quite clear, as it seems to me, that it was not a sale without reserve.

h So far as textbook writers are concerned both *Chitty on Contracts* (28th edn, 1999) para 2-010 and *Benjamin on Sale of Goods* (5th edn, 1997) para 2-005 adopt the view expressed by the majority of the court in *Warlow*'s case.

As to consideration, in my judgment there is consideration both in the form of detriment to the bidder, since his bid can be accepted unless and until it is j withdrawn, and benefit to the auctioneer as the bidding is driven up. Moreover attendance at the sale is likely to be increased if it is known that there is no reserve.

As to the agency point, there is no doubt that when the sale is concluded, the contract is between the purchaser and vendor and not the auctioneer. Even if the identity of the vendor is not disclosed, it is clear that the auctioneer is selling as agent. It is true that there was no such contract between vendor and purchaser.

But that does not prevent a collateral agreement existing between the auctioneer and bidder. A common example of this is an action for breach of warranty of authority, which arises on a collateral contract. *a*

For these reasons I would uphold the judge's decision on liability.

Mr Moran submits that the judge was in error in awarding the claimant £27,600. He submits that he should have awarded no more than £1,600. He described it as a pleading point, and I confess I have found it not altogether easy to follow. The argument appears to be this: the judge's assessment was based on the replacement cost of the machines, yet that was not the way the claimant's case was presented, at least until final submissions. The pleading was: '... the Plaintiff claims the value of the machines, in the sum of £14,000 each, less the bid price of £200 and the costs of the auction £82. Sum claimed £27,518.' Mr Moran submitted that he had come to meet a case based on the difference in value and not the cost of replacement. In the course of the hearing Mr Moran objected to the claimant giving any evidence that he had replaced the machines and this objection was upheld. He is therefore aggrieved that the judge appears to have assessed quantum on the basis of the cost of a new machine. Rather, he submits, it should have been the price at which they were eventually sold or £1,000 each which was what the claimant himself said he was prepared to bid for them. *b c d*

The judge expressed the matter in this way:

> 'The plaintiff is entitled to be put in the position in which he would have been if the contract had not been broken, that is, he would have had two newly manufactured engine tuning machines. There is no doubt that on the only evidence there is these would have cost over £14,000 each to buy in the ordinary way. There was no evidence that such machines could be bought anywhere else by the plaintiff for less, only that in fact these two were sold elsewhere for a total of £1,500, which fact the defendants were not prepared at the time to tell the plaintiff. It was not suggested that the plaintiff could or should have bought them himself via the magazine advertisement for this sum. The plaintiff of course has to prove his loss. He says that he lost these two new machines. Clearly he did. The defendant's contention is that the value of these machines, ie the measure of the plaintiff's loss, was only £1,500, but that sum would not put the plaintiff into possession or into a position to obtain possession of two brand new £14,000 tuning machines. If the position had been that the plaintiff was simply a trader only concerned with the sale value of machinery which he was not going to use, then there is a logic in the defendant's contention. He would simply have lost a saleable item with a value, on the evidence, of £1,500 at most. But the plaintiff wanted to use these new machines in his business and not trade them, and on the evidence there was, namely that the manufacturer sold such new machines at £14,521, and the auctioneer's assertion that they were worth £14,000 each, and there being no evidence that comparable machines could be got elsewhere for less, I find that the measure of the plaintiff's loss is indeed £28,000, less the £400 of his bid, namely £27,600.' *e f g h j*

In my opinion the judge was entitled to approach the matter in the way he did. Where a seller wrongfully refuses to deliver goods to the buyer, the measure of damages where there is a market in the goods is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time when they ought to have been delivered (1979 Act, s 51(3)). Although this is not an action against the vendor, it seems to me that the same

measure of damages applies. It is not necessary that the purchaser actually goes into the market and replaces the goods.

There was in fact evidence that the only market was to purchase from the manufacturer and there was also the evidence of Mr Cross himself in his witness statement that the machines are worth £14,000 each; this was supported by the manufacturer's invoice. We do not in fact know whether the claimant purchased replacement machines and if so at what price, because Mr Moran objected to the evidence being given, no doubt because he thought that the judge might accept his argument based on the actual price at which they were subsequently sold. If the claimant had in fact replaced the machines at the manufacturer's list price (the only market), then that would be the recoverable damages, less of course the £400 bid. But of that there is no evidence. In my view the judge was entitled to accept that on the evidence the value was £14,000 each. I would therefore dismiss the appeal.

PILL LJ. I agree that the auctioneer was under an obligation to sell to the highest bidder, for the reasons given by Sir Murray Stuart-Smith.

I also agree that the judge was entitled on the evidence to award damages of £27,600 for breach of that obligation. The use of the word 'value' in the claimant's pleading was in my view a sufficient indication that the claimant intended to rely on the rule provided by s 51(3) of the Sale of Goods Act 1979. The judge was on the evidence entitled to hold that the manufacturer's list price of £14,000 was the relevant market price of each machine.

The claimant was perhaps fortunate in that respect. In most cases involving the sale of secondhand equipment, there will be evidence of secondhand prices which would disentitle the judge from adopting the figure from the manufacturer's list. In this case, the auctioneer's counsel objected to such evidence being given in the hope that the judge would assess damages on the basis of the sum of £750 each for which the machines were actually sold subsequent to the auction. In my view the judge was not bound to find that the sale price of those particular machines was the market price. His finding is justified on the special facts of the case. The finding does not support a principle that the manufacturer's list price is normally the market price of secondhand goods.

Appeal dismissed.

Dilys Tausz Barrister.

Note

Coflexip SA and another v Stolt Comex Seaway MS Ltd and others

COURT OF APPEAL, CIVIL DIVISION

ALDOUS, CHADWICK AND BUXTON LJJ

20–23 JUNE, 31 JULY 2000

Patent – Infringement – Injunction – Form of order – Judge upholding claim for patent infringement but granting injunction only restraining defendants from infringing in manner proved at trial – Whether judge should have granted injunction restraining defendants from infringing patent in suit.

On 22 January 1999 Laddie J handed down a judgment upholding a claim for patent infringement brought by the plaintiffs, Coflexip SA and Coflexip Stena Offshore Ltd (Coflexip), against the defendants, Stolt Comex Seaway MS Ltd, Stolt Comex Seaway Ltd and Stolt Comex Seaway SA (Stolt) (now known as Stolt Offshore MS Ltd, Stolt Offshore Ltd and Stolt Offshore A/S). However, in a separate judgment handed down on 29 January 1999 ([1999] 2 All ER 593), the judge refused to grant Coflexip an injunction in the normal form, restraining Stolt from infringing the patent in suit. Instead, he granted an injunction in more limited form, restraining Stolt from using the process described in a product and process description which they had prepared in order to assist the court at trial. With the judge's leave, Stolt appealed from his finding that Coflexip's patent was valid and infringed. By respondent's notice, Coflexip cross-appealed against the judge's refusal to grant them an injunction in normal form. On 31 July 2000, the Court of Appeal handed down a judgment (fully reported at [2000] IP & T 1332) dismissing Stolt's appeal, but allowing Coflexip's cross-appeal. Accordingly, the court discharged the injunction granted by Laddie J and replaced it with one in the normal form.

Giving the leading judgment, **ALDOUS LJ** stated:

> '... 60. It is important that an order, such as an injunction, is drafted so as to set out, with such clarity as the context admits, what may not be done. It is for that reason that the standard form of injunction is in the terms restraining the defendant from infringing the patent. Such an injunction is limited in term and confined to the right given by s 60(1) and (2) of the [Patents Act 1977]. It also excludes acts, carried out by the defendant and which fall within the ambit of the monopoly, but are excluded from infringement by the 1977 Act; for example private use coming within s 60(5)(a) of the 1977 Act. Such an injunction is confined to the monopoly as claimed. The claim has been construed by the court with the aid of the parties and in the context of the acts alleged by the plaintiff to infringe and any other potentially infringing acts which the defendant wishes to bring before the court. Of course a dispute can arise as to whether acts, not brought before the court, amount to a breach of the injunction. But such a dispute arises against the background where the ambit of the claim and therefore the injunction has been the subject of consideration by the court and has been construed by it ...

64. When deciding what is the appropriate form of injunction in a patent action, it must be borne in mind that the injunction is being granted to prevent apprehended use of the patentees' statutory monopoly, as defined in his claim. The decision as to form is taken against the background of the claim having been construed by the court as between the parties. That of course does not happen in other intellectual property cases. An injunction which just restrained breach of confidence would not be appropriate for many reasons, including because the extent of the confidential information would not have been determined. In passing-off cases a change of circumstance can alter the representation made and therefore the injunction normally sets out the act which is to be prevented, qualified by such words as "so as to pass-off".

65. The judge seemed to believe that injunctions which restrained infringement of a patent were broad injunctions: but they equate to the statutory right given, a right which has been held to have been validly granted and infringed. The injunction granted by the judge would allow the defendant to do other acts even though they may infringe. The defendant in those circumstances would be better off in that a change from that which is described and shown in the process description would allow him to continue in business without having to seek guidance from the court before adopting the change. The advantage to the defendant of only having the injunction cover a particular article or process is clear. If he makes a change he will not be in breach and it will be up to the patentee to bring another action. However the disadvantage to the patentee is equally clear. To obtain an injunction he has to establish his monopoly and that it has been infringed, and the judge must conclude that further infringement is apprehended. From his point of view, it is the infringer who should seek guidance from the court if he wishes to sail close to the wind. In the normal course of events that would be reasonable.

66. The usual form of injunction which protects the right established by the patentee, with its ambit construed by the court, does in general provide a fair solution. However each case must be determined on its own facts and the discretion exercised accordingly ...'

Celia Fox Barrister.

CAS (Nominees) Ltd and others v Nottingham Forest plc and others

CHANCERY DIVISION

EVANS-LOMBE J

25, 26, 31 JULY 2000

Discovery – Legal professional privilege – Communications between legal adviser and client – Minority shareholders in public limited company bringing unfair prejudice proceedings in respect of transaction approved by general meeting – Claimants seeking disclosure of legal advice given to company in respect of transaction and preparations for general meeting – Claimants relying on rule entitling shareholders to obtain otherwise privileged documents from company – Whether disclosure rule applying only to small private companies.

An extraordinary general meeting of the shareholders of N plc approved an agreement relating to the disposal of shares in a wholly-owned subsidiary. The claimants, who were substantial minority shareholders in N plc, contended that that agreement was unfairly prejudicial to them, and brought proceedings under s 459 of the Companies Act 1985 against various defendants, including, in a nominal capacity, N plc itself. During the course of those proceedings, the claimants made applications for specific disclosure of a number of documents containing communications between N plc and its legal advisers which had come into existence at about the same time as, and were connected with, the board's decision to support the proposed transaction and the preparations for the extraordinary general meeting. At that time, the directors had realised that the proposed transaction would probably lead to litigation, and the defendants contended that the documents were protected from disclosure by legal professional privilege. However, the claimants relied on the rule that a shareholder in a company was entitled to obtain from it otherwise privileged documents provided that they related to the company's administration and not to litigation between the parties (the disclosure rule). The defendants contended that that rule applied only to small private companies with limited share holdings, and that it should not be applied to companies, such as N plc, with substantial numbers of shares on issue, quoted on a stock market.

Held – The disclosure rule applied to all companies, irrespective of their size and importance. That rule was based on principles of trust law, with an analogy being drawn between the position of directors as fiduciaries and trustees. Although directors could not properly be described as trustees of the assets of the company within their charge, they none the less owed fiduciary duties to the shareholders which prevented them from applying those assets save for the purposes of the company. Directors were subject to the same duty to shareholders regardless of the size of the company concerned. In the instant case, the documents had been created or added to by lawyers and others for the purpose of procuring N plc to take certain actions, albeit that it had been anticipated that those actions might give rise to litigation in which the claimants would challenge their propriety. In proceedings in which N plc appeared only in a nominal capacity so that it would be bound by an order made by the court, there was no reason why the claimants

should not be entitled to see the advice and guidance given to the board when those transactions had been embarked upon. Accordingly, the documents sought were not protected from disclosure by legal professional privilege (see p 959 *g h* and p 960 *a* to *d*, post).

Woodhouse & Co (Ltd) v Woodhouse (1914) 30 TLR 559 and *Dennis & Sons Ltd v West Norfolk Farmers' Manure & Chemical Co-operative Co Ltd* [1943] 2 All ER 94 applied.

Notes

For privilege claimed by persons in a fiduciary capacity, see 13 *Halsbury's Laws* (4th edn) para 83.

Cases referred to in judgment

Crossmore Electrical and Civil Engineering Ltd, Re [1989] BCLC 137.
Dennis & Sons Ltd v West Norfolk Farmers' Manure & Chemical Co-operative Co Ltd [1943] 2 All ER 94, [1943] Ch 220.
Foss v Harbottle (1843) 2 Hare 461, 67 ER 189.
Gourand v Edison Gower Bell Telephone Co of Europe (1888) 57 LJ Ch (NS) 498.
Hydrosan Ltd, Re [1991] BCLC 418.
Kenyon Swansea Ltd, Re [1987] BCLC 514.
Woodhouse & Co (Ltd) v Woodhouse (1914) 30 TLR 559, CA.

Applications

CAS Nominees Ltd and AON Pension Trustees Ltd, the claimants in proceedings for unfair prejudice under s 459 of the Companies Act 1985, applied for orders requiring disclosure of documents by the first, second and fourth to eighth defendants, Nottingham Forest plc, Nottingham Forest Football Club Ltd, Eric Malcolm Barnes, Philip Soar, Sir David White, John David Pelling and Nicholas Mark Leslau (the defendants). The facts are set out in the judgment.

David Chivers (instructed by *Nabarro Nathanson*) for the claimants.
Catherine Roberts (instructed by *Berwin Leighton*) for the defendants.

Cur adv vult

31 July 2000. The following judgment was delivered.

EVANS-LOMBE J.

1. I have to deal with applications for disclosure of documents made by the claimants against the first, second and fourth to eight defendants (the defendants) in a petition brought by the claimants against eight defendants under s 459 of the Companies Act 1985. The application was made in the course of a case management conference when I had to deal with a number of other issues of disclosure, amendment of pleadings, and security for costs. I reserved judgment on the issue which I deal with in this judgment because of lack of time and also because it raises what may be a novel point of law.

2. It is necessary to set out the background facts of the case. I do so from a case summary provided by the claimants.

3. In their petition under s 459 of the 1985 Act the claimants allege that the affairs of Nottingham Forest plc (the company) have been conducted in a manner unfairly prejudicial to them. Nottingham Forest Football Club Ltd (the club) operates the football team 'Nottingham Forest'. Until the matters complained of

by the claimants, the club was a wholly-owned subsidiary of the company. The company was established in 1997 for the purpose of acquiring the club. That acquisition had proceeded against a background of two competing (but unsuccessful) bids, one of which had involved the third respondent (Mr Doughty) and one of which had involved a Mr Albert Scardino (Mr Scardino). At all material times the company has been listed on AIM.

4. On 16 July 1999 Mr Doughty entered into an agreement with the company and the club under which he would subscribe £6m for 29·75m new ordinary shares in the club representing 40·5% of its share capital, with an option to subscribe a further £6m for a further 23·8m new ordinary shares (following which he would hold 55% of the enlarged share capital so that he would control the club and the company would become a minority shareholder). The agreement was conditional upon the approval of the company's shareholders by ordinary resolution which approval was obtained at an extraordinary general meeting on 28 July 1999.

5. The claimants, who between them control 24·3% of the company's share capital, say that the agreement with Mr Doughty was unfairly prejudicial. The mechanism of allowing Mr Doughty to invest in the club (rather than the company) was adopted for no proper purpose of the company, but specifically to ensure that shareholders in the company were denied the protections available to them under the 1985 Act or the City Code on Take-overs and Mergers. The defendants contend that the agreement was made for a proper purpose, namely to ensure the urgent injection of funds into the club.

6. The claimants also say that the approval of the company in general meeting did not render the agreement proper, moreover that such approval was procured by a tricky circular. In particular the claimants say that an approach from Mr Scardino to invest in the company was not disclosed to shareholders (who were left with the impression that there was no realistic alternative to Mr Doughty's proposal). The defendants say that Mr Scardino's approach did not represent a realistic alternative justifying its disclosure. The claimants also say, and the defendants deny, that the prices at which the company's shares were allotted to Mr Doughty and at which he had an option to acquire further shares in the company, represented an undervalue.

7. The claimants seek an order setting aside the agreement alternatively an order that their shares be purchased on the basis that the agreement was never entered into. The claimants served their petition on the defendants on 28 October of last year. The pleadings are now complete and the parties have exchanged lists of documents.

8. The issue with which I have to deal concerns an application by the claimants for specific disclosure of a number of documents in respect of the whole or parts of which the defendants contend are protected from disclosure by reason of legal professional privilege. The documents fall into four classes. In respect of the first class a number of documents have been produced on disclosure which have been redacted so as to exclude passages which, it is contended, contain privileged information. In all save one of these documents the redactions have been made to exclude handwritten comments added to those documents. The second classification refers to an advice by counsel referred to in minutes of a board meeting of the company on 15 July 1999 and a further advice from counsel referred to in a fax dated 9 July 1999. The third classification refers to one document only namely a draft of the circular to shareholders which was ultimately distributed to them for the purposes of the extraordinary general

meeting to approve the transaction with Mr Doughty to which I have already referred. The fourth class of document refers to documents recording legal advice mentioned in paras 28·7, 34·4, and 44·2 of the defence of the defendants.

9. All the documents in question were brought into existence at about the time of, and are connected with, the decision by the board of the company to support Mr Doughty's proposed acquisition of shares in the company and the preparations for an extraordinary general meeting of the company to approve that transaction. It is the defendant's submission that, on the material before the court, it is apparent that, at all material times, the directors of the company realised that to go ahead with the transaction with Mr Doughty would, in all probability, result in litigation of the type which has in fact emerged, brought on behalf of substantial minority shareholders who opposed the company entering into the transaction and preferred the proposal that Mr Scardino acquire a substantial shareholding. For the purposes of this judgment I am content to assume that such is established.

10. The defendants oppose disclosure on the basis that the documents in question, or the passages in them which have been redacted, are protected from disclosure by legal professional privilege because they contain communications between the company and its legal advisors with relation to proceedings with which the claimants were threatening the defendants and which have ultimately been commenced. It is accepted by the defendants that in order to succeed in their opposition to disclosure the defendants must first establish that advice given to the company, in these circumstances, is capable of attracting the protection of such privilege.

11. The fundamental rule which governs an attempt by a shareholder to obtain the production of documents by a company in which he holds shares but which documents would otherwise be protected by legal professional privilege is to be found in the judgment of Phillimore LJ in *Woodhouse & Co (Ltd) v Woodhouse* (1914) 30 TLR 559. The report summarises his judgment as follows (at 590):

> '... [the judge] had read the opinions, and they were taken on behalf of the company and not on behalf of others, two of them after the action began, and the third in preparation for the action. They had to consider the principle applicable where a shareholder was a plaintiff or a defendant in litigation with the company. To his mind, whether he was plaintiff or defendant was immaterial ... The principle was that if people had a common interest in property, an opinion having regard to that property, paid for out of the common fund, *i.e.*, company's money or trust fund, was the common property of the shareholders, or *cestuis que trust*. But where the parties were sundered by litigation such an opinion obtained by one of them was privileged.'

12. In proceedings under s 459 of the 1985 Act the company, of which the disputing shareholders or directors hold shares and over the control of which their dispute arises, is only a nominal party to the litigation which, in substance, is a dispute between shareholders. See *Re Crossmore Electrical and Civil Engineering Ltd* [1989] BCLC 137 per Hoffmann J. The same is true where a company is made defendant to a representative shareholders action against directors under the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.

13. In *Dennis & Sons Ltd v West Norfolk Farmers' Manure & Chemical Co-operative Co Ltd* [1943] 2 All ER 94, [1943] Ch 220 Simonds J was considering an action by shareholders seeking relief against the directors of a company who, they

alleged, had improperly exercised their powers to control the company's affairs. In those proceedings the plaintiffs sought disclosure of a report by accountants which had been obtained by the company in anticipation of the dispute. In his judgment Simonds J says:

> 'Two points have been raised, first, whether, having regard to the circumstances in which, and the date on which, the accountants' report was made, it is a privileged document, and, secondly, whether, even if it were otherwise a privileged document, it is privileged having regard to the fact that the plaintiffs are themselves shareholders in the defendant company. I have formed a clear opinion on the second point which disposes of the case. The general rule, which applies equally as between a company and its shareholders and as between a trustee and his beneficiaries is thus stated at pp. 518 and 519 of the Annual Practice, 1943: "A cestui que trust ... is entitled to see cases and opinions submitted and taken by the trustee for the purpose of the administration of the trust; but where stated and taken by the trustees not for that purpose, but for the purpose of their own defence in litigation against themselves by the cestui que trust they are protected ... On the same principle a ratepayer would be entitled to see cases and opinions taken by the corporation on the subject of rates ... and so in *Gourand* v. *Edison Gower Bell Telephone Co., Ld.* (*Gourand v Edison Gower Bell Telephone Co of Europe* (1888) 57 LJ Ch (NS) 498), an action by shareholders against the company, the plaintiffs were held entitled to see communications between the company and their solicitors: but similarly a shareholder could not seek counsel's opinion taken by the company, in respect of the matter in dispute between them." In the present case it seems clear that when, in January, 1938, the defendants instructed the accountants to make a report on the interpretation of the article, and, therefore, on the duty of the directors in administering the affairs of the company, they were doing something on behalf of all the shareholders. They were seeking to do no more than to perform their duty having regard to the difference of opinion which had arisen on the board, and they did not seek the report because some action was threatened against them. That being so, the plaintiffs, as shareholders, are entitled to see what the accountants reported regarding the rights and duties of the board. That was the position when the report was commanded. Two days before it was made the plaintiffs instituted proceedings by way of originating summons so that the construction of the article and their rights under it might be determined. The present defendants were necessarily made defendants in those proceedings. It appears to me that the plaintiffs, by instituting the proceedings two days before the report was received, did not lose their right as shareholders to see that which they otherwise would have been entitled to. In other words, the report was not a document obtained by the defendants for the purpose of defending themselves against hostile litigation, and it was only where a document is obtained by a company for that purpose that privilege can be claimed. It must never be forgotten that the rules as to privilege are strict, and, as has so often been said, privilege is not to be extended.' (See [1943] Ch 220 at 222–223.)

14. The cases of *Woodhouse & Co* and *Dennis & Sons* were cited by Harman J in *Re Hydrosan Ltd* [1991] BCLC 418 together with other authority including the decision of Hoffmann J in the *Crossmore Electrical* case. Harman J was considering a s 459 petition where the petitioners were complaining that the company's funds

had been improperly applied in financing earlier litigation. The petitioners were seeking disclosure of documents relating to a rights issue of which complaint was made. Production of those documents was refused by the registrar on the grounds that they were covered by legal professional privilege.

15. Harman J, applying the rule in the *Woodhouse & Co* case, ordered that the documents be produced. The petition in that case included a prayer for the winding-up of the company. It was argued that this made the litigation hostile to the company as well as to the respondent shareholders. Harman J says (at 421):

> 'It is quite true that if a winding-up order is made on a contributories' petition the company will suffer what I usually refer to as death, that is, its coming to an end and eventual dissolution, but the wrongs claimed and the nature of the allegations are of wrongs by those in control of the company against a shareholder rather than by the company itself in any real sense. Here in this present case if there were documents created in the course of proceedings, other than the s 459 petition, such as, it may well be, the claim brought by the petitioner here against the company in the Chancery Division for wrongful dismissal and also the claim in an industrial tribunal for what is nowadays called unfair dismissal, in such matters, it seems to me, the claim truly is against the company. A judgment recovered on it would make the claimant in it a creditor of the company and would found a creditors' petition for winding up of the company. Such matters, it seems to me, are hostile litigation within the doctrine of *Woodhouse & Co (Ltd) v Woodhouse* ((1914) 30 TLR 559) which is an exception to the general rule, but that exception does not in my judgment have any application to documents for a members' just and equitable petition. In such cases the principle applies which Vinelott J asserted in *Re Kenyon Swansea Ltd* ([1987] BCLC 514 at 521) ...'

16. In the present case Miss Roberts for the defendants, while accepting, as she was bound to, that the rule as to disclosure found in the *Woodhouse & Co* case was applicable to small private companies with limited share holdings, argued that it should not be applied to companies such as the first defendants, a plc with substantial numbers of shares on issue, quoted on a stock market. She pointed out that all the authorities cited in *Re Hydrosan Ltd* were about small private companies with limited issues of shares. To apply the *Woodhouse & Co* rule to companies such as the first defendant would be impractical and an unjustifiable extension.

17. I am unable to accept that submission. Nothing in the *Woodhouse & Co* case or the subsequent authorities down to and including *Re Hydrosan Ltd* supports the proposition that the rule is to be differently applied depending on the size and importance of the company concerned. As the authorities show the rule is based on principles of trust law, an analogy being drawn between the position of directors as fiduciaries and trustees. As the authorities show, directors though not properly described as trustees of the assets of the company within their charge, none the less owe fiduciary duties to the shareholders which prevent them from applying those assets save for the purposes of the company. Directors are subject to the same duty to shareholders regardless of the size of the company concerned.

18. Miss Roberts was unable, when pressed by me, to produce any satisfactory criterion by which to judge whether the company concerned was one to which the *Woodhouse & Co* rule as to disclosure would be applied and one that to which it would not.

19. It follows, in my judgment, that the documents in the four classifications which I have set out, and which are the subject matter of this part of the application, were not documents which were protected from disclosure by legal professional privilege. They were documents which were created or which were added to by lawyers or others for the purpose of procuring the company to take certain actions, albeit it was anticipated that those actions might give rise to litigation in which a challenge would be mounted to their propriety by the present petitioners. In the present case the company has procured the issue of a substantial number of the shares of its subsidiary to Mr Doughty and given him an option to acquire further shares which would render the company a minority shareholder in that subsidiary. It is alleged amongst other matters that the issue of those shares and the granting of the option were at a discount on the true value of the shares at the relevant time as demonstrated by their market price. It is also alleged that the shareholders of the company in general meeting were induced to vote in favour of this transaction as a result of a misleading circular. I say nothing as to whether any of those allegations are justified. I can see powerful contrary arguments. However, I can see no reason why the objecting shareholders should not be entitled to see the advice and guidance being given to the company's board at the time these transactions were embarked upon in proceedings in which the company itself only appears as a defendant in a nominal capacity so as to be bound by any order which the court makes.

20. That disposes of this part of the applications before me and makes it unnecessary for me to have to go on to consider whether the documents or any of them are not disclosable on the basis that they are not only capable of being bet are actually subject to legal professional privilege.

Order accordingly.

Celia Fox Barrister.

Bank of Credit and Commerce International SA (in liquidation) v Ali and others

[2001] UKHL/8

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD BROWNE-WILKINSON, LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN AND LORD CLYDE

16–18 JANUARY, 1 MARCH 2001

Contract – Release – General release – Employee agreeing to release all claims he might have against employer – Employee bringing claim not known to exist in law when release signed – Whether release barring employee's claim.

In 1990, following an extensive reorganisation of its worldwide business, the appellant bank made redundant a number of its employees, including the respondent, N. The redundancy notice stated that N would receive a statutory redundancy payment and an ex gratia payment. He was also offered the option of receiving an additional month's gross salary if he was willing to sign a form acknowledging that the payment he would receive from the bank was in full and final settlement. N signed the form which recorded that he agreed to accept the terms set out in attached documents in full and final settlement of 'all or any claims whether under statute, Common Law or in Equity of whatsoever nature that exist or may exist and, in particular, all or any claims rights or applications of whatsoever nature that [N] has or may have or has made or could make in or to the Industrial Tribunal'. Under the agreement, N received almost £10,000. Of that sum, £2,772·50 was paid in consideration for his signing the form of release. The following year, the bank collapsed, and it became generally known that a significant part of its business had been carried out in a corrupt and dishonest manner. Subsequently, a number of employees brought claims against the bank, contending that the bank had breached an implied duty not to carry on a corrupt and dishonest business, and seeking 'stigma' damages to compensate them for the alleged handicap that they had suffered in the labour market as a result of their association with the bank. The bank's liquidators contended that the terms of the release barred N from bringing the stigma claim, even though it was not until 1997 that such a claim was recognised to exist in law. The judge held that the language of the release was sufficiently comprehensive to embrace N's stigma claim—a view that was shared by the majority of the Court of Appeal on N's appeal. Nevertheless, the court unanimously held that it would be unconscionable to allow the bank to rely on the release in order to bar N's claim. Accordingly, N's appeal was allowed, and the liquidators appealed to the House of Lords.

Held – (Lord Hoffmann dissenting) Although a party could, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he was not, and could not, be aware, the court would be slow to infer that he had done so in the absence of clear language to that effect. In the instant case, neither the bank nor N could have realistically supposed that a claim for stigma damages lay within the realm of practical possibility. On a fair

construction of the document, it was impossible to conclude that the parties had intended to provide for the release of rights and the surrender of claims which they could never have had in contemplation at all. If the parties had sought to achieve so extravagant a result, they should have used language which left no room for doubt and which might at least have alerted N to the true effect of what (on that hypothesis) he was agreeing. Accordingly, the appeal would be dismissed on that ground without the need to consider the issue of unconscionability (see [9]–[14], [16]–[17], [19]–[21], [27]–[28], [31], [35], [79] and [86]–[88], post).

Decision of the Court of Appeal [2000] 3 All ER 51 affirmed on different grounds.

Notes

For the construction of releases, see 9(1) *Halsbury's Laws* (4th edn reissue) para 1053.

Cases referred to in opinions

Arrale v Costain Civil Engineering Ltd [1976] 1 Lloyd's Rep 98, CA.

Bank of Credit and Commerce International SA (in liq) v Ali (No 2) [1999] 4 All ER 83.

Bell v Lever Bros Ltd [1932] AC 161, [1931] All ER Rep 1, HL.

Cloutte v Storey [1911] 1 Ch 18.

Cole v Gibson (1750) 1 Ves Sen 503, 27 ER 1169.

Countess of Rutland's Case (1604) 5 Co Rep 25b, 77 ER 89.

Ecclesiastical Comrs for England v North Eastern Rly Co (1877) 4 Ch D 845.

Grant v John Grant & Sons Pty Ltd (1954) 91 CLR 112, Aust HC.

Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 All ER 98, [1998] 1 WLR 896, HL.

Lindo v Lindo (1839) 1 Beav 496, 48 ER 1032.

London and South Western Rly Co v Blackmore (1870) LR 4 HL 610.

Lyall v Edwards (1861) 6 H & N 337, 158 ER 139.

Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq) [1997] 3 All ER 1, [1998] AC 20, [1997] 3 WLR 95, HL.

Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 1 All ER 108, [1983] QB 284, [1982] 3 WLR 1036, CA; *affd* [1983] 2 All ER 737, [1983] 2 AC 803, [1983] 3 WLR 163, HL.

Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556, [1980] AC 827, [1980] 2 WLR 283, HL.

R v Cambridge Health Authority, ex p B [1995] 2 All ER 129, [1995] 1 WLR 898, CA.

Ramsden v Hylton (1751) 2 Ves Sen 304, 28 ER 196.

Richmond v Savill [1926] 2 KB 530, [1926] All ER Rep 362, CA.

Salkeld v Vernon (1758) 1 Eden 64, 28 ER 608.

Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1966] 2 All ER 61, [1967] 1 AC 361, [1966] 2 WLR 944, HL.

Torrens Aloha Pty Ltd v Citibank NA (1997) 144 ALR 89, Aust FC.

Tudor Grange Holdings Ltd v Citibank NA [1991] 4 All ER 1, [1992] Ch 53, [1991] 3 WLR 750.

Turner v Turner (1880) 14 Ch D 829.

Yoshimoto v Canterbury Golf International Ltd (27 November 2000, unreported), NZ CA.

Appeal

The Bank of Credit and Commerce International SA (in liquidation) appealed with permission from the order of the Court of Appeal (Sir Richard Scott V-C, Chadwick and Buxton LJJ) on 19 April 2000 ([2000] 3 All ER 51, [2000] ICR 1410) allowing an appeal from the decision of Lightman J on 18 December 1998 ([1999] 2 All ER 1005, [1999] ICR 1068) dismissing the claim by the respondent, Khawaja Mohammad Naeem, a former employee of the bank, for damages for misrepresentation and breach of his contract of employment. The claim was heard as a test case in part of the proceedings between the bank and several hundred of its former employees, including the first defendant, Munawar Ali. The facts are set out in the opinion of Lord Bingham of Cornhill.

Christopher Jeans QC and *Daniel Stilitz* (instructed by *Lovells*) for the bank's liquidators.

Robin Allen QC, *Issac Jacob* and *Thomas Coghlin* (instructed by *Beale & Co*) for Mr Naeem.

Their Lordships took time for consideration.

1 March 2001. The following opinions were delivered.

LORD BINGHAM OF CORNHILL. My Lords,

[1] The liquidators of the Bank of Credit and Commerce International SA appeal against a decision of the Court of Appeal ([2000] 3 All ER 51, [2000] ICR 1410) reversing a decision of Lightman J ([1999] 2 All ER 1005, [1999] ICR 1068). These decisions were made on an issue ordered to be tried to determine the effect, validity and enforceability of an agreement made between the bank and certain of its employees about a year before application was made for the winding up of the bank. Two cases were selected for trial as test cases on this issue, but one of the cases has been compromised. Mr Naeem is thus the sole respondent to this appeal.

[2] The facts giving rise to this litigation have been agreed between the parties and are comprehensively summarised by Lightman J in para 3 of his judgment at first instance ([1999] 2 All ER 1005 at 1009, [1999] ICR 1068 at 1072) and Chadwick LJ in paras 42–49 of his judgment in the Court of Appeal ([2000] 3 All ER 51 at 63–67, [2000] ICR 1410 at 1424–1429). It is unnecessary to rehearse that detailed history again. The salient facts are these. Mr Naeem was employed by the bank in the United Kingdom from June 1985. In the spring and early summer of 1990 the bank embarked on an extensive reorganisation of its worldwide business which made a number of its UK employees redundant. Mr Naeem was one of these. Following consultation with the Advisory, Conciliation and Arbitration Service (ACAS) and the employees' trade union a notice was sent to Mr Naeem among other employees on 18 June 1990 terminating his employment on 30 June 1990. The notice said that he would receive his full notice entitlement, a statutory redundancy payment (plus accrued holiday pay) and an ex gratia payment. A schedule was attached to the notice summarising the payment on offer. Reference was made to potential set-offs for credit card debts, season ticket loans and current account overdraft balances owed to the bank (in Mr Naeem's case no such debts existed) and Mr Naeem was offered the option of receiving an additional month's gross salary in addition to the total payment set out in the schedule if he was willing to sign an ACAS form acknowledging that the payment he would receive

from the bank was in full and final settlement. In the notice Mr Naeem was offered a meeting with an officer of ACAS and he accepted this offer. a

[3] The meeting took place on 4 July 1990, just after the termination of Mr Naeem's employment. Following a short interview with an ACAS official Mr Naeem signed and a representative of the bank countersigned ACAS Form COT 3 which recorded:

> 'The Applicant [Mr Naeem] agrees to accept the terms set out in the documents attached in full and final settlement of all or any claims whether under statute, Common Law or in Equity of whatsoever nature that exist or may exist and, in particular, all or any claims rights or applications of whatsoever nature that the Applicant has or may have or has made or could make in or to the Industrial Tribunal, except the Applicant's rights under the Respondent's [the bank's] pension scheme.' b c

Under the agreement Mr Naeem received a total of £9,910·79, of which £2,772·50 was paid in consideration of Mr Naeem signing the form of release. If he had not signed the form of release, he would not have received that part of the total.

[4] On 5 July 1991 application was made that the bank be wound up by the High Court. It quickly became clear and generally known that the bank was and had for some years been seriously insolvent and that a significant part of its business had been carried on in a corrupt and dishonest manner. In the course of the liquidation a number of employees sought to claim (or counterclaim) damages caused to the employees by their association with the bank, the stigma of which association was said to handicap the employees in obtaining other employment. Such damages were attributed to the bank's breach of an implied duty owed to the employees not to carry on a dishonest or corrupt business. It was also contended that the employees had been induced to work for the bank by the false representation that it was an honest and creditworthy financial institution. d e

[5] The liquidators rejected the employees' claims for stigma damages and damages for misrepresentation, and their rejection of the stigma claims was upheld by the courts until, in *Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1, [1998] AC 20, the House of Lords ruled that such claims were sustainable in principle. A number of employees including Mr Naeem wish to pursue such claims. The liquidators contend that Mr Naeem (the claimant chosen for the purpose of resolving this issue) is debarred from claiming such damages by the terms of the release which he signed on 4 July 1990. f g

[6] In para 56 of his judgment in the Court of Appeal Chadwick LJ helpfully summarised the issues and the factual setting in which they must be resolved:

> 'The first issue on this appeal is whether the court should construe the general words used so as to include the stigma claims. The second issue is whether, if that is the effect of those words as a matter of construction, the court should allow BCCI to rely upon a construction which has that effect. Those issues arise in a factual context in which (i) BCCI must be treated as having knowledge at the relevant time that it was engaged in a dishonest and corrupt business—that is accepted for the purposes of the ACAS COT 3 issue, (ii) Mr Naeem must be treated as not having that knowledge at the relevant time—that, also is accepted for the purposes of the issue, (iii) it was a necessary incident of the way in which BCCI was carrying on its business that the dishonest and corrupt nature of that business should be concealed h j

a from the general body of employees, including Mr Naeem, (iv) BCCI must be taken to have known that Mr Naeem did not have that knowledge at the relevant time—it was BCCI's intention to conceal the dishonest and corrupt nature of its business from the general body of its employees and there was no reason to think that it had not achieved that objective, (v) without that knowledge Mr Naeem could not have appreciated that there had been a b breach of the implied term on which the stigma claim is founded, and (vi) the possibility that BCCI—a bank authorised by the Bank of England under the Banking Act 1987 to carry on banking business in London—would be carrying on a dishonest and corrupt business was so remote that Mr Naeem could not been expected to appreciate that it might exist, or that BCCI might be in breach of its obligation not to abuse the trust and confidence which he c was entitled to place in it as his employer.' (See [2000] 3 All ER 51 at 69, [2000] ICR 1410 at 1431.)

[7] Lightman J and a majority of the Court of Appeal (Chadwick and Buxton LJJ) held that the general language of the release was sufficiently comprehensive to embrace the claims which Mr Naeem sought to pursue. Since all the claims d known to the parties were identified and met in full, the broad language of the release must (they held) be taken to refer to other claims, not at that stage known or identified. Sir Richard Scott V-C took a different view. He held in para 34 of his judgment that the appeal should be allowed—

e 'on the ground that the COT 3 agreement, properly construed on the assumed facts and in the context of the parties' knowledge at the time it was signed, does not bar Mr Naeem's "stigma" claim.' (See [2000] 3 All ER 51 at 61, [2000] ICR 1410 at 1422.)

Mr Naeem's appeal against Lightman J's dismissal of his claim was allowed, since f all members of the Court of Appeal held that it would in all the circumstances be unconscionable for the bank to rely on the release in order to bar Mr Naeem's claim.

[8] I consider first the proper construction of this release. In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the g parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective h judgment based on the materials already identified. The general principles summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 114–115, [1998] 1 WLR 896 at 912–913 apply in a case such as this.

j [9] A party may, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, if appropriate language is used to make plain that that is his intention. This proposition was asserted by Lord Keeper Henley in *Salkeld v Vernon* (1758) 1 Eden 64, 28 ER 608, in a passage quoted in [11] below. It was endorsed by the High Court of Australia in *Grant v John Grant & Sons Pty Ltd*

(1954) 91 CLR 112 at 129 where Dixon CJ (speaking for himself and Fullagar, Kitto and Taylor JJ) said: *a*

> 'No doubt it is possible *a priori* that the release was framed in general terms in the hope of blotting out, so to speak, all conceivable grounds of further disputes or claims between all or any two or more parties to the deed, whether in respect of matters disclosed by a party against whom a claim might be made or undisclosed, of matters within the knowledge of a party by whom a claim might be made or outside it. If so the case would fall within the exception which, in the passage already cited, Lord *Northington* [Lord Keeper Henley] made from his proposition that a release *ex vi termini* imports a knowledge in the releasor of what he releases, namely the exception expressed by the words "unless upon a particular and solemn composition for peace persons expressly agree to release uncertain demands" (*Salkeld* v. *Vernon*).' *b* *c*

The proposition was roundly asserted by Sir Richard Scott V-C in the present case. In para 11 of his judgment ([2000] 3 All ER 51 at 56, [2000] ICR 1410 at 1415) he said: *d*

> 'The law cannot possibly decline to allow parties to contract that all and any claims, whether or not known, shall be released. The question in a case such as the present is to ascertain, objectively, whether that was the parties' intention or whether, in order to correspond with their intentions, a restriction, and if so what restriction, should be placed on the scope of the release.' *e*

He made a similar point in para 19 of his judgment ([2000] 3 All ER 51 at 58, [2000] ICR 1410 at 1417–1418). This seems to me to be both good law and good sense: it is no part of the court's function to frustrate the intentions of contracting parties once those have been objectively ascertained.

[10] But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware. In *Cole v Gibson* (1750) 1 Ves Sen 503 at 507, 27 ER 1169 at 1171, Lord Hardwicke LC said: *f*

> 'I will not say, there may not be such a confirmation or release given, as may release the remedy of the party; for it is hard to say that in a court of equity, a man having a right of action or suit to be relieved in equity, and knowing the whole of the case, may not release that, on whatever consideration it arises, so far as regards himself: but it must be applied to that particular case, doing it with his eyes open, and knowing the circumstances.' *g* *h*

Lord Hardwicke LC returned to the question in *Ramsden v Hylton* (1751) 2 Ves Sen 304 at 310, 28 ER 196 at 200:

> 'The strongest and most material objection is the release; but I am of opinion, it would not be construed as a release of this demand, either in point of law, or in a court of equity. First, it is certain, that if a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited (*Cole v Gibson* (1750) 1 Ves Sen 503, 27 ER 1169), which was under the contemplation of the parties, and intended to be released ... But there is no occasion to rely on the law for this; *j*

for it is clear, that it would not in a court of equity, it being admitted on all hands, and it must be so taken, that this settlement was unknown to all the parties: nor did the daughters know of this contingent provision, beside which they had no other provision out of this estate; and all they could be intitled to must arise out of the personal estate of their father or other relations. It is impossible then to imply within the general release that which neither party could have under consideration, and which it is admitted neither side knew of; and as this release cannot have its effect to bar this demand, so it cannot be set up against them in a court of equity.'

[11] Lord Keeper Henley, in *Salkeld v Vernon* (1758) 1 Eden 64 at 67–68, 28 ER 608 at 609 held:

'Now a release *ex vi termini* imports a knowledge in the releasor of what he releases, unless upon a particular and solemn composition for peace persons expressly agree to release uncertain demands.'

Lord Langdale MR spoke to similar effect in *Lindo v Lindo* (1839) 1 Beav 496 at 505–506, 48 ER 1032 at 1036, declining to construe general words as having an effect not contemplated by any of the parties at the time.

[12] In *Lyall v Edwards* (1861) 6 H & N 337, 158 ER 139, the issue was whether the terms of a general release should be construed to cover potential claims in conversion of which the parties (or at any rate the releasor) were unaware at the time of the agreement. Pollock CB held:

'It is a principle long sanctioned in Courts of equity, that a release cannot apply, or be intended to apply to circumstances of which a party had no knowledge at the time he executed it, and that if it is so general in its terms as to include matters never contemplated, the party will be entitled to relief.' (See (1861) 6 H & N 337 at 347, 158 ER 139 at 143.)

Martin B confined himself to considering the relief which a court of equity would give if a release executed for a limited purpose was expressed in terms more extensive than intended. Wilde B advanced a rule of construction:

'The doctrine of a Court of equity is, that a release shall not be construed as applying to something of which the party executing it was ignorant, and we have now to act on that doctrine in a Court of law.' (See (1861) 6 H & N 337 at 348, 158 ER 139 at 144.)

[13] This approach was echoed by Lord Westbury in *London and South Western Rly Co v Blackmore* (1870) LR 4 HL 610 at 623–624:

'The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged, or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release.'

[14] *Ecclesiastical Comrs for England v North Eastern Rly Co* (1877) 4 Ch D 845 again raised the question whether general words of release were to be held as covering claims of which one party was unaware at the date of the agreement. Malins V-C did not consider this question at any length in his judgment, but appears to have concluded (at 853) that the release would have been treated as covering the

claims in question had the plaintiffs known the true facts, which they did not. In *Turner v Turner* (1880) 14 Ch D 829 at 834 he held:

> 'In a case of this kind it is the duty of the Court to construe the instrument according to the knowledge of the parties at the time, and according to what they intended, and not to extend it to property which was not intended to be comprised within it ... I quite agree with the assertion made by Mr. *Woods* and other of the learned counsel that the words of release are in themselves abundantly sufficient, and if the deed is to be read literally and to be considered as including everything which they had known or might hereafter know, it is quite clear that this suit is barred by that release. But it has always been the rule of this Court to construe releases and documents of that kind with regard to the intention of the parties, and to refer in such cases to the state of the property which was known at the time.'

A similar expression of opinion is to be found in *Cloutte v Storey* [1911] 1 Ch 18 at 34. In *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112 the High Court of Australia referred with approval to a number of these authorities, including a statement by Sir Frederick Pollock in his *Principles of Contract* (13th edn, 1950) p 412, where he wrote: '... in equity "a release shall not be construed as applying to something of which the party executing it was ignorant."' Then the High Court concluded (at 129–130):

> 'From the authorities which have already been cited it will be seen that equity proceeded upon the principle that a releasee must not use the general words of a release as a means of escaping the fulfilment of obligations falling outside the true purpose of the transaction as ascertained from the nature of the instrument and the surrounding circumstances including the state of knowledge of the respective parties concerning the existence, character and extent of the liability in question and the actual intention of the releasor.'

[15] A search of the Australian case law shows that *Grant's* case has been frequently cited and relied upon. In *Torrens Aloha Pty Ltd v Citibank NA* (1997) 144 ALR 89 it was held that a waiver executed in 1987 should not be construed to cover a claim which was not the subject of consideration by the parties at the time and would have been doomed to failure until the High Court in effect created a new cause of action five years later.

[16] Reflections of such an approach are found in the judgment of Lord Denning MR (but not the other members of the court) in *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep 98. The plaintiff had lost his left arm in an industrial accident in Dubai and had accepted a paltry sum in local currency, the full sum to which he was entitled under a local ordinance—

> 'in full satisfaction and discharge of all claims in respect of personal injury whether now or hereafter to become manifest arising directly or indirectly from an accident which occurred on 3rd July, 1968.' (See [1976] 1 Lloyd's Rep 98 at 99.)

The issue was whether the release applied to claims for common law damages. Lord Denning MR, in agreement with Stephenson LJ (Geoffrey Lane LJ dissenting), held that it did not. But he also held that if, contrary to his view, the release did cover common law claims there was no consideration for the plaintiff's promise. As he put it (at 102):

'I would say that, if there was a true accord and satisfaction, that is to say, if Mr. Dohale, with full knowledge of his rights, freely and voluntarily agreed to accept the one sum in discharge of all his claims, then he would not be permitted to pursue a claim at common law. But in this case there is no evidence of a true accord at all. No one explained to Mr. Dohale that he might have a claim at common law. No one gave a thought to it. So there can have been no agreement to release it. There being no true accord, he is not barred from pursuing his claim at common law.'

[17] In his judgment in the present case Sir Richard Scott V-C held ([2000] 3 All ER 51 at 58, [2000] ICR 1410 at 1418 (para 22)): 'In my judgment, there are no such things as rules of equitable construction of documents.' Buxton LJ ([2000] 3 All ER 51 at 78, [2000] ICR 1410 at 1440 (para 92)) agreed with Sir Richard Scott V-C's proposition. I also agree with it. More than a century and a quarter have passed since the fusion of law and equity and it would be both destructive of that great reform, and altogether anomalous, if it were not correct. But acceptance of that proposition should not lead one to regard the authority cited above as spent, or as a dead letter. Some of the cases, I think, contain statements more dogmatic and unqualified than would now be acceptable, and in some of them questions of construction and relief were treated almost indistinguishably. But I think these authorities justify the proposition advanced in para 10 above and provide not a rule of law but a cautionary principle which should inform the approach of the court to the construction of an instrument such as this. I accept, as my noble and learned friend Lord Hoffmann forcefully points out, that authorities must be read in the context of their peculiar facts. But the judges I have quoted expressed themselves in terms more general than was necessary for decision of the instant case, and I share their reluctance to infer that a party intended to give up something which neither he, nor the other party, knew or could know that he had.

[18] So I turn to consider the agreement made between the bank and Mr Naeem. His employment was terminated on grounds of genuine redundancy. The agreement provided for payment in full of salary in lieu of notice and redundancy pay. It took account of matters such as holiday pay and season ticket loans. It plainly covered the ordinary incidents of the employer–employee relationship. But the liquidators contend that it cannot have been limited to such incidents or to claims which might be made to an industrial tribunal: otherwise the reference to 'all or any claims whether under statute, Common Law or in Equity of whatsoever nature that exist or may exist' would lack any field of potential reference. This is a compelling submission which has, understandably, found favour with the courts below and with my noble and learned friend Lord Hoffmann. But the liquidators accept that the language of the clause is subject to some implied limitations: where ex-employees have had deposits with the bank, the liquidators have not (very properly) sought to resist claims for repayment in reliance on the general release. Such claims, they say, fall outside the clause because they do not relate to the employer–employee relationship. That would be true, if employees were entirely free to make whatever banking arrangements they chose. But acceptance of these claims involves acceptance that the clause does not mean all it might be thought to say. What of a latent claim for industrial disease or personal injury caused to the employee by the negligence of the employer but unknown to both parties? Mr Jeans QC for the liquidators, in the course of an admirable argument, recognised the difficulty of

submitting that such a claim would be precluded by the provision, even though it would relate to the employer-employee relationship. I would not myself infer that the parties intended to provide for the release of such a claim. The same would in my view be true if, unknown to the employee, the bank had libelled him as an employee. The clause cannot be read literally.

[19] What, then, of the claim for stigma damages which lies at the heart of this appeal? The bank, through its senior employees, is fixed with knowledge of the bank's insolvency and nefarious practices, although it seems unlikely that those negotiating with the employees were alert to these facts, very carefully concealed from the world. Mr Naeem had no such knowledge. Neither the bank, even when fixed with such knowledge, nor Mr Naeem could realistically have supposed that such a claim lay within the realm of practical possibility. On a fair construction of this document I cannot conclude that the parties intended to provide for the release of rights and the surrender of claims which they could never have had in contemplation at all. If the parties had sought to achieve so extravagant a result they should in my opinion have used language which left no room for doubt and which might at least have alerted Mr Naeem to the true effect of what (on that hypothesis) he was agreeing.

[20] On this ground, essentially the first ground of Sir Richard Scott V-C's conclusion ([2000] 3 All ER 51 at 61, [2000] ICR 1410 at 1422 (para 34)), I would dismiss the appeal. This makes it unnecessary to consider whether, on the liquidators' construction, Mr Naeem would be entitled to relief against enforcement of the agreement on grounds of unconscionability, and I prefer to express no opinion on that matter. I would order the liquidators to pay the costs of these proceedings here and below, subject to any costs-sharing order which may be or become applicable.

LORD BROWNE-WILKINSON. My Lords,

[21] I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bingham of Cornhill. For the reasons which he gives I too would dismiss the appeal.

LORD NICHOLLS OF BIRKENHEAD. My Lords,

[22] This appeal raises a question of interpretation of a general release. By a general release I mean an agreement containing widely drawn general words releasing all claims one party may have against the other. The release given by Mr Naeem was of this character. Mr Naeem accepted a payment from BCCI 'in full and final settlement of all or any claims ... of whatsoever nature that exist or may exist'.

[23] The circumstances in which this general release was given are typical. General releases are often entered into when parties are settling a dispute which has arisen between them, or when a relationship between them, such as employment or partnership, has come to an end. They want to wipe the slate clean. Likewise, the problem which has arisen in this case is typical. The problem concerns a claim which subsequently came to light but whose existence was not known or suspected by either party at the time the release was given. The emergence of this unsuspected claim gives rise to a question which has confronted the courts on many occasions. The question is whether the context in which the general release was given is apt to cut down the apparently all-embracing scope of the words of the release.

[24] In times past the common law courts and the Court of Chancery differed in their approach to this question. In particular, the Court of Chancery was readier to admit extrinsic evidence as an aid to interpretation than were the common law courts. Sir Frederick Pollock summarised the matter thus in the first edition of his work *Principles of Contract* (1876) p 414:

> 'We have seen that courts of law as well as courts of equity have assumed a power to put a restricted construction on general words when it appears on the face of the instrument that it cannot have been the real intention of the parties that they should be taken in their apparent general sense. But courts of equity will do the like if the same conviction can be arrived at by evidence external to the instrument ... This jurisdiction is exercised chiefly in dealing with releases.'

[25] This difference in approach is now a matter of historic interest and no more. It is part of the history of the law of interpretation, described vividly in *Wigmore on Evidence* vol 9 (Chadbourn revision, 1981) para 2461, as 'the history of progress from a stiff and superstitious formalism to a flexible rationalism'. Today there is no question of a document having a legal interpretation as distinct from an equitable interpretation.

[26] Further, there is no room today for the application of any special 'rules' of interpretation in the case of general releases. There is no room for any special rules because there is now no occasion for them. A general release is a term in a contract. The meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made. This general principle is as much applicable to a general release as to any other contractual term. Why ever should it not be?

[27] That said, the typical problem, as I have described it, which arises regarding general releases poses a particular difficulty of its own. Courts are accustomed to deciding how an agreement should be interpreted and applied when unforeseen circumstances arise, for which the agreement has made no provision. That is not the problem which typically arises regarding a general release. The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary, part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality. When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which the release was given the release is applicable. The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release. The risk that further claims might later emerge was a risk the person giving the release took upon himself. It was against this very risk that the release was intended to protect the person in whose favour the release was made. For instance, a mutual general release on a settlement of final partnership accounts might well preclude an erstwhile partner from bringing a claim if it subsequently came to light that inadvertently his share of profits had been understated in the agreed accounts.

[28] This approach, however, should not be pressed too far. It does not mean that once the possibility of further claims has been foreseen, a newly emergent claim will always be regarded as caught by a general release, whatever the

circumstances in which it arises and whatever its subject matter may be. However widely drawn the language, the circumstances in which the release was given may suggest, and frequently they do suggest, that the parties intended or, more precisely, the parties are reasonably to be taken to have intended, that the release should apply only to claims, known or unknown, relating to a particular subject matter. The court has to consider, therefore, what was the type of claims at which the release was directed. For instance, depending on the circumstances, a mutual general release on a settlement of final partnership accounts might properly be interpreted as confined to claims arising in connection with the partnership business. It could not reasonably be taken to preclude a claim if it later came to light that encroaching tree roots from one partner's property had undermined the foundations of his neighbouring partner's house. Echoing judicial language used in the past, that would be regarded as outside the 'contemplation' of the parties at the time the release was entered into, not because it was an unknown claim, but because it related to a subject matter which was not 'under consideration'.

[29] This approach, which is an orthodox application of the ordinary principles of interpretation, is now well established. Over the years different judges have used different language when referring to what is now commonly described as the context, or the matrix of facts, in which a contract was made. But, although expressed in different words, the constant theme is that the scope of general words of a release depends upon the context furnished by the surrounding circumstances in which the release was given. The generality of the wording has no greater reach than this context indicates.

[30] The cases are legion. A few well known examples will suffice. As long ago as 1750 Lord Hardwicke LC said that it was common in equity to restrain a general release to 'what was under consideration at the time of giving it' (see *Cole v Gibson* (1750) 1 Ves Sen 503 at 507, 27 ER 1169 at 1171). A century later, in 1839, Lord Langdale MR said that the general words of a release are to be restrained by—

> 'the contract and the intention of the parties, that contract and intention appearing by the deed itself or from any other proper evidence that may be adduced upon the occasion.' (See *Lindo v Lindo* (1839) 1 Beav 496 at 506, 48 ER 1032 at 1036.)

In 1870 Lord Westbury said that the 'general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given' (see *London and South Western Rly Co v Blackmore* (1870) LR 4 HL 610 at 623). In 1926 Bankes LJ emphasised the 'necessity of ascertaining what the parties were contracting about before the court can determine the true meaning' of a release (see *Richmond v Savill* [1926] 2 KB 530 at 540, [1926] All ER Rep 362 at 367). In 1954 Dixon CJ, Fullagar, Kitto and Taylor JJ, in a joint judgment in the High Court of Australia, said that the general words of a release are confined to 'the true purpose of the transaction ascertained from the scope of the instrument and the external circumstances' (see *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112 at 130).

[31] This judgment in the High Court of Australia in *Grant's* case contained also the observation that the surrounding circumstances to be taken into account include the state of knowledge of the respective parties concerning the existence, character and extent of the liability in question and 'the actual intention of the

releasor'. For many years the accepted wisdom has been that evidence of the actual intention of the parties is not admissible on the interpretation of a written agreement, although such evidence is admissible for other purposes, for example, on a claim for rectification. In *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 115, [1998] 1 WLR 896 at 913, my noble and learned friend Lord Hoffmann pointed out that the exclusion from evidence of the previous negotiations of the parties and their declarations of subjective intent is for reasons of practical policy. He added that the boundaries of this exception are in some respects unclear. Whether these reasons of practical policy still hold good today in all circumstances has become increasingly the subject of debate in recent years. The debate is still continuing: see the recent observations of Thomas J in the Court of Appeal of New Zealand in paras 59 to 95 of his judgment in *Yoshimoto v Canterbury Golf International Ltd* (27 November 2000, unreported). This is not the moment to pursue this topic, important though it is, because the point does not arise on this appeal. I desire, however, to keep the point open for careful consideration on a future occasion.

Sharp practice

[32] Thus far I have been considering the case where both parties were unaware of a claim which subsequently came to light. Materially different is the case where the party to whom the release was given knew that the other party had or might have a claim and knew also that the other party was ignorant of this. In some circumstances seeking and taking a general release in such a case, without disclosing the existence of the claim or possible claim, could be unacceptable sharp practice. When this is so, the law would be defective if it did not provide a remedy.

[33] That is not the present case. Although BCCI through its officers may be fixed with knowledge of the corrupt activities taking place within the bank, officers of BCCI and, through them, BCCI itself were not aware that these activities might give bank employees a claim for damages for breach of their contracts of employment. In *Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1, [1998] AC 20 the House developed or, put more bluntly, changed the law. The House decided that, as a matter of law, corrupt and dishonest activities by an employer are capable of giving rise to a claim in damages. But that decision was in June 1997, seven years after Mr Naeem had signed his release form. In these circumstances there can be no question of BCCI having indulged in anything approaching sharp practice in this case. This being so, I prefer to leave discussion of the route by which the law provides a remedy where there has been sharp practice to a case where that issue arises for decision. That there is a remedy in such cases I do not for one moment doubt.

The present case

[34] I turn to the interpretation of the release signed by Mr Naeem. Clearly, BCCI and Mr Naeem are to be regarded as having intended not to confine the release signed by Mr Naeem to known claims. Specific payments were made in settlement in full of all known claims. Mr Naeem's redundancy package comprised four weeks' pay, an ex gratia payment equal to two weeks' pay, three weeks' pay in lieu of notice, and statutory redundancy pay. These items totalled

£7,138. An additional amount, equal to a further one month's pay, £2,772, was paid in exchange for his signing the general release (ACAS form COT 3). Plainly, the general release was intended to 'mop up' any other claims which Mr Naeem might have. BCCI was making a specific additional payment in order to be rid of the possibility of having to face any further claims from Mr Naeem. Unfair dismissal is the most obvious example. The release specifically mentioned any application Mr Naeem could make to the industrial tribunal. But the release is not confined to a claim for unfair dismissal. It would include also matters such as a claim for wrongful dismissal.

[35] Equally clearly the release is confined to claims arising out of the employment relationship. The release cannot reasonably be regarded as embracing any claim the employee might have as a depositor or borrower. I am inclined to think that the release is to be construed even more narrowly as restricted to claims arising out of the *ending* of the employment relationship. What if it later came to light that due to a clerical error Mr Naeem had been significantly underpaid while employed? It would be surprising if Mr Naeem could not pursue such a claim. Whether this is so or not, I consider these parties are to be taken to have contracted on the basis of the law as it then stood. To my mind there is something inherently unattractive in treating these parties as having intended to include within the release a claim which, *as a matter of law*, did not then exist and whose existence could not then have been foreseen. This employee signed an informal release when he lost his job, in return for an additional month's pay. The ambit of the release should be kept within reasonable bounds. Mr Naeem cannot reasonably be regarded as having taken upon himself the risk of a subsequent retrospective change in the law. A claim arising out of such a change cannot be regarded as having been within the contemplation of the parties. I too would dismiss this appeal.

LORD HOFFMANN. My Lords,

[36] I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill and I gratefully adopt his statement of the facts. There are two issues in this case. First, does Mr Naeem's claim fall within the description of claims which he agreed to release? If it does, then the second point is whether in the circumstances BCCI is entitled to rely upon the agreement.

[37] I agree with my noble and learned friend that the first issue raises an ordinary question of construction. What would a reasonable person have understood the parties to mean by using the language of the document against all the background which would reasonably have been available to them at the time? But I regret that I cannot agree with his answer. It appears to me to give too little weight to the actual language and background and to rely unduly upon the expressions of judges used in other cases dealing with different documents.

[38] The language of the document is very wide. The impression it conveys is that the draftsman meant business. He has gone to some trouble to avoid leaving anything out. He uses traditional style: pairs of words like 'full and final settlement', 'all or any claims', 'that exist or may exist' and phrases like 'whether under statute, Common law or in Equity' and 'of whatsoever nature'. Admittedly, he could have gone further. *Tudor Grange Holdings Ltd v Citibank NA* [1991] 4 All ER 1 at 5, [1992] Ch 53 at 57 contains an even more elaborate release and I have seen American documents in which the release covers an entire page. But most people

in this country would regard this as overkill. The modern English tradition, while still erring on the side of caution, is to avoid the grosser excesses of verbiage and trust to the judges to use common sense to get the message. I think that this tendency should be encouraged. So I think that anyone who was simply reading the document without preconceptions would accept that the draftsman was not leaving deliberate gaps. It does not however follow that the language was to be read completely literally. There may be limitations in scope to be inferred from the background, limitations from context which the draftsman may have thought too obvious to mention. But that is a different matter from saying that he did not use enough words.

[39] The background is however very important. I should in passing say that when, in *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 114, [1998] 1 WLR 896 at 913, I said that the admissible background included 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man', I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as *relevant*. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: '... we do not easily accept that people have made linguistic mistakes, particularly in formal documents.' I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage.

[40] What is the relevant background in this case? To start with, there are three matters to which I attach considerable importance. First, there was no dispute between the parties. No doubt Mr Naeem and his union were opposed to the whole idea of making him redundant. But, given that he was being made redundant, there was no dispute about the legal consequences. Mr Naeem had a claim to salary in lieu of notice and redundancy pay which BCCI did not contest. Secondly, there was no element of compromise. All his claims known to the parties were paid in full; in fact, more than in full because there was an ex gratia increase over the statutory redundancy pay. Thirdly, the release was not simply in consideration of a settlement or compromise. It was not, as often happens, a mere ancillary tidying up. BCCI paid a separate consideration of some £2,700 specifically for the release.

[41] The absence of a dispute is important because most of the authorities on the construction of releases concern documents which were intended to settle disputes. In such a case, the scope of the dispute provides a limiting background context to the document. It is easy to infer that although the parties used very wide language—'all claims' and so forth—they meant all claims arising out of the matters in dispute. It would go without saying that they were not intending to include claims of an altogether different character. A good example is the decision of the House of Lords in *London and South Western Rly Co v Blackmore* (1870) LR 4 HL 610. In 1861 the railway company used its statutory powers to buy some of

Mr Blackmore's land for railway purposes. In 1864 they had a dispute over their boundary. This was settled by an agreement that he should build a wall to be maintained at their joint expense. The agreement included a release of claims in general terms. In 1866 the railway company decided that it did not need the land it had taken and proposed to sell it as surplus land. Mr Blackmore claimed that, as the person from whom it had been taken, he had a statutory right of pre-emption under the Land Clauses Consolidation Act 1845. The railway company argued (rather faintly, it would seem, by their second counsel) that it fell within the description of claims which he surrendered when settling the boundary dispute. Lord Hatherley LC, who gave the leading judgment, did not even bother to address this point. Lord Westbury picked it up. He said (at 623):

> 'The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given.'

[42] This is rather a sweeping statement. It is almost always dangerous to say 'always'. But, in cases of a release given in connection with the settlement of a dispute, it is a fair generalisation.

[43] There may also be cases in which there is no dispute but the parties enter into a compromise of undisputed claims. This happens when an insolvent debtor enters into a composition with his creditors. In such a case, an ancillary release is also likely to be construed as releasing any further claim on the debts which are being compromised but not as extending to claims which did not fall within the terms of the composition. The best example is *Lyall v Edwards* (1861) 6 H & N 337, 158 ER 139. Edwards and Matthie were East India and colonial brokers who suspended payment and entered into a compromise with their creditors, including the plaintiffs. The creditors agreed by a deed of composition that the assets of the partnership should be realised, a dividend paid to creditors and the defendants then given a release in general terms. After executing the deed, the plaintiffs found that they had a claim for the conversion of 22 chests of indigo of which they had not known and for which they had not claimed in the composition. The Court of Exchequer held that a replication in these terms was a good answer to the plea of release. Martin B said:

> 'The replication is founded on the equitable doctrine that if a release is given for a particular purpose, and it is understood by the parties that its operation is to be limited to that purpose, but it turns out that the terms of the release are more extensive than was intended, a Court of equity will interfere and confine it to that which was in the contemplation of the parties at the time it was executed.' (See 6 H & N 337 at 347, 158 ER 139 at 144.)

[44] I shall have to come back later to the question of why Martin B calls this an 'equitable doctrine' rather than an illustration of the general proposition that language always takes meaning from context. It requires a certain amount of historical explanation. But nowadays, if the context satisfies the court that a release was 'understood by the parties ... to be limited' in some way, then that, as an ordinary matter of construction, is what the document means. The decision in *Lyall*'s case makes perfectly good sense as an example of contextual construction.

[45] In the present case, however, there is no context of a particular dispute being settled or particular claims being compromised. So the generalisations in the *London and South Western Rly* case and *Lyall*'s case are of little assistance. We

are dealing with similar forms of words, but in a radically different situation. Nevertheless, although there was no dispute or compromise, that does not mean that there was no context whatever. The parties were making an agreement for the termination of Mr Naeem's employment. One would therefore expect that when the release referred to all his claims, it meant claims arising out of the employment relationship. He agreed that he would not make any claims in his capacity as a former employee. I doubt, however, whether a reasonable person would have understood the parties to be dealing with claims he might coincidentally have in some other capacity—for example, as a depositor with the bank.

[46] It may also be that a reasonable person would regard the release as applicable only to *financial* claims and not, for example, to claims for personal injury. This is a rather more difficult question, on which there is something to be said on both sides, and I shall return to it later. But what seems to me quite impossible is to exclude financial claims arising out of the employment relationship on the grounds that they were unknown, or not within the specific contemplation of the parties. Not only is there no context of compromise or dispute which suggests this, but there is an extremely strong indication which points the other way.

[47] The counter indication, as it seems to me, is the fact that after payment of the known claims in full, BCCI paid £2,772·50 specifically for the release in the COT 3 form. This may be taken as representative of the sums paid to the 900 employees who were made redundant. So BCCI paid some £2·5m for the releases. The reasonable man is bound to ask himself: what was it paying for? If it was intended that the release should be confined to claims within the contemplation of the parties, it was getting no consideration whatever. Why did it bother to insist on the forms being signed? In my view, one of the first principles of construction is to try to give some business sense to the agreement. To exclude unknown claims makes the release nonsensical. Nor do I think it is realistic to attribute to the parties an intention to make fine distinctions between different kinds of unknown claims; for example, between those which were conceivable but not conceived of and those which (perhaps because of what was then thought to be the law) were not even conceivable. To regard such claims as nevertheless included in the class of those released does not seem to me extravagant. On the contrary, the more improbable the claim, the more likely it is that the reasonable employee would be willing to part with it for ready money. And the construction gives effect to the object of BCCI, which must have been to draw a final line under the employment relationship.

[48] For these reasons, I think that Miss Cherie Booth QC, who appeared for Mr Naeem before Lightman J ([1999] 2 All ER 1005, [1999] ICR 1068), was realistic and right to concede that as a matter of construction her client's claim fell within the terms of the release. Lightman J proceeded on this assumption. A majority of the Court of Appeal ([2000] 3 All ER 51, [2000] ICR 1410) also thought that she was right. I think that even Sir Richard Scott V-C accepted that, as a matter of objective construction, giving the document the meaning it would have conveyed to a reasonable man aware of all the background available to the parties, the claim was covered by the release. But he laid stress on matters which were known to only *one* of the parties, namely the knowledge by the higher management of the BCCI fraud and their knowledge that Mr Naeem and other

employees were unaware of it. He said ([2000] 3 All ER 51 at 60, [2000] ICR 1410 at 1421 (para 30)):

> 'In a case such as the present, in which Mr Naeem was unaware of the facts but BCCI was aware of them and was aware of Mr Naeem's ignorance, a conclusion on construction which attributed to the parties an objectively ascertained intention that the COT 3 release should bar the "stigma" claim would reward dishonesty at the expense of the innocent. The only honest intention that BCCI could have had in the circumstances of this case would have been an intention that left the stigma claim outside the scope of the COT 3 release.'

[49] I read this passage as meaning that on ordinary principles of objective construction, Mr Naeem's claim was barred, but that BCCI's knowledge and conduct made it inequitable, wrong, unfair, for BCCI to rely on that construction. This is an argument with which I shall in due course have to deal, but it does not go to the first question I identified at the beginning of my speech—the question of what the document means. It goes to the second question—whether BCCI is entitled to rely upon the document. It would be contrary to basic principles of construction for the meaning of a document to be affected by facts which were known to one party but not reasonably available to the other.

[50] The main contrary argument which Mr Allen QC put before your Lordships was an argument based on authority. He referred the House to a number of cases, going back to the eighteenth century, from which he culled general statements much along the lines of those which I have already cited from the *London and South Western Rly* case and *Lyall's* case. From these he invited your Lordships to hold that there was a general presumption that, in the absence of what were described as 'clear words to the contrary', general words of release would be confined to matters which were within the specific contemplation of the parties. And he urged your Lordships to adopt this construction even in a case in which there were obviously no claims within the specific contemplation of the parties.

[51] My Lords, I have a number of difficulties with this argument, the first of which goes to the root of the process of interpretation. If interpretation is the quest to discover what a reasonable man would have understood specific parties to have meant by the use of specific language in a specific situation at a specific time and place, how can that be affected by authority? How can the question of what a reasonable man in 1990 would have thought BCCI and Mr Naeem meant by using the language of an ACAS form be answered by examining what Lord Keeper Henley said in 1758 (*Salkeld v Vernon* (1758) 1 Eden 64, 28 ER 608)? I can understand that if parties in a legal context use words in what appears to have been a technical sense, it may be necessary to ascertain that technical meaning from authorities. But there is nothing of that kind here.

[52] My second difficulty is that Mr Allen's citations of authority were almost entirely context free. He read a number of general statements of the kind which I have already cited without inviting your Lordships to examine in any detail the facts of the cases in which they were made. But that does not seem to me a proper use of authority. The remarks of judges, however general, have to be read in context no less than the general words of contractual documents. Let me add to the two cases I have already mentioned another containing remarks upon which Mr Allen particularly relied. In *Ramsden v Hylton* (1751) 2 Ves Sen 304,

28 ER 196 John Hylton married the daughter of Sir Richard Musgrave in 1693 and the Musgrave family provided £2,000 for a marriage settlement. The trusts after the deaths of the husband and wife were to any sons in tail male and in default of male issue to trustees to create a portions term to raise £8,000 for portions for any daughters. John Hylton died in 1707 leaving two sons and four daughters. Both sons died without issue, so the trusts to raise portions for the daughters took effect. But no one had been aware of the terms of the settlement. It was found among some family papers after the death of the second son, also called John. Until then it had been assumed that the elder son and then John were absolutely entitled to the settled property. When the settlement was found, the daughters claimed their portions. As against one of the daughters, John's estate pleaded a release in general terms contained in a deed made between her and John in 1728. The background to the deed was that John had owed his sister £1,000 under a family testamentary disposition and had given a bond for £2,000 as security. By the deed, she agreed to give up the bond and accept a mortgage over the settled estate, which everyone assumed to belong to John. The release stated that she accepted the mortgage in satisfaction of all her claims against him. This was the context in which Lord Hardwicke LC said:

> 'The strongest and most material objection is the release; but I am of opinion, it would not be construed as a release of this demand, either in point of law, or in a court of equity. First, it is certain, that if a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited (*Cole v Gibson* (1750) 1 Ves Sen 503 at 507, 27 ER 1169 at 1171), which was under the contemplation of the parties, and intended to be released. The particular point in consideration was not relative to this estate, but what they could have against him as representative to his mother, brother, or father's personal estate, to which the words are particularly confined. But there is no occasion to rely on the law for this; for it is clear, that it would not in a court of equity, it being admitted on all hands, and it must be so taken, that this settlement was unknown to all the parties: nor did the daughters know of this contingent provision, beside which they had no other provision out of this estate; and all they could be intitled to must arise out of the personal estate of their father or other relations. It is impossible then to imply within the general release that which neither party could have under consideration, and which it is admitted neither side knew of; and as this release cannot have its effect to bar this demand, so it cannot be set up against them in a court of equity.' (See 2 Ves Sen 304 at 310, 28 ER 196 at 200.)

[53] So in this case there was a particular context, namely the testamentary claim of the daughter, which limited the scope of the release. Like all the other cases, *Ramsden*'s case makes good sense in terms of ascertaining contextual meaning.

[54] It would be wearisome to take your Lordships through all the other cases upon which Mr Allen relied. But I think it is worth pausing at this point to consider why it has been possible for Mr Allen to compile, from cases decided in contexts far removed from the present, an anthology of dicta which appear to lay down generally applicable rules of construction. It is not easy to recover the intellectual background against which the eighteenth and even nineteenth

century judges decided questions of construction and this is not the place for a detailed historical inquiry. What is, I think, beyond dispute is that their approach was far more literal and less sensitive to context than ours today. Courts were reluctant to admit what was called 'extrinsic evidence', that is to say, evidence of background which would put the language into context. This reluctance has to do with a number of factors which are now of purely historical interest, such as trial by jury, under which the construction of documents was treated as a matter of law for the judge, the incompetence of the parties and persons interested to give evidence, the fact that most documents which came before the courts were deeds prepared by lawyers and a general feeling that the less the court took account of extrinsic evidence, the more predictable would be the construction which it gave to the document. As Popham CJ said in the *Countess of Rutland's Case* (1604) 5 Co Rep 25b at 26a, 77 ER 89 at 90:

> '... it would be inconvenient, that Matters in Writing made by Advice and on Consideration and which finally import the certain Truth of the Agreement of the Parties should be controlled by Averment of the Parties to be proved by the incertain Testimony of slippery Memory.'

[55] In this pursuit of certainty the courts, of both common law and equity, evolved what were called 'rules of construction', by which certain words or expressions were treated, in the absence of contrary language, as having certain meanings. These rules no doubt reflected what in most cases the parties would have intended by using such language. And in the case of documents drawn up by lawyers, the skilled draftsman would be aware of the rules of construction and navigate their reefs and shoals to give effect to the intention of the parties, settlor or testator. But the generality with which they were expressed and their insensitivity to context, as opposed to the particular words which had been used, made them rigid and often productive of injustice. Books like *Jarman on Wills* are monuments to the rules of construction and a melancholy record of the occasions on which they have defeated the intentions of testators.

[56] It was this way of thinking which led eighteenth and nineteenth century judges to explain their decisions in cases like *Ramsden's* case as based upon rules of construction rather than simply an interpretation of language in its context and why Martin B in *Lyall's* case thought it necessary to say, not merely that the parties did not intend the release to apply to claims outside the composition, but that his interpretation was based upon an 'equitable doctrine'.

[57] It was however unusual, even in the nineteenth century, for commercial documents to be interpreted according to rules of construction. The quest for certainty, which still dominated the construction of wills and deeds, was thought less important than the need to give effect to the actual commercial purpose of the document. There was however one remarkable example in the twentieth century of a rule of construction being evolved by the courts in a commercial context. This was the rule for construing exemption clauses. But the purpose was different from that of most of the rules applied to wills and deeds. It was not to promote certainty of construction but to remedy the unfairness which exemption clauses could create. As Mr Allen also contended for a rule of construction on grounds of fairness, I think that the story of the rise and fall of the rule of construction for exemption clauses may be instructive.

[58] A vivid account of what happened was given by Lord Denning MR in *Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 1 All ER 108 at 113–114, [1983] QB 284 at 296–297:

> 'None of you nowadays will remember the trouble we had, when I was called to the Bar, with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of "freedom of contract". But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, "Take it or leave it." The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, "You must put it in clear words," the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them ... Faced with this abuse of power, by the strong against the weak, by the use of the small print of the conditions, the judges did what they could to put a curb on it. They still had before them the idol, "freedom of contract". They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called "the true construction of the contract". They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put on them a strained and unnatural construction. In case after case, they said that the words were not strong enough to give the big concern exemption from liability, or that in the circumstances the big concern was not entitled to rely on the exemption clause. If a ship deviated from the contractual voyage, the owner could not rely on the exemption clause. If a warehouseman stored the goods in the wrong warehouse, he could not pray in aid the limitation clause. If the seller supplied goods different in kind from those contracted for, he could not rely on any exemption from liability. If a shipowner delivered goods to a person without production of the bill of lading, he could not escape responsibility by reference to an exemption clause. In short, whenever the wide words, in their natural meaning, would give rise to an unreasonable result, the judges either rejected them as repugnant to the main purpose of the contract or else cut them down to size in order to produce a reasonable result.'

[59] Lord Denning MR went on to explain ([1983] 1 All ER 108 at 115, [1983] QB 284 at 298–299) that everything had now changed as a result of the passing of the Unfair Contract Terms Act 1977: 'We should no longer have to go through all kinds of gymnastic contortions to get round them.' A few years earlier, in *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 at 561, [1980] AC 827 at 843 Lord Wilberforce had said much the same thing:

> 'There were a large number of problems, productive of injustice, in which it was worse than unsatisfactory to leave exception clauses to operate. Lord Reid referred to these in the *Suisse Atlantique* case ([1966] 2 All ER 61 at 76, [1967] 1 AC 361 at 406), pointing out at the same time that the doctrine

of fundamental breach was a dubious specific. But since then Parliament has taken a hand: it has passed the Unfair Contract Terms Act 1977. This Act applies to consumer contracts and those based on standard terms and enables exception clauses to be applied with regard to what is just and reasonable. It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions.'

[60] My Lords, the lesson which I would draw from the development of the rules for construing exemption clauses is that the judicial creativity, bordering on judicial legislation, which the application of that doctrine involved is a desperate remedy, to be invoked only if it is necessary to remedy a widespread injustice. Otherwise there is much to be said for giving effect to what on ordinary principles of construction the parties agreed.

[61] Whether such a rule of construction is necessary in this case can best be considered after I have dealt with the second point, namely whether BCCI is precluded on grounds of fairness and equity from relying upon the ordinary meaning of the release. It will then be possible to say whether the law is adequate to deal with cases of unfairness, so as to make it unnecessary to approach the matter by an artificial rule of construction. When judges say that 'in the absence of clear words' they would be unwilling to construe a document to mean something, they generally mean (as they did in the case of exemption clauses) that the effect of the document is unfair. It will therefore be essential to examine whether this is true of the present case.

[62] The disappearance of artificial rules for the construction of exemption clauses seems to me in accordance with the general trend in matters of construction, which has been to try to assimilate judicial techniques of construction to those which would be used by a reasonable speaker of the language in the interpretation of any serious utterance in ordinary life. In *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 114, [1998] 1 WLR 896 at 912, I said with the concurrence of three other members of the House: 'Almost all the old intellectual baggage of "legal" interpretation has been discarded.' But if Mr Allen's submissions on the rules of construction are accepted, a substantial piece of baggage will have been retrieved. Lord Keeper Henley's ghost (*Salkeld v Vernon* (1758) 1 Eden 64, 28 ER 608) will have struck back. I think it would be an unfortunate retreat into formalism if the outcome of this case were to require employers using the services of ACAS to add verbiage to the form of release in order to attain the comprehensiveness which it is obviously intended to achieve.

[63] Before leaving the question of construction, I must deal with some subsidiary arguments which Mr Allen made. The first was what I might call the all-or-nothing argument. If I have understood it correctly, it went as follows. BCCI's construction depends upon a literal reading of the release clause. It involves reading any claim to mean absolutely any claim whatever. But BCCI concedes that context would almost certainly limit the clause to claims arising out of the employment relationship. In so doing, they have sold the pass and

allowed Mr Naeem to put forward a different principle of limitation for which the context provides no support—indeed, which the separate consideration for the release actually contradicts—namely that it does not apply to claims which were unknown to the parties, or at any rate those which were entirely unknown or unimaginable. A similar argument is advanced on the basis of the concession that it was arguable that the release did not apply to personal injury claims. I find it difficult to deal with this argument because it seems to me so entirely irrational.

[64] The following conversation may be imagined. A motorist is stopped by a park warden driving down a road which is signposted 'No cars allowed'. He says, 'But I am driving a green car'. The warden points out that it is nevertheless a car. The motorist says, 'But the words cannot be read literally. Do you suggest that they forbid children's toy cars?' The warden concedes that the context suggests a prohibition for the protection of pedestrians frequenting the park and that it does not apply to toy cars. 'And what about police cars going to an emergency? Surely there is an implied exception for emergency vehicles?' 'Yes, perhaps there is.' 'Well then', says the motorist, 'if it cannot be read literally, why should it apply to green cars'?

[65] The fact is that BCCI is not contending for a literal meaning. It is contending for a contextual meaning, but submitting that while the context excludes claims outside the employee relationship, it includes unknown claims. As for personal injuries, I agree with Mr Jeans QC who appeared for BCCI that this is a debatable area. Mr Allen QC, who has considerable experience of the use of the COT 3 form, told us that in industries in which long-term industrial injury claims are common, it is customary to have a specific clause excluding personal injury claims from the release. This would suggest that the parties otherwise expect that they would or might be caught by the general words. I am not sure that Mr Naeem would have been entitled to bring a claim after leaving his employment on the ground that he was suffering from repetitive strain injury caused by his use of the BCCI computer. BCCI might be entitled to say that it paid the extra money in return for not having to hear from Mr Naeem in his capacity as employee again. If, however, a court decided that it did not come within the class of claims released, it would not be on the ground that it had not been known at the time to the parties. On the contrary, one would be much more likely to conclude that the parties intended to exclude such a claim from the release if it was known to the parties. If both parties knew that Mr Naeem had a personal injury claim which was potentially worth, say, £30,000, the court would be reluctant to interpret the agreement as amounting to its release in consideration of less than £3,000. But the principle of exclusion would have to be that personal injury claims, as such, were outside the scope of the agreement. It would not support the exclusion of claims for some entirely different reason.

[66] Another suggestion was that the clause should not be construed to release claims arising out of a wrongful act of BCCI. This was put forward by analogy with the construction of exemption clauses, on which there is authority for saying that they should prima facie not be read to exempt a contracting party from liability for negligence. I have already referred to the change which has taken place in the court's approach to exemption clauses. But in any case, there seems to me no real analogy. The reason for the traditional hostility of the courts to exemption clauses was that they often amounted to taking with one hand what had been given with the other. A contracting party undertook various obligations and then provided that he was not to be liable if he failed to perform them. But

the release in this case is quite different. BCCI is paying a sum of money specifically to buy its release from any possible future claim by the employee. If there was such a claim, it was almost bound to be founded upon some wrongful act of BCCI—a breach of contract or statutory obligation, or else a tort. It is hard to imagine what other kind of claim there could be. So the release involved the employee taking a sum of money in return for giving up the speculative possibility that he might have such a claim. This has nothing in common with an exemption clause.

[67] Finally it was submitted that although, for the reasons I have advanced, the release applied to unknown claims, it should not be read as applying to claims of which the employer actually knew, and in particular claims which he knew were unknown to the employee. There are two forms in which this argument can be put. One, as I have already said, was that adopted by Sir Richard Scott V-C. It involved relying as background upon the actual fact that BCCI knew of its own misconduct and knew that it was unknown to the employee. But these facts, whatever argument they may support to preclude BCCI from relying on the agreement, cannot affect its construction. They are not admissible background. An alternative is to put the proposition in general terms: no release of unknown claims should be construed to extend to claims which were known to the party obtaining the benefit of the release but not to the other party. My difficulty with this proposition is, that it involves another artificial rule of construction. In view of the principles upon which the beneficiary of a release can be precluded from relying upon it because he has been guilty of sharp practice, to which I shall in a moment refer, I think that it is unnecessary to create such a rule of construction. There is again an analogy with exemption clauses and the 1977 Act.

[68] My Lords, I turn now to the question of whether BCCI is entitled to rely upon the terms of the release. Mr Jeans said that BCCI was under no obligation to disclose to Mr Naeem that it had been guilty of breaches of the implied term of trust and confidence in the contract of employment. The House of Lords decided in *Bell v Lever Bros Ltd* [1932] AC 161, [1931] All ER Rep 1 that the employment relationship was not a contract uberrimae fidei and that an employee negotiating the terms upon which his employment would be terminated had no obligation to disclose to the employer that he had been guilty of conduct which would have justified his summary dismissal. The same must be true of an employer.

[69] My Lords, I think that this argument presses the principle in *Bell*'s case too far. It was not a case which concerned a general release. A transaction in which one party agrees in general terms to release another from any claims upon him has special features. It is not difficult to imply an obligation upon the beneficiary of such a release to disclose the existence of claims of which he actually knows and which he also realises may not be known to the other party. There are different ways in which it can be put. One may say, for example, that inviting a person to enter into a release in general terms implies a representation that one is not aware of any specific claims which the other party may not know about. That would preserve the purity of the principle that there is no positive duty of disclosure. Or one could say, as the old Chancery judges did, that reliance upon such a release is against conscience when the beneficiary has been guilty of a suppressio veri or suggestio falsi. On a principle of law like this, I think it is legitimate to go back to authority, to Lord Keeper Henley in *Salkeld v Vernon* (1758) 1 Eden 64 at 69, 28 ER 608 at 610, where he said 'no rule is better established

than that every deed obtained on *suggestio falsi*, or *suppressio veri*, is an imposition in a court of conscience'.

[70] In principle, therefore, I agree with what I consider Sir Richard Scott V-C to have meant in the passage in para 30 of his judgment ([2000] 3 All ER 51 at 60, [2000] ICR 1410 at 1421) which I have quoted (ante, [48]), and with Chadwick LJ, that a person cannot be allowed to rely upon a release in general terms if he knew that the other party had a claim and knew that the other party was not aware that he had a claim. I do not propose any wider principle: there is obviously room in the dealings of the market for legitimately taking advantage of the known ignorance of the other party. But, both on principle and authority, I think that a release of rights is a situation in which the court should not allow a party to do so. On the other hand, if the context shows that the parties intended a general release for good consideration of rights unknown to both of them, I can see nothing unfair in such a transaction.

[71] It follows that in my opinion the principle that a party to a general release cannot take advantage of a suggestio falsi or suppressio veri, in other words, of what would ordinarily be regarded as sharp practice, is sufficient to deal with any unfairness which may be caused by such releases. There is no need to try to fill a gap by giving them an artificial construction.

[72] I am therefore in complete agreement with Chadwick LJ on both the construction of the document and the principles which determine whether or not BCCI may rely upon it. Where I respectfully part company from him is on the application of the law to the facts. In my opinion, there are no grounds for holding that in July 1990 BCCI knew that Mr Naeem had or might have a claim for stigma against the bank of which he himself was unaware. The representative of the bank who negotiated the agreement was also unaware of the central fraud, but I shall for present purposes assume that the knowledge of the higher management should be attributed to BCCI. The bank would therefore have known that it had been continuously in breach of its implied obligation of trust and confidence. But that breach had not caused any damage to Mr Naeem in the past and there was nothing to suggest that, now that he was leaving the bank, it would give rise to a claim in the future. The bank was going to go on trading from Abu Dhabi and did not contemplate an imminent disclosure of the fraud which might affect Mr Naeem's prospects of re-employment. And even if BCCI knew or ought to have known that such might be the case, any lawyer whom it consulted in 1990 would have advised that such consequences were too remote to form the subject matter of a claim. It was not until *Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1, [1998] AC 20 that it would have occurred to anyone. So the concealment of the central fraud was extremely reprehensible conduct in relation to the depositors and the public at large, but there was no reason to think it in any way relevant to the bank's dealings with Mr Naeem in 1990. Accordingly I do not think that a case of suppressio veri has been made out.

[73] It follows that in my opinion the stigma claim falls within the description of claims which Mr Naeem agreed to release and there is no reason why BCCI should not rely upon the release. My Lords, I do not think that there is any injustice in this result. Of course I sympathise with Mr Naeem, who, after a long and unblemished career in banking in Pakistan and then, from 1974, in this country, found himself made redundant at the difficult age of 49. But this is regrettably a very common occurrence. The claim that his subsequent difficulties

in finding another job are attributable to his having worked for BCCI is however extremely speculative. In *Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1 at 22, [1998] AC 20 at 53 Lord Steyn drew attention to the formidable practical obstacles to such a claim presented by the limiting principles of causation, remoteness and mitigation. So it has turned out. In 1999 Lightman J tried five representative cases out of the 369 which had been commenced by former BCCI employees (see *Bank of Credit and Commerce International SA (in liq) v Ali (No 2)* [1999] 4 All ER 83). None of them succeeded in proving that his unemployment was attributable to stigma. Four of the cases tried by Lightman J appear to have concerned employees who were dismissed by the liquidators when the bank collapsed in 1991. By contrast, Mr Naeem and the others made redundant in 1990 face the additional hurdle of having to explain why their unemployment is attributable to stigma when they were unable to find jobs for a year before any stigma attached to them. The present position is that this vastly expensive litigation, which has been twice to the House of Lords and given rise to two lengthy trials before Lightman J, has produced benefits for no one except the lawyers involved and has been at the expense, not of the fraudulent villains but of the public and the unfortunate creditors of BCCI.

[74] Mr Naeem says that despite all his difficulties, he should be entitled to have his day in court. He should not be struck out merely because he accepted £2,772 for a general release in 1990. In *Malik*'s case Lord Nicholls of Birkenhead said that he was—

> 'conscious that the outcome of the present appeals may be seen by some as opening the door to speculative claims, to the detriment of admitted creditors. Claims of handicap in the labour market, and the other ingredients of the cause of action now under consideration, may give rise to lengthy and costly investigations and, ultimately, litigation. If the claims eventually fail, liquidators may well be unable to recover their costs from the former employees ... I am aware of the dangers here, but it could not be right to allow "floodgates" arguments of this nature to stand in the way of claims which, as a matter of ordinary legal principle, are well founded.' (See [1997] 3 All ER 1 at 11–12, [1998] AC 20 at 41–42.)

[75] In general, I would respectfully agree. Justice is a matter of individual right which cannot be subjected to an ordinary utilitarian calculation. But there are limits. There are some people who assume that life itself is literally priceless; that no expense for the purpose of saving a life can possibly be too much. But the fact is that resources even for these purposes are not unlimited. Choices have to be made: see the judgment of Sir Thomas Bingham MR in *R v Cambridge Health Authority, ex p B* [1995] 2 All ER 129, [1995] 1 WLR 898. Similarly there comes a point at which the object of achieving perfect justice for everyone has to be tempered by some consideration of the resources required to investigate every possible claim. In the present case, this point does not arise. The House has decided that the stigma claims should go forward and so they must. But I see no reason in justice to add to the expense by giving the language of the release a strained construction which will require BCCI to answer claims from which it paid to be free.

[76] I would allow the appeal and restore the judgment of Lightman J.

LORD CLYDE. My Lords,

[77] This case seems to me primarily to involve a question of construction. On 4 July 1990 Mr Naeem signed a formal agreement with the appellant bank. The agreement was typed on a printed form, headed 'Advisory Conciliation and Arbitration Service'. It bears the reference COT 3. From the provision for a 'Tribunal case number' and the descriptive headings to the agreement the form appears to have been intended for use in connection with applications made or about to be made to the industrial tribunal. After specifying the parties to the agreement the printed text states: 'Settlement reached as a result of conciliation action'. But these parts of the form are not of immediate relevance. The critical words are:

> 'The applicant agrees to accept the terms set out in the documents attached in full and final settlement of all or any claims whether under statute, Common law or in Equity of whatsoever nature that exist or may exist and, in particular, all or any claims rights or applications of whatsoever nature that the applicant has or may have or has made or could make in or to the industrial tribunal, except the applicant's rights under the respondent's pension scheme.'

The documents attached appear to have been a statement of 'redundancy disbursements' and a statement of 'redundancy package calculation'.

[78] In the construction of any agreement the problem for a court is to determine—

> 'the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.' (See *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 114, [1998] 1 WLR 896 at 912–913 per Lord Hoffmann.)

The knowledge reasonably available to them must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.

[79] I agree with the view expressed in the Court of Appeal ([2000] 3 All ER 51, [2000] ICR 1410) that there are no 'rules of equitable construction'. Such guides to construction as have been identified in the past should not be allowed to constrain an approach to construction which looks to commercial reality or common sense. If they are elevated to anything approaching the status of rules they would deservedly be regarded as impedimenta in the task of construction. But they may be seen as reflections upon the way in which people may ordinarily

be expected to express themselves. Generally people will say what they mean. Generally if they intend their agreement to cover the unknown or the unforeseeable, they will make it clear that their intention is to extend the agreement to cover such cases. If an agreement seeks to curtail the possible liabilities of one party, he, if not both of them, will generally be concerned to secure that the writing clearly covers that curtailment.

[80] On the face of it, if one were to take a strict or literal approach, the words of the agreement seem to include every claim of any kind, whether then identifiable or not, which Mr Naeem might have in any capacity against the bank at any time, then or in the future. But such a comprehensive disclaimer would in my view be a remarkable thing for him to be giving, and indeed it is not suggested that its scope does extend to such a universality. It is accepted that it does not relate to sums which Mr Naeem might have in any account which he had with the bank. So this is not a case where the plain meaning of the words can be taken as conclusive. There is then a real problem as to the precise scope of the disclaimer.

[81] At one extreme the respondents in their statement of claim argued that the agreement properly construed was a compromise in respect of their claims for statutory redundancy pay, wages in lieu of notice and unfair dismissal only. But that contention was not persisted in before Lightman J and it is clearly too narrow a solution. It fails to recognise the reference to claims at common law or in equity, and the width of the reference to claims 'of whatsoever nature'. On the other hand the immediate context of the form COT 3 suggests that at least at the forefront of the parties' minds were the claims which Mr Naeem might present to an industrial tribunal. Indeed ACAS had been brought in to assist in the arrangements being made for the considerable number of cases where the bank was terminating employments and endeavouring to reach settlements of claims which would arise on such terminations. In the statement which had been prepared by ACAS to explain the terms of the proposed settlement it was stated that ACAS had been asked by the employer to 'assist in reaching settlements of claims which might be made to an industrial tribunal arising out of the ending of your employment'. The statement went on to explain that in return for the sum of money and other benefits which were specified in the employer's letter: '... you would agree to waive certain rights which you may have relating to possible claims to an industrial tribunal, (including unfair dismissal), or any other court.' The agreement was evidently intended to deal principally with claims which could be taken to the industrial tribunal. Hence the reference in the agreement 'in particular' to claims of that kind. But the reference to claims at common law and in equity of whatsoever nature must bring in matters beyond the scope of the jurisdiction of the industrial tribunal.

[82] Claims at common law or in equity could at least include matters relating to the calculation or payment of past wages or other benefits to which the employee was entitled in terms of his contract. A claim at common law for wrongful dismissal could also be included. It seems to me that the context of the agreement is the termination of the employment and the desire of the employer to finalise any contractual debts due to the employees whose employment was being terminated together with all statutory or common law obligations arising upon the termination of the contract.

[83] Regard should also be given to the statements of redundancy disbursements and redundancy payment calculation. It appears from these documents that the

basic package which the employer was offering sought to meet any claim for statutory redundancy pay and for sums due in lieu of notice. It also allowed for settlement of other obligations and debts current between the parties in respect of mortgage subsidy, outstanding season ticket loan balance, current account overdraft and certain outstanding credit card debts. These all seem to relate to a final accounting between the parties of any indebtedness by the employee towards the employer on the termination of their relationship. But the employer was evidently to remain liable to the former employee in respect of any credit balances in any account he had with the bank and in respect of the pension rights expressly mentioned in the agreement.

[84] The package also included an additional payment upon signing the form COT 3. The sum appears to have been one twelfth of the gross annual salary. Given that what the parties principally had in mind was the possibility of resort to the industrial tribunal it seems to me that an additional sum might not unreasonably be offered in order to secure finality and to avoid such a possibility. The provisions of s 140(2)(d), (e) and (g) of the Employment Protection (Consolidation) Act 1978 are relevant in this connection. By virtue of those provisions the involvement of ACAS in the settlement of certain claims or potential claims to an industrial tribunal may exclude the operation of s 140(1), a section which otherwise would avoid any agreement such as the one here in issue to preclude an employee from bringing proceedings before the tribunal. The benefit which the employer might well consider worth paying a month's salary for was the security of obviating any proceedings before the tribunal arising out of the termination of the employment.

[85] The alternative is to suppose that the sum was meant to discharge all future claims whether they arose out of the termination of the employment or not. While I can accept that it was intended to exclude any claims which the employee could then have made relating to the settlement of accounts at the termination of the employment, it seems to me improbable that the parties, in the context in which they were making this agreement, were intending to cut out all future claims of any kind not related to the termination. It was not resolved in the course of the argument whether a claim for personal injury based on the negligence of the bank was meant to be covered by the agreement. I should have thought that if that had been intended , and if the amount of the month's salary was intended to cover that sort of future claim, some more specific indication of that would have been given in the terms of the agreement.

[86] But the claim which Mr Naeem now seeks to present for stigma damages is a far more remote possibility than a claim for personal injuries on the ground of negligence. The stigma claim is one which neither party could have contemplated even as a possibility as the law stood at the time when the agreement was made. At that time it would not be known whether or not the employee would have any difficulty at all in finding alternative employment. The bank's conduct had not yet achieved the notoriety which could create the stigma. But even if those facts had been even suspected as a possibility the prospect of any liability falling on the bank to a former employee is something which must have been far beyond the reasonable contemplation of the parties. Even without formulating any definition of the precise scope of the agreement, it seems to me that if the parties had intended to cut out a claim of whose existence they could have no knowledge they would have expressed that intention in words more precise than the generalities which they in fact used. In

so far as Mr Naeem may also seek to present a claim in tort for fraudulent misrepresentation inducing him to start the employment in the first place or to continue in it thereafter, while the legal basis for such a claim may not be particularly novel, the idea of such a claim at the time when the parties made the agreement at the termination of the employment seems to me correspondingly remote from what the parties might reasonably be taken in the circumstances to have contemplated.

[87] The point has been stressed that claims for stigma damages may be extraordinarily difficult of proof and while the construction which I have preferred opens the door to Mr Naeem to present the claim, the hurdles which he may yet face may be very difficult to overcome. But that is of course a consideration entirely irrelevant to the question of construction raised in this case. Having reached the view which I have on the matter of construction it is unnecessary to say anything about any equitable considerations which might operate to prevent the bank relying upon the agreement, were it wide enough to comprehend the stigma claim.

[88] I would dismiss the appeal.

Appeal dismissed.

Celia Fox Barrister.

Ashworth Hospital Authority v MGN Ltd

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, MAY AND LAWS LJJ

9, 10 OCTOBER, 18 DECEMBER 2000

Discovery – Discovery against parties to proceedings – Discovery for purposes of identifying other parties – Identification of wrongdoers – Whether jurisdiction to order third party to disclose identity of wrongdoer confined to tortious conduct.

Contempt of court – Refusal to disclose source of information – Journalist – Disclosure necessary in interests of justice – Hospital employee giving confidential information about patient to journalist via intermediary – Hospital seeking order requiring journalist to disclose identity of intermediary in order to discover identity of ultimate source – Whether necessary in interests of justice for identity of source to be revealed – Contempt of Court Act 1981, s 10 – Human Rights Act 1998, Sch 1, art 10.

The defendant newspaper company, MGN, published in one of its newspapers an article about B, a convicted murderer who was detained at the claimant special hospital. The article included a series of verbatim extracts from information held on a database maintained by the hospital's staff. Those extracts, together with additional information about B held on the database, had been supplied to one of the newspaper's journalists by a regular source (the intermediary). The latter, who was paid by the journalist for the information, had himself received it, probably in exchange for payment, from a member of the hospital staff (the source) who was subject to a contractual duty of confidentiality. The journalist knew the identity of the intermediary but not that of the source. In subsequent proceedings for breach of confidence brought by the hospital against MGN, the judge made an order requiring MGN to disclose the identity of the intermediary as a means of identifying the source, whom the hospital intended to dismiss. MGN appealed, challenging the judge's jurisdiction to make the order. In particular, it contended that the court's equitable jurisdiction to require a third party who had become involved in wrongdoing to disclose the identity of the wrongdoer against whom the claimant had a cause of action in respect of that wrong was confined to tortious conduct, and that the breach of confidence alleged by the hosptial was not tortious. Alternatively, MGN contended that the order infringed s 10 of the Contempt of Court Act 1981[a], which precluded the court from requiring a person to disclose the source of information contained in a publication for which he was responsible, unless it was established that disclosure was necessary in the interests of justice or national security or for the prevention of disorder or crime. In support of that contention, MGN relied on the right to freedom of expression in art 10[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). That right included the freedom to receive and impart information, but was subject to such restrictions as were prescribed by law and were necessary in a democratic society, for, inter alia, the protection of health

a Section 10 is set out at p 1007 *d*, post

b Article 10, so far as material, is set out at p 1007 *f g*, post

or morals, the protection of the rights of others and preventing the disclosure of information received in confidence.

Held – (1) There was no basis in principle for confining the jurisdiction to order disclosure of the identity of a wrongdoer against a third party who had become involved in that wrongdoing to cases involving tort. Rather, that jurisdiction was one of general application, existing in equity wherever the person against whom disclosure was ordered had got 'mixed up' in wrongful conduct which infringed a claimant's legal rights. Even if that was wrong, and the jurisdiction to order discovery against an innocent party only arose where that party had been 'mixed up' in tortious wrongdoing, there was no ground for extending that restriction to cases where the defendant was susceptible to suit on the ground of the same wrongdoing as that perpetrated by those whose identity had been sought. In the instant case, the hospital had a claim in contract for breach of confidence against the source, and a claim in equity for the same breach of confidence against the source, the intermediary and MGN. The latter was not innocently mixed up in the wrongdoing, but was a wrongdoer itself. It followed that there had been jurisdiction to make the order (see p 1004 *j* to p 1005 *f*, p 1006 *a* and p 1012 *e f*, post); *Norwich Pharmacal Co v Customs and Excise Comrs* [1973] 2 All ER 943 considered.

(2) Section 10 of the 1981 Act set out to give effect to the general requirements of art 10 of the convention in the narrow context of protection of the sources of information of the press. The approach to the interpretation of s 10 should, so far as possible, equate the specific purposes for which disclosure of sources was permitted under s 10 with the legitimate aims justifying restrictions on the right to freedom of expression under art 10. Similarly, the English court should apply the same test of necessity as that applied by the European Court of Human Rights when considering art 10. In respect of purposes and legitimate aims, the 'interests of justice' in s 10 should be interpreted as meaning interests that were justiciable, and was not confined to the technical sense of the administration of justice in the course of legal proceedings in a court of law. It could not be readily envisaged that any such interest would fall outside outside one or more of the catalogue of legitimate aims in art 10. As regards necessity, the court had, first, to decide whether the interests of justice were engaged; secondly, to consider whether, as a fact, disclosure was necessary to achieve the relevant ends of justice; and, thirdly, to weigh, as a matter of discretion, the specific interests of the claimant against the public interest in the protection of journalists' confidential sources. In the instant case, the object of the hospital's proceedings satisfied the test of being in the interests of justice and constituted three legitimate aims under art 10—the protection of health, the protection of the rights of others and preventing the disclosure of information received in confidence. It was also necessary to identify the source in order to remove the risk of further disclosures of confidential material. Moreover, although the decisions of the Court of Human Rights demonstrated that the freedom of the press had in the past carried greater weight in that court than in the English courts, and that an order requiring journalists to disclose their sources could be justified only in exceptional circumstances where vital public or individual interests were at stake, the instant case was exceptional. The disclosure of confidential medical records to the press was misconduct which was not merely of concern to the individual establishment in which it occurred. It was an attack on an area of confidentiality which should be protected in a democratic society. The protection of patient information was of vital concern

to the National Health Service, and it would be no bad thing if the judge's order discouraged press sources from disclosing similar information in the future. Accordingly, the appeal would be dismissed (see p 1007 *j*, p 1008 *j* to p 1009 *a*, p 1011 *c* to *f* and *j* to p 1012 *e*, post); *X Ltd v Morgan-Grampian (Publishers) Ltd* [1990] 2 All ER 1 and *Goodwin v UK* (1996) 22 EHRR 123 considered.

Notes

For the power to order a journalist to disclose his sources, see 8(1) *Halsbury's Laws* (4th edn reissue) para 472, for the right to freedom of expression, see 8(2) *Halsbury's Laws* (4th edn reissue) para 158, and for the jurisdiction to order a third party to disclose the identity of a wrongdoer, see 13 *Halsbury's Laws* (4th edn reissue) para 18.

For the Contempt of Court Act 1981, s 10, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 200.

For the Human Rights Act 1998, Sch 1, art 10, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 524.

Cases referred to in judgments

A-G v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545, [1990] 1 AC 109, [1988] 3 WLR 776, HL.

British Steel Corp v Granada Television Ltd [1981] 1 All ER 417, [1981] AC 1096, [1980] 3 WLR 774, HL.

Broadmoor Special Hospital Authority v Robinson [2000] 2 All ER 727, [2000] 1 WLR 1590, CA.

Camelot Group plc v Centaur Communications Ltd [1998] 1 All ER 251, [1999] QB 124, [1998] 2 WLR 379, CA.

Derbyshire CC v Times Newspapers Ltd [1993] 1 All ER 1011, [1993] AC 534, [1993] 2 WLR 449, HL.

Goodwin v UK (1996) 22 EHRR 123, ECt HR.

Moodalay v Morton (1785) 1 Bro CC 469, 28 ER 1245.

Norwich Pharmacal Co v Customs and Excise Comrs [1973] 2 All ER 943, [1974] AC 133, [1973] 3 WLR 164, HL.

Orr v Diaper (1876) 4 Ch D 92, 35 LT 468.

Post v Toledo, Cincinnati and St Louis Railroad Co (1887) 11 NE Rep 540, Mass SC.

R v Dr James Collins and Ashworth Hospital Authority, ex p Brady (10 March 2000, unreported), QBD.

R v Secretary of State for the Home Dept, ex p Simms [1999] 3 All ER 400, [1999] 3 WLR 328, HL.

Ricci v Chow [1987] 3 All ER 534, [1987] 1 WLR 1658, CA.

Secretary of State for Defence v Guardian Newspapers Ltd [1984] 3 All ER 601, [1985] AC 339, [1984] 3 WLR 986, HL.

Sunday Times v UK (1979) 2 EHRR 245, ECt HR.

X Ltd v Morgan-Grampian (Publishers) Ltd [1990] 1 All ER 616, [1991] 1 AC 1, [1990] 2 WLR 421, CA; *affd* [1990] 2 All ER 1, [1991] 1 AC 1, [1990] 2 WLR 1000, HL.

Cases also cited or referred to in skeleton arguments

A-G v Newspaper Publishing plc [1987] 3 All ER 276, [1988] Ch 333, CA.

Albert (Prince) v Strange, A-G v Strange (1849) 2 De G & Sm 635, 64 ER 293.

CHC Software Care Ltd v Hopkins & Wood [1992] FSR 241.

Chief Constable of Leicestershire Constabulary v Garavelli (1997) EMLR 543, DC.

Commonwealth of Australia v John Fairfax & Sons Ltd (1980) 147 CLR 39, Aust HC.

Company Securities (Insider Dealing) Act 1985, Re an inquiry under [1988] 1 All ER 203, [1988] AC 660, HL.
Federal Comr of Taxation v United Aircraft Corp (1943) 68 CLR 525, Aust HC.
Francome v Mirror Group Newspapers Ltd [1984] 2 All ER 408, [1984] 1 WLR 892, CA.
John v Express Newspapers plc [2000] 3 All ER 257, [2000] 1 WLR 1931, CA.
Kitechnology BV v Unicor GmbH Plastmaschinen (1995) FSR 765, CA.
Lion Laboratories Ltd v Evans [1984] 2 All ER 417, [1985] QB 526, CA.
Observer v UK (1991) 14 EHRR 153, ECt HR.
R v Central Independent Television plc [1994] 3 All ER 641, [1994] Fam 192, [1994] 3 WLR 20, CA.
Saltman Engineering Co Ltd v Campbell Engineering Co Ltd [1963] 3 All ER 413, CA.
Saunders v Punch Ltd (t/a Liberty Publishing) [1998] 1 All ER 234, [1998] 1 WLR 986.
Seager v Copydex Ltd (No 2) [1969] 2 All ER 718, [1969] 1 WLR 809, CA.
Special Hospitals Service Authority v Hyde (1994) BMLR 75.
Tipping v Clarke (1843) 2 Hare 383, 67 ER 157.

Appeal

The defendant newspaper publisher, MGN Ltd, appealed with permission of Rougier J on 19 April 2000 from his order on 30 June 2000 requiring it to serve upon the claimant, Ashworth Hospital Authority, a witness statement explaining how it came to be in possession or control of any medical records kept by the hospital in respect of Ian Brady, a patient detained at Ashworth, and identifying any employee of Ashworth and the name of the person or persons who were involved in MGN acquiring possession or control of those records. The facts are set out in the judgment of Lord Phillips of Worth Matravers MR.

Desmond Browne QC and *Richard Parkes* (instructed by *Swepstone Walsh*) for MGN.
Nigel Pleming QC and *Vincent Nelson* (instructed by *Reid Minty*) for Ashworth.

Cur adv vult

18 December 2000. The following judgments were delivered.

LORD PHILLIPS OF WORTH MATRAVERS MR.

Introduction

1. On 2 December 1999 the appellant 'MGN' published in the Daily Mirror an article written by Mr Gary Jones, the 'Investigations Editor', about Ian Brady, who, with Myra Hindley, was convicted in 1966 of what are popularly known as 'the Moors Murders'. That article included a series of verbatim extracts from information held on a database called PACIS maintained by the staff of the respondent, Ashworth Hospital Authority (Ashworth), in whose custody Ian Brady is detained. Mr Jones had received these extracts, together with additional information about Ian Brady held on PACIS, from one of his regular sources (the intermediary). Mr Jones subsequently paid the intermediary £1,500 for this information. The intermediary had received the information from a member of the staff of Ashworth (the source). The likelihood is that the intermediary paid the source for the information. Mr Jones knows the identity of the intermediary but not of the source. He believes, however, that if he discloses the name of the intermediary this will lead to the identification of the source. On 30 June 2000

Rougier J ordered MGN to disclose the identity of the intermediary, as a means of identifying the source. MGN now appeal against that order. They contend that it is one that Rougier J had no jurisdiction to make and that it offends against art 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (the convention)

2. This appeal raises the following major issues in respect of Rougier J's order: Was there jurisdiction under the principle in *Norwich Pharmacal Co v Customs and Excise Comrs* [1973] 2 All ER 943, [1974] AC 133 (*Norwich Pharmacal*)? Was there jurisdiction under the principle in *Broadmoor Special Hospital Authority v Robinson* [2000] 2 All ER 727, [2000] 1 WLR 1590 (*Broadmoor*)? Did the order infringe s 10 of the Contempt of Court Act 1981? Did the order infringe art 10 of the convention?

3. Before turning to these issues, it is necessary to address the relevant facts.

Background

4. Ashworth is one of three special hospitals provided by the Secretary of State for Health pursuant to ss 1 and 4 of the National Health Service Act 1977, as amended, for persons subject to detention under the Mental Health Act 1983 who require treatment under conditions of special security on account of their dangerous, violent or criminal propensities.

5. Prior to 30 September 1999 Ian Brady was accommodated at Ashworth on Jade Ward. On that day he was transferred to Lawrence Ward. He took objection both to the fact of this transfer and to the manner in which it was achieved. He immediately complained to the police that he had been assaulted and renewed his complaint through the National Health Service Complaints Procedure. He also went on hunger strike, refusing to take food or nutritionally sweetened drinks. At the same time he began a media campaign, writing repeatedly to the BBC and others and issuing information through his solicitor. He complained about the way that he had been treated and gave details of his hunger strike and the manner in which it was affecting him.

6. Substantial media interest was stimulated and Angela Anderson, Ashworth's director of communications, found it necessary to issue a total of 12 press releases between 1 October 1999 and 11 January 2000 in answer to inquiries for information. The second of these, on 2 October, began by stating:

> 'Ian Brady, a patient at Ashworth Hospital, has exercised his right to refuse permission for the hospital to disclose any clinical details about him.'

7. The press releases did no more than outline the manner in which Ian Brady was being treated. On 29 October it was announced that as he had refused food for a total of 30 days, a programme of 're-feeding' had been introduced. This involved force-feeding by means of a naso-gastric tube.

8. On 2 February 2000 Ian Brady obtained leave to apply for judicial review, challenging the continuing decision to force-feed him. Pursuant to his application, which was supported by Ashworth, the hearing took place in private. The judge, Maurice Kay J, announced, however, that judgment would be given in open court. It was delivered on 10 March 2000 (see *R v Dr James Collins and Ashworth Hospital Authority, ex p Brady* (10 March 2000, unreported)). It ruled that the force-feeding was lawful in that it was reasonably administered as part of the medical treatment given to Brady for the mental disorder from which he was suffering. By virtue of s 63 of the 1983 Act consent was not needed for such treatment. The judgment

set out, in detail, particulars of Ian Brady's clinical history which related to this conclusion.

The publication

9. The article in the Daily Mirror spanned two pages under the heading:

'DEATH WISH DIARY
HUNGER STRIKE BRADY IS DETERMINED TO DIE'

10. Much of the article consisted of extracts from what was described as 'a "confidential" diary of his deteriorating condition kept by the authorities at Merseyside's Ashworth Hospital where he is serving out his life sentence.' A short extract will give the flavour of these:

> 'October 7: Received a letter this pm, author unknown, containing plastic rosary beads and a small religious medal. Brady disposed of same. During conversation re the subject of no alcohol for patients over the festive period, stated "What do you expect, with the ex-governor of a terrorist prison in charge?"
>
> October 18: Still refusing food. Ian is taking fluids in the form of regular cups of coffee. Now weighs 13st, a loss of two pounds since yesterday.
>
> October 19: Avoiding speaking with staff, offering only abrupt and hostile replies. Ian appeared very vague and a little disorientated towards his surroundings.
>
> October 20: Ian was observed pacing the day area before returning to his usual daytime location in the smoking lounge.
>
> October 21: He appeared to have co-ordination difficulty, dropping items he was carrying several times and finding it difficult to retrieve them. Weight 12st 12lbs.
>
> October 24: Re blood tests, he stated "They can take the lot".'

The relief sought

11. After an exchange of solicitors' letters Ashworth began proceedings on 25 January 2000 which, ultimately, sought the following relief:

> '(1) An order that the defendant do forthwith deliver up to the claimant all medical records or copy medical records or extracts therefrom in its possession, power, custody or control relating to the claimant's care or treatment of Ian Brady, being a patient at Ashworth Hospital.
>
> (2) An order that the defendant do forthwith be restrained from publishing, distributing or otherwise disseminating any information contained in the said medical records relating to Mr Brady.
>
> (3) An order that the defendant do by its proper officer within two working days make and serve upon the claimant a witness statement: a) Explaining how it came to be in the possession or control of any medical records kept by the claimant in respect of Mr Brady, whether that possession or control be of originals, copies or extracts. b) Identifying any employee of the claimant and the name of the person or persons (and any address, telephone and fax numbers known for such person or persons) who were involved in the defendant acquiring possession or control of the said records.'

12. An interim order was made in terms of the first head of relief sought, but Mr Jones explained that, in accordance with his normal working practice, he had

destroyed the material that he had received after writing his article. At the trial this was accepted, as was his statement that there was no intention to publish anything further based on that information. This led Rougier J, who described Mr Jones as 'a straightforward witness', to decline to order the second head of relief. He did, however, make an order in the terms of the third head of relief.

What did Mr Jones receive?

13. Before us there was a lively dispute between counsel as to the information that was received by Mr Jones. No hint of this issue is to be found in the judgment, but it proved to be one of some significance. It was Ashworth's case that Mr Jones received, by facsimile, a print-out of that section of the database in which the extracts that he quoted had been recorded. Mr Desmond Browne QC, for MGN, submitted, however, that the evidence demonstrated that the source had edited the print-out to remove sensitive material before providing it to the intermediary.

The PACIS database

14. It is common ground that the extracts quoted in the Mirror article originated from Ashworth's PACIS database. Mr Brewster, Ashworth's information manager, produced at the trial 17 pages of print-out from the database. These had been redacted to exclude all matter except the extracts that were quoted in the Mirror article. That which remained constituted no more than about 5% of the original print-out.

15. Dr James Collins, the consultant forensic psychiatrist who was Mr Brady's responsible medical officer under the 1983 Act, gave evidence that the 17 pages included 'a wealth of material, far more than was published'. He added: 'I do not know who did the editing to select this material.' He went on to explain what the pages in question would have contained:

> 'These are the daily running records, and they will include medical nursing, social work, psychology, rehabilitation stuff; running records of the patient ... Care team meeting minutes would be within this record, so the discussions the care team have on the ward about where they think the case is up to, what they should be doing next, Mr Brady's mental state at any given time. The minutes of those meetings would be within this record.'

16. He added that this material would have been considerably more sensitive than the extracts that were published. Mr Jones was asked about the material that he received. He said that he received a series of faxed sheets. Initially he said: 'it was more than one page. I cannot remember how many, but there were several pages'. Subsequently he said that there were probably about a dozen, though he could not say exactly. The printing filled up the full A4 pages. It appeared to be the daily diary in its entirety:

> '... the material we printed was that which is of interest to us. There was no clinical detail to the records ... I would say probably there was twice the amount of information than we published that I had possession of, and it was not very detailed, it was not very important to me, and I cannot remember exactly what it contained ... To me it just seemed a diary of eye witness accounts of Brady's movements on a daily basis.'

17. Mr Jones was asked whether some portions of the notes were rather more sensitive than the ones he did use. He replied that he did not remember any other sensitive points.

18. Mr Browne submitted that, unless Mr Jones' evidence was rejected as untruthful, it must follow that the pages he received were not facsimiles of a printout from PACIS. The source in Ashworth must have edited the print-out in order to remove sensitive material.

19. I can find no trace in the proceedings below of a suggestion that the source 'sanitised' the PACIS print-out before passing it to the intermediary—indeed MGN's skeleton argument suggests that 'the material might have been printed out, left lying in a ward and picked up by a visitor'. I do not accept Mr Browne's submission that one is driven by Mr Jones' evidence to conclude that the source edited the print-out. I would not impugn the judge's conclusion that Mr Jones was a straightforward witness, but his description of the information that he received was vague and contained inconsistencies. He was so uncertain about the number of pages that he received that I have no difficulty in reconciling his 'about a dozen' pages with the 17 pages of the print-out. On his own description of the diary that he received, the extracts that he selected for his article can only have been a fraction of the total material, not about half of it.

20. I have concluded that the overwhelming likelihood is that the source provided to the intermediary a print-out from the PACIS database of the daily 'running records' in relation to Ian Brady for the period from 1 to 29 October 1999 and that this was faxed on by the intermediary to Mr Jones in its entirety. From this information Mr Jones selected the short extracts that were included in his article.

Ashworth's data recording system

21. The PACIS system was used to record all data about patients at Ashworth, in preference to hand-copy records. There was a degree of grading of information, so that some had access restricted, while 'general information' was available to all who had access to the database. Because those caring for psychiatric patients require information about them for a wide variety of purposes, access to the database was conferred widely on staff at Ashworth. Those who had access to Ian Brady's file within PACIS included the staff on his ward, his patient care team, site managers, medical care staff, health record staff, the pharmacy, all doctors in the directorate and their medical secretaries, all psychologists and social workers and security staff. In all about 200 people had access to all the material on the general records held on PACIS.

22. Any person who had access to material could print this out from any terminal at Ashworth without leaving any audit trail indicating that this had been done, or by whom.

23. The confidentiality of patients' medical records was strongly emphasised whenever a new member of staff was engaged at Ashworth and the standard contract of employment contains the following clause:

> 'DISCLOSURE OF INFORMATION
>
> You must not whilst you are employed or after your employment ends disclose to any unauthorised person information concerning the Authority's business or the patients in its care nor must you make any copy, abstract, summary or précis of the whole or part of a document relating to the Authority.'

Tightening of procedures

24. Ms Roberts, the Ashworth project director, agreed that the publication in the Mirror had led to a rethink about 'who should have access to what' and to a 'tightening of procedures to limit information on a "need to know" basis'. She had also recommended the introduction of an audit trail facility, which would identify which authorised users had had access to particular files. She commented, however, that in order to put in place a robust security system it was necessary to know how the leak to the Mirror had occurred. Even then, no system could guarantee that someone with access to information would not improperly make it public.

Attempts to find the source of the leak

25. As soon as the publication in the Mirror occurred, Ashworth carried out an internal investigation in an attempt to find out how the leak had occurred and who was responsible for it. The investigation was unsuccessful. No criticism has been made of its adequacy. Compliance with the order made by Rougier J is the only way in which the identity of the source is likely to be discovered.

The effect of the leak

26. Rougier J recorded that:

> 'Witnesses called on behalf of the claimant have given me reasons which I find compelling, whereby a leak such as this has the effect of creating a highly detrimental impact on the security of the hospital, the treatment of its patients, and the morale of the staff.'

27. The judge then went on to set out these reasons. Mr Browne has challenged each of them, arguing that they were nothing like as compelling as the judge suggested. I propose to consider shortly the challenge made to the most important of these.

Inhibition on staff recording information

28. The judge found that—

> 'in a psychiatric hospital the fullest possible knowledge of a patient is requisite, since it enables the hospital to provide the least restrictive environment and to treat and to manage its patients safely, and thereby to prevent them either running into danger from other patients or becoming a danger themselves ... The knowledge that such information may find its way into unauthorised hands may well have the effect of inhibiting the appropriate recording of information to the patients' detriment. To a slight degree that has already happened here, according to Dr Collins, the medical officer responsible for Ian Brady.'

29. Mr Browne argued that this consideration was not compelling as, on the evidence, it had only happened 'to a slight degree'. This was a reference to a more cautious attitude spoken to by Dr Collins in respect of recording material on the database. It is correct that the evidence did not demonstrate that the Mirror publication had led to a significant change in the willingness of staff at Ashworth to record information on the database. At the same time there was evidence which justified the judge's conclusion that if confidence in the security of a database is destroyed, there will be inhibition upon the use of the database for recording sensitive information. Common sense tells one as much.

Inhibition on patients providing information and damage to the therapeutic patient/doctor relationship

30. The judge found that knowledge of leaks was liable to have the effect of dissuading patients from providing information about themselves and that:

> 'Once it were known among patients that their records might well be leaked there would, in all probability, be a sharp downturn in the essential therapeutic patient/doctor relationship where trust is of fundamental importance. I have heard that many of these patients become quite paranoid about what is written about them.'

31. Mr Browne made the point that there was no evidence that this in fact occurred after the Mirror publication. This is correct, but there was ample evidence from staff at Ashworth that public disclosure of information provided in confidence would be likely to destroy trust and hinder therapy. Again, it seems to me that this proposition is self-evident.

Damage to staff relationships

32. The judge found that:

> 'The presence of a mole in the ranks creates an atmosphere of mutual distrust amongst the staff which is highly detrimental to efficient and co-operative working.'

33. Mr Browne made the point that so many of the staff had had access to the information leaked that there was no scope for the finger of suspicion to point to any individual. This is beside the point. Ashworth hospital has had an unhappy history, which it is unnecessary to explore in this judgment. This left its staff, however, particularly vulnerable to an incident such as the leak to the Mirror. Ms Roberts gave evidence of clinicians reporting to her that the incident had impacted on their clinical work. She said:

> 'I think it is difficult to emphasise the importance and the time and the energy and the commitment that the new management team have been putting into trying to build up confidence of establishing a new management arrangement, number of new appointments, of trying to say, put the past behind us and move on. These sorts of events make people feel it is more of the same. We will be dogged by these kinds of occurrences.'

The risk of a recurrence

34. The judge held:

> 'I think too much emphasis has been laid upon the fact that the authority were unable to point to a great deal of damage on the lines that they fear having taken place as a result of this particular leak. In my judgment, it is not so much the nature of this leak, but the fact that it happened at all, which is all important, for, unless stopped, that which has occurred once may well occur again. I do not see that however much the procedure was tightened it could ever be made watertight.'

35. Mr Pleming QC, for Ashworth, relied heavily on this finding. He submitted that should MGN's appeal be allowed, this would act as a signal, not merely to the source but to other hospital staff, that patient confidentiality could be disregarded with impunity. Mr Browne challenged the judge's finding that

unless stopped, that which had occurred might occur again. In so doing he relied upon 'the (perhaps surprising) responsibility of the source in what he should select for release'. I have already given my reasons for rejecting this analysis of the facts. Mr Browne also relied on the tightening of Ashworth's security procedures, but the evidence was that these could not ensure that the source did not strike again. Finally Mr Browne urged that the Mirror publication about Brady was 'one-off' and that there was an apparent lack of interest by the media in Ashworth patients other than Brady.

36. I consider that the judge's evaluation of the likelihood of further disclosures of patient information from within Ashworth was correct. Dr Collins gave evidence that, while the Mirror publication was the first occasion upon which there had been a leak of hospital notes, the general view within the hospital was that there had probably been leaks by hospital staff to the media, in the form of stories. This picture tallies with evidence given by Mr Jones that the intermediary 'has a number of sources within the hospital, who has been the supplier of accurate information in the past'.

37. This evidence suggests that the disclosure of hospital records represents an escalation in a series of disclosures from Ashworth and raises a real danger that if the source is not identified, further disclosures of confidential records may occur.

38. Mr Browne made the point that there had been no leak from Ashworth since the Mirror publication. I do not find that surprising. I would expect the intermediary and the source to be lying low, awaiting the result of these proceedings.

39. With this summary of the facts, I turn to the first major issue of law.

Norwich Pharmacal jurisdiction

40. In *Norwich Pharmacal* the issue that remained when the case reached the House of Lords was whether the court had jurisdiction to order the Commissioners of Customs and Excise to disclose information, received in confidence, that would identify importers of goods which infringed the plaintiffs' patents, where no other claim for relief lay against the commissioners. The House of Lords held that the court had an equitable jurisdiction to make the order sought.

41. At the outset of his judgment Lord Reid examined the history of discovery as a remedy in equity and identified the principle that—

> 'discovery to find the identity of a wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong.' (See [1973] 2 All ER 943 at 948, [1974] AC 133 at 174.)

42. He went on to consider the position of a party, such as the commissioners, who were not wrongdoers but had facilitated the wrongdoing. After referring to a number of early authorities, he held:

> 'They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he

unwittingly facilitated its perpetration. I am the more inclined to reach this result because it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability. I would therefore hold that the respondents must disclose the information now sought unless there is some consideration of public policy which prevents that.' (See [1973] 2 All ER 943 at 948–949, [1974] AC 133 at 175.)

43. In the present case Ashworth advanced the following propositions founded on *Norwich Pharmacal*: (1) Where a person becomes involved in the tortious acts of others the court imposes upon that third party a duty to assist one injured by those acts by giving him full information by way of disclosure of the wrongdoer. (2) Where a person gets mixed up in the unlawful acts of others (which need not be tortious) he incurs a similar liability to that set out in (1).

44. The first proposition as a general principle, is not controversial. Mr Pleming conceded, however, that the second was unsupported by authority.

45. Ashworth's contentions on the application of these principles to the facts of the present case were as follows: (1) The abstraction by the source of the extract of Ian Brady's confidential records was tortious. (2) The transfer of the confidential information to MGN, through Mr Jones was tortious. (3) MGN were 'mixed-up' in the tortious conduct within the principle in *Norwich Pharmacal*. Alternatively: (4) The abstraction and transfer of the information was unlawful and the same consequences follow.

46. MGN's case in relation to Ashworth's attempt to found jurisdiction on *Norwich Pharmacal* was as follows: (1) The information transferred was not confidential in nature and involved no wrongdoing. (2) If the information was confidential in nature, it ceased to be confidential when Brady put it into the public domain. (3) If the information was confidential, the confidence was Brady's, not Ashworth's and Ashworth had no standing to take proceedings to enforce it. (4) The principle in *Norwich Pharmacal* only applies to tortious conduct. The breach of confidence alleged in this case was not tortious.

Was the information confidential?

47. MGN contended that the information disclosed was so banal as to be incapable of being confidential. The judge rejected this contention. He held:

> 'It is well settled that there is an abiding obligation of confidentiality as between doctor and patient, and in my view when a patient enters a hospital for treatment, whether he be a model citizen or murderer, he is entitled to be confident that details about his condition and treatment remain between himself and those who treat him. Furthermore, there must be a subjective element as to what any one patient would consider so personal that he would not wish it to be divulged.'

48. I am in no doubt that the information disclosed was confidential. While much of the information quoted in the Mirror article was banal, Dr Collins drew attention to the fact that it included clinical observations, albeit that Mr Jones did not recognise them as such. There is, however, a further and important point. The relevant information, when considering whether a breach of confidence

occurred, is the whole of the PACIS print-out that was transmitted to Mr Jones, not merely those passages that he chose to reproduce in his article. Having regard to the overall nature of this material, as described by Dr Collins, it is clear that it was confidential.

Had the information disclosed been placed in the public domain by Brady?

49. Rougier J held that the extract published in the Mirror was 'no more than a watered down version of that which Ian Brady himself has thrust into the public domain in furtherance of his campaign'. He went on to hold that any confidence was Brady's and not Ashworth's. On that basis he concluded that Ashworth could not found jurisdiction on breach of confidentiality.

50. Had Brady sought to complain that the publication in the Mirror included confidential material about him, it is likely that his own conduct in putting similar information into the public domain would have provided the answer to his complaint. What is at issue, however, is whether Brady's conduct removed the confidential character of the detailed diary of observations that had been placed on the PACIS database by various members of Ashworth staff. That question is linked with the question of whether any confidence in the information attached to Brady alone, or whether it also attached to Ashworth.

Was the confidence that of Brady alone?

51. Focusing on the article published in the Mirror, Rougier J held that Ashworth had no right to confidentiality in the information that it contained. His reasoning was as follows:

> 'On reading the article I am unable to detect anything contained therein which strays outside the limits of what might be termed Ian Brady's personal right to confidentiality. I am not impressed by the argument that merely because the descriptions of the man come from various sources within the hospital, that automatically creates a state of confidentiality of which the hospital could take advantage, but I wish to make it quite plain that that is a decision which I have reached upon the facts of this case, and upon a reading of this article. I must not be taken to be voicing any general proposition that data recorded about a patient in a fashion such as this could not, in an appropriate case, attract the shield of confidentiality in favour of the hospital.'

52. I am unable to accept this reasoning. The extracts published consisted of observations of Brady by different members of the staff at Ashworth that were recorded as part of his medical records. Though they were personal to Brady, I consider that Ashworth had a clear independent interest in retaining their confidentiality. The Department of Health published, on 7 March 1996, *Guidance on the Protection and Use of Patient Information*. This includes the following guidance under the heading: 'Who has a duty of confidence?':

> 'Everyone working for or with the NHS who records, handles, stores, or otherwise comes across information has a personal common law duty of confidence to patients *and to his or her employer*.' (My emphasis.)

53. This guidance accurately states the position. Both Ashworth and its patients shared an interest in the confidentiality of patient records.

54. I do not consider that the publicity generated by Ian Brady himself in the period before the publication of the Mirror article had the effect of stripping the

cloak of confidentiality from the more detailed records about Brady on the PACIS database. Ashworth was entitled to insist that those records remained confidential.

Is Norwich Pharmacal jurisdiction restricted to tort?

55. The wrongdoing in which the commissioners were 'mixed up' in *Norwich Pharmacal* was tortious. MGN submitted that the jurisdiction recognised in that case was one which arose only in relation to tort. If that is correct, a claimant can only invoke *Norwich Pharmacal* jurisdiction in a breach of confidence case if the breach of confidence involves tortious conduct. This it will often do. If the confidential information is in, or reduced to, hard copy form, the paper on which it is recorded will often belong to the claimant. Unauthorised transfer of the information will often involve the conversion by the source of the paper on which the information is printed.

56. Mr Pleming submitted that, on the authorities, the court focuses when considering *Norwich Pharmacal* jurisdiction in a breach of confidence context, not on the breach of confidentiality but on the tortious act of the source in converting or stealing the document containing the confidential information.

57. If this equitable head of jurisdiction depends upon the fortuity of whether or not a virtually valueless piece of paper on which the information is recorded belongs to the claimant, our law is in a sorry state. Do the authorities lead inexorably to this conclusion?

58. The starting point must be *Norwich Pharmacal* itself. In the much quoted passage from his judgement ([1973] 2 All ER 943 at 948–949, [1974] AC 133 at 175), which I have set out earlier, Lord Reid spoke expressly of a person getting mixed up 'in the *tortious* acts of others' (my emphasis). Elsewhere, however, he spoke of 'the wrongdoer'. None of the other members of the Committee suggested that the jurisdiction to order disclosure was restricted to cases of tort. Lord Morris of Borth-y-Gest spoke of 'wrongdoers' (see [1973] 2 All ER 943 at 951, 952, [1974] AC 133 at 178, 179) and of the protection of a plaintiff's 'interests' and 'rights' (see [1973] 2 All ER 943 at 951, 953, [1974] AC 133 at 178, 180). Lord Kilbrandon spoke of 'a just cause of action' (see [1973] 2 All ER 943 at 973, [1974] AC 133 at 202), 'litigious matters', 'unlawfully causing him damage' (see [1973] 2 All ER 943 at 973, [1974] AC 133 at 203), '"a bona fide claim"', 'infringing ... rights' (see [1973] 2 All ER 943 at 975, [1974] AC 133 at 205).

59. The authorities to which Lord Reid referred and which were exhaustively analysed by other members of the Committee involved a wide variety of causes of action. They included passing off (see *Orr v Diaper* (1876) 4 Ch D 92, 35 LT 468); liability of stockholders for debts (see *Post v Toledo, Cincinnati and St Louis Railroad Co* (1887) 11 NE Rep 540) and interference with proprietary rights that might involve breach of contract (see *Moodalay v Morton* (1785) 1 Bro CC 469, 28 ER 1245).

60. In none of these cases did the precise nature of the alleged infringement of the plaintiff's rights appear to have been material, nor did any member of the Committee draw any distinction between them on that basis (see, in particular, *Norwich Pharmacal Co v Customs and Excise Comrs* [1973] 2 All ER 943 at 968, [1974] AC 133 at 197 per Lord Cross of Chelsea).

61. I can see no basis in principle for confining *Norwich Pharmacal* to cases involving tort. On the contrary the principle in *Norwich Pharmacal* should be one of general application. Under it jurisdiction to order disclosure of the identity of wrongdoers should exist in equity wherever the person against whom disclosure is sought has got 'mixed up' in wrongful conduct that infringes a claimant's legal rights. That general principle emerges from the judgments of Lord Morris,

Viscount Dilhorne, Lord Cross and Lord Kilbrandon. I do not believe that Lord Reid's reference to 'tortious acts' was any more than a reflection of the fact that the relevant wrongdoing in *Norwich Pharmacal* was tortious.

62. Do the authorities preclude extending *Norwich Pharmacal* jurisdiction beyond the field of tort? We have been referred to a number cases in which the jurisdiction was invoked in cases which involved tort: *British Steel Corp v Granada Television Ltd* [1981] 1 All ER 417, [1981] AC 1096; *X Ltd v Morgan-Grampian (Publishers) Ltd* [1990] 2 All ER 1, [1991] 1 AC 1 and *Ricci v Chow* [1987] 3 All ER 534, [1987] 1 WLR 1658. In each of these, express reference was made to the fact that the wrongdoing in respect of which the jurisdiction was invoked was tortious. I do not consider, however, that any of them precludes this court from applying the principle in *Norwich Pharmacal* more widely. We have been referred to no decision which has held, in terms, that the principle is restricted to cases involving tort.

63. In the present case the source abstracted information from the PACIS database which he or she transmitted to the intermediary in breach of confidence and in breach of contract. The intermediary, knowing that the information had been obtained in breach of confidence, passed it to MGN, through Mr Jones. MGN, knowing that the information had been transferred in breach of confidence, published extracts from it. In these circumstances, claims for breach of confidence lie against MGN, the intermediary and the source. The basis of those claims was explored by the House of Lords in *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, [1990] 1 AC 109. As against the source the claim can be brought in contract. As against all three it lies in equity (see [1988] 3 All ER 545 at 645, [1990] 1 AC 109 at 261 per Lord Keith of Kinkel, [1988] 3 All ER 545 at 648, [1990] 1 AC 109 at 268 per Lord Griffiths and [1988] 3 All ER 545 at 658–659, [1990] 1 AC 109 at 281–282 per Lord Goff of Chieveley).

64. Proceedings were properly commenced against MGN, claiming relief additional to the disclosure of the identity of the others involved in the breach of confidence. This was not a case, such as *Norwich Pharmacal,* where no substantive claim lay against the defendant. The defendant is not innocently mixed up in the wrongdoing of the source, but is a wrongdoer itself. At the outset of his judgment in *Norwich Pharmacal* Lord Reid said:

> 'Discovery as a remedy in equity has a very long history. The chief occasion for its being ordered was to assist a party in an existing litigation. But this was extended at an early date to assist a person who contemplated litigation against the person from whom discovery was sought, if for various reasons it was just and necessary that he should have discovery at that stage. Such discovery might disclose the identity of others who might be joined as defendants with the person from whom discovery was sought. Indeed in some cases it would seem that the main object in seeking discovery was to find the identity of possible other defendants. It is not clear to me whether in all these cases the plaintiff had to undertake in some way to proceed against the person from whom he sought discovery if he found on discovery being ordered that it would suit him better to drop his complaint against that person and concentrate on his cause of action against those whose identity was disclosed by the discovery. But I would think that he was entitled to do this if he chose.' (See [1973] 2 All ER 943 at 947, [1974] AC 133 at 173.)

65. Even if, contrary to my view, the jurisdiction to order discovery against an innocent party only arises when that party has been 'mixed up' in tortious

wrongdoing, I see no basis for extending that restriction to the case where the defendant is susceptible to suit on the ground of the same wrongdoing as that perpetrated by those whose identity is sought.

66. In summary, I find that the jurisdiction of the court was properly invoked in this case because: (1) the principle in *Norwich Pharmacal* is not restricted to cases involving tort or (2) if it is so restricted, the restriction does not apply where the defendant is not merely innocently mixed up in the wrongdoing, but is a party to it.

67. I should add that, had it been necessary, I would reluctantly have held that jurisdiction was validly founded on the probability that, in abstracting the information, the source committed the tort of converting the 17 sheets of paper on which the information was printed, and that MGN was 'mixed up' in that tort by purchasing and using the information printed on the paper (see the comments of Lord Donaldson MR in *X Ltd v Morgan-Grampian (Publishers) Ltd* [1990] 1 All ER 616 at 625–626, [1991] 1 AC 1 at 24).

The Broadmoor jurisdiction

68. Rougier J founded his jurisdiction to make the order sought by Ashworth on the decision of this court in *Broadmoor Special Hospital Authority v Robinson* [2000] 2 All ER 727, [2000] 1 WLR 1590. This was correctly described by counsel for MGN as an innovatory decision. As I have found a more conventional basis for the jurisdiction of the court it is not necessary to consider whether *Broadmoor* might have provided an alternative route, had one been needed.

Section 10 of the 1981 Act and art 10 of the convention

69. Having found that there was a valid jurisdictional basis for making the order that MGN attacks, it is now necessary to consider whether the exercise of that jurisdiction should have been precluded by s 10 of the 1981 Act. It is also necessary to consider the effect of art 10 of the convention. That raises a question of the approach of this court, having regard to the fact that, since Rougier J gave judgment, the Human Rights Act 1998 has come into force. Section 3 of that Act provides:

> '(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section—(a) applies to primary legislation and subordinate legislation whenever enacted ...'

70. Section 2 requires the court to take into account the jurisprudence of the European Court of Human Rights, in so far as it is relevant.

71. These requirements should not, in practice, result in this court applying a different approach to that which fell to be applied by Rougier J. The courts have frequently stated that in the field of freedom of speech there is no difference in principle between English law and art 10 of the convention (see, for instance, *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 660, [1990] 1 AC 109 at 283–284 per Lord Goff; *Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011 at 1021, [1993] AC 534 at 551 per Lord Keith; *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 407, [1999] 3 WLR 328 at 336 per Lord Steyn).

72. More particularly, in *Secretary of State for Defence v Guardian Newspapers* Ltd [1984] 3 All ER 601 at 615, [1985] AC 339 at 361 Lord Scarman remarked of s 10:

> 'The section, it is important to note in this connection, bears a striking resemblance to the way in which many of the articles of the [convention] which formulate the fundamental rights and freedoms protected by that convention are framed: namely a general rule subject to carefully drawn and limited exceptions which are required to be established, in case of dispute, to the satisfaction of the European Court of Human Rights.'

73. In *Camelot Group plc v Centaur Communications Ltd* [1998] 1 All ER 251 at 256, [1999] QB 124 at 132 Schiemann LJ remarked that the 1981 Act was enacted to bring domestic law into line with the requirements of the convention.

74. Mr Browne contends, however, that the decisions of the English court do not properly reflect the importance that the Strasbourg court has attached to the freedom of the press and that Rougier J failed to do so in the present case.

75. It is convenient at this point to set out the relevant provisions of s 10 and of art 10.

76. Section 10, 'Sources of information', provides:

> 'No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.'

Article 10 provides:

> '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

77. Comparing these two provisions, it is apparent that s 10 sets out to give effect to the general requirements of art 10 in the narrow context of protection of the sources of information of the press. Article 10 permits the right of freedom of expression to be circumscribed where 'necessary in a democratic society' to achieve a number of specified legitimate aims. Section 10 provides that the freedom of expression of the press may not be circumscribed by a requirement to disclose sources of information except where necessary for a number of specified purposes.

78. It seems to me that the approach to the interpretation of s 10 should, in so far as possible: (i) Equate the specific purposes for which disclosure of sources is permitted under s 10 with 'legitimate aims' under art 10. (ii) Apply the same test of necessity to that applied by the European Court when considering art 10.

Purposes and legitimate aims

79. 'National security' features both as a legitimate aim in art 10 and as a purpose in s 10. The same is true of 'the prevention of disorder or crime'. The remaining purpose in s 10, 'the interests of justice', falls to be contrasted with—

> 'territorial integrity or public safety ... the protection of health or morals ... the protection of the reputation or rights of others ... preventing the disclosure of information received in confidence'

and 'maintaining the authority and impartiality of the judiciary', all of which are to be found in art 10. What light does the lengthy catalogue in art 10 throw on the meaning of the phrase 'the interests of justice' in s 10? This question is of some importance, for a stark difference of view has been expressed in the House of Lords which must now, I believe, be resolved by reference to the Strasbourg jurisprudence rather than according to the doctrine of precedent, should the two be in conflict.

80. In *Secretary of State for Defence v Guardian Newspapers* Ltd [1984] 3 All ER 601 at 607, [1985] AC 339 at 350 Lord Diplock stated:

> '... in my view the expression "justice", the interests of which are entitled to protection, is not used in a general sense as the antonym of "injustice" but in the technical sense of the administration of justice in the course of legal proceedings in a court of law ...'

81. Lord Roskill agreed with this (see [1984] 3 All ER 601 at 621, [1985] AC 339 at 369).

82. These views did not form part of the reason for the decision. In *X Ltd v Morgan-Grampian (Publishers) Ltd* [1990] 2 All ER 1 at 9, [1991] 1 AC 1 at 43 Lord Bridge advanced a wider interpretation:

> 'I agree entirely with the first half of this dictum. To construe "justice" as the antonym of "injustice" in s 10 would be far too wide. But to confine it to "the technical sense of the administration of justice in the course of legal proceedings in a court of law" seems to me, with all respect due to any dictum of Lord Diplock, to be too narrow. It is, in my opinion, "in the interests of justice", in the sense in which this phrase is used in s 10, that persons should be enabled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain these objectives. Thus, to take a very obvious example, if an employer of a large staff is suffering grave damage from the activities of an unidentified disloyal servant, it is undoubtedly in the interests of justice that he should be able to identify him in order to terminate his contract of employment, notwithstanding that no legal proceedings may be necessary to achieve that end.'

83. Ashworth rely on Lord Bridge's interpretation, for they have made it plain that if the source is identified their intention is to dismiss rather than implead him or her.

84. In *Goodwin v UK* (1996) 22 EHRR 123 at 140 the European Court recorded the fact that Lord Diplock's interpretation had been replaced by that of Lord Bridge without adverse comment. It seems to me that both interpretations are consistent with art 10, but that the interpretation of Lord Bridge accords more happily with the scheme of art 10. Thus 'interests of justice' in s 10 mean interests that are justiciable. I cannot readily envisage any such interest that would not fall

within one or more of the catalogue of legitimate aims in art 10. In the present case Ashworth could argue that their claim for identification of the source is in the interests of the protection of health, the protection of rights of others and preventing the disclosure of information received in confidence.

'Necessary'

85. In *Sunday Times v UK* (1979) 2 EHRR 245 at 275 (para 59) the European Court commented:

> 'The Court has noted that, whilst the adjective "necessary", within the meaning of Article 10(2), is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and that it implies the existence of a "pressing social need".'

86. The court went on to say that it had to consider not merely whether the interference complained of corresponded to a 'pressing social need' but whether it was 'proportionate to the legitimate aim pursued' and whether the reasons given to justify it were 'relevant and sufficient under Article 10(2)' (see (1979) 2 EHRR 245 at 278).

87. In *Goodwin v UK* the court considered the decision reached by the House of Lords in *X Ltd v Morgan-Grampian (Publishers) Ltd* [1990] 2 All ER 1, [1991] 1 AC 1. That case had involved the supply to a journal of a stolen confidential corporate plan which gave information about the finances of a company that the English courts found would, if made public, threaten severe damage to the company and consequently to the livelihood of its employees. In the leading judgment Lord Bridge gave these reasons for holding that the disclosure of the identity of the supplier of the plan was 'necessary in the interests of justice' within s 10:

> 'It would be foolish to attempt to give comprehensive guidance as to how the balancing exercise should be carried out. But it may not be out of place to indicate the kind of factors which will require consideration. In estimating the importance to be given to the case in favour of disclosure there will be a wide spectrum within which the particular case must be located. If the party seeking disclosure shows, for example, that his very livelihood depends on it, this will put the case near one end of the spectrum. If he shows no more than that what he seeks to protect is a minor interest in property, this will put the case at or near the other end. On the other side the importance of protecting a source from disclosure in pursuance of the policy underlying the statute will also vary within a wide spectrum. One important factor will be the nature of the information obtained from the source. The greater the legitimate public interest in the information which the source has given to the publisher or intended publisher, the greater will be the importance of protecting the source. But another and perhaps more significant factor which will very much affect the importance of protecting the source will be the manner in which the information was itself obtained by the source. If it appears to the court that the information was obtained ... illegally, this will diminish the importance of protecting the source unless, of course, this factor is counterbalanced by a clear public interest in publication of the information, as in the classic case where the source has acted for the purpose of exposing iniquity. I draw attention to these considerations by way of

illustration only and I emphasise once again that they are in no way intended to be read as a code.' (See [1990] 2 All ER 1 at 9–10, [1991] 1 AC 1 at 44.)

88. The European Court accepted that the order to disclose the source pursued a legitimate aim in protecting the company's rights. It held, however, that it did not satisfy the test of being 'necessary in a democratic society'. The judgment of the court included this important statement of principle:

'Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.' (See (1996) 22 EHRR 123 at 143 (para 39).)

89. The court held that a large measure of protection of the company had been achieved by an interim injunction, which prevented media disclosure of the information. The judgment continued (at 145):

'43. What remains to be ascertained by the Court is whether the further purposes served by the disclosure order provided sufficient justification.

44. In this respect it is true, as Lord Donaldson put it, that the injunction "would not effectively prevent publication to [Tetra's] customers or competitors" directly by the applicant journalist's source (or that source's source). Unless aware of the identity of the source, Tetra would not be in a position to stop such further dissemination of the contents of the plan, notably by bringing proceedings against him or her for recovery of the missing document, for an injunction against further disclosure by him or her and for compensation for damage. It also had a legitimate reason as a commercial enterprise in unmasking a disloyal employee or collaborator who might have continuing access to its premises in order to terminate his or her association with the company.

45. These are undoubtedly relevant reasons. However, as also recognised by the national courts, it will not be sufficient, *per se*, for a party seeking disclosure of a source to show merely that he or she will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he or she bases his or her claim in order to establish the necessity of disclosure. In that connection, the Court would recall that the considerations to be taken into account by the Convention institutions for their review under Article 10(2) tip the balance of competing interests in favour of the interest of democratic society in securing a free press. On the facts of the present case, the Court cannot find that Tetra's interests in eliminating, by proceedings against the source, the residual threat of damage through dissemination of the confidential information otherwise than by the press, in obtaining compensation and in unmasking a disloyal employee or collaborator were, even if considered cumulatively, sufficient to outweigh the vital public

a interest in the protection of the applicant journalist's source. The Court does not therefore consider that the further purposes served by the disclosure order, when measured against the standards imposed by the Convention, amount to an overriding requirement in the public interest.'

90. It seems to me that the approach of the European Court to the question of whether disclosure of a source is 'necessary' involves a single exercise in which the court considers not merely whether, on the facts of the particular case, disclosure of the source is necessary to achieve the legitimate aim but, more significantly, whether the achievement of the legitimate aim on the facts of the instant case is so important that it overrides the public interest in protecting journalistic sources in order to ensure free communication of information to and through the press.

91. Mr Browne submitted that in a case such as this the English court has to follow a three-stage test. First it has to decide whether the interests of justice are engaged. Secondly the court has to consider as a fact whether disclosure is necessary to achieve the relevant ends of justice. Finally the court has to weigh, as a matter of discretion, the specific interests of the claimant against the public interest in the protection of journalists' confidential sources. It is in the final stage that the European dimension becomes particularly important.

92. It seems to me that this step-by-step approach leads to the same destination as the approach adopted by the European Court, and I am content to follow it.

93. I have already indicated why I consider that the object of these proceedings satisfies both the test of being in the interests of justice and constitutes more than one legitimate aim under art 10. Ashworth succeeds on the first stage. As to the second stage, there is ample authority that in order to demonstrate that disclosure of a source is necessary, a claimant must show that all other reasonable means have been employed unsuccessfully to identify the source. Mr Browne does not suggest that Ashworth falls at this hurdle. He contends, however, that Ashworth has not demonstrated that it is necessary to identify the source in order to remove the risk of further disclosures of confidential material. For the reasons that I have given I reject that submission. Unless and until the source is identified and dismissed there must be a significant risk that his or her venality will lead to the sale of further confidential information.

94. Mr Browne concentrated most of his submissions on the third stage. He contended that Rougier J had ignored the European dimension. He had not considered whether the order for disclosure was proportional, having regard to the importance of the freedom of the press.

95. Mr Browne placed particular emphasis on the decision in *Goodwin v UK*. He submitted that the fact that the European Court, when ostensibly applying the same test as the House of Lords, reached a different result, demonstrated that the English courts were applying a different standard to that of the European Court. Insufficient weight was being given to the vital importance attached by the European Court to press freedom.

96. The argument that *Goodwin v UK* established a stricter standard than *X Ltd v Morgan-Grampian* [1990] 2 All ER 1, [1991] 1 AC 1 was advanced in *Camelot Group plc v Centaur Communications Ltd* [1998] 1 All ER 251, [1999] QB 124. Schiemann LJ rejected this submission, holding that the different result merely reflected the fact that different courts can reach different conclusions although applying the same principles to the same facts (see [1998] 1 All ER 251 at 259, [1999] QB 124 at 135). Mr Browne submitted that this explanation would not wash, because the margin

of appreciation applied by the European Court would have prevented such a result.

97. I consider that Schiemann LJ correctly identified that the European Court differed from the English courts in its view of the implications that non-disclosure of the source would have for the plaintiff company. At the same time I am inclined to accept Mr Browne's submission that the decisions of the European Court demonstrate that the freedom of the press has in the past carried greater weight in Strasbourg than it has in the courts of this country.

98. Notwithstanding this conclusion, I have decided that the judgment of Rougier J should be upheld. In *Goodwin v UK* (1996) 22 EHRR 123 at 137 (para 64), the Commission expressed the view that only in 'exceptional circumstances where vital public or individual interests are at stake' can an order requiring journalists to disclose their sources be justified.

99. The disclosure of confidential medical records to the press is misconduct which is not merely of concern to the individual establishment in which it occurs. It is an attack on an area of confidentiality which should be safeguarded in any democratic society. The protection of patient information is of vital concern to the National Health Service and, I suspect, to health services throughout Europe. This is an exceptional case. If the order made by Rougier J discourages press sources from disclosing similar information in the future, this will be no bad thing. I would dismiss the appeal.

MAY LJ.

100. I agree.

LAWS LJ.

101. I have had the advantage of reading the judgment of Lord Phillips of Worth Matravers MR in draft, and I agree that this appeal should be dismissed for all the reasons given by him. I add a few words upon one aspect of the case only, having regard to our duty under the Human Rights Act 1998 to take account of the Strasbourg jurisprudence (s 2) and to act compatibly with rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969 (the convention)) (s 6(1)). The Master of the Rolls has referred to the decision of the European Court of Human Rights in *Goodwin v UK* (1996) 22 EHRR 123. It is in my judgment of the first importance to recognise that the potential vice—the 'chilling effect'—of court orders requiring the disclosure of press sources is in no way lessened, and certainly not abrogated, simply because the case is one in which the information actually published is of no legitimate, objective public interest. Nor is it to the least degree lessened or abrogated by the fact (where it is so) that the source is a disloyal and greedy individual, prepared for money to betray his employer's confidences. The public interest in the non-disclosure of press sources is constant, whatever the merits of the particular publication, and the particular source. The suggestion (which at one stage was canvassed in the course of argument) that it may be no bad thing to impose a 'chilling effect' in some circumstances is in my view a misreading of the principles which are engaged in cases of this kind. In my judgment, the true position is that it is always prima facie (I can do no better than the Latin) contrary to the public interest that press sources should be disclosed; and in any given case the debate which follows will be conducted upon the question whether there is an overriding public interest, amounting to a pressing social need, to which the need to keep press sources confidential should give way.

a That debate will arise under s 10 in the municipal legislation; it will arise more broadly by reference to art 10 of the convention, and in the light of the Strasbourg jurisprudence on art 10.

102. In the present case I am entirely satisfied, for the reasons given by the Master of the Rolls, that the need to protect press sources must exceptionally give way to the need for the source to be identified.

Appeal dismissed.

Kate O'Hanlon Barrister.

R v Lambert
R v Ali
R v Jordan

COURT OF APPEAL, CRIMINAL DIVISION
LORD WOOLF CJ, ROUGIER AND BELL JJ
27, 28, 31 JULY 2000

Criminal evidence – Burden of proof – Statutory provisions imposing burden of proof on defendant – Principles to be applied when determining whether provisions compatible with human rights convention – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 6.

Criminal law – Murder – Diminished responsibility – Burden of proof – Whether statutory provision requiring defendant to prove diminished responsibility compatible with human rights convention – Homicide Act 1957, s 2(2) – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 6.

Drugs – Controlled drugs – Unlawful possession – Possession with intent to supply – Defence – Whether statutory provisions imposing burden of proof on defendant compatible with human rights convention – Misuse of Drugs Act 1971, ss 5(4), 28 – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 6.

In three conjoined appeals against conviction, a common issue arose on the effect of the Human Rights Act 1998 on statutory provisions which, though providing a benefit for a defendant, required him to prove certain facts before he could obtain that benefit. Two of the appeals concerned the defence of diminished responsibility provided by s 2[a] of the Homicide Act 1957, and in particular the requirement, in s 2(2), that the defendant prove that he was suffering from the diminished responsibility which reduced the offence of murder to that of manslaughter. The remaining appeal concerned ss 5(4)[b] and 28[c] of the Misuse of Drugs Act 1971, which the courts had interpreted as requiring the defendant to prove, on the balance of probabilities, certain exculpatory facts in relation to the offences of unlawfully possessing a controlled drug and possession with intent to supply. On the appeals, the appellants relied on the right to a fair hearing conferred by art 6(1)[d] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950; on the presumption of innocence conferred by art 6(2) on those charged with a criminal offence; and on the requirement in s 3[e] of the 1998 Act that a statutory provision had to be read and given effect in a way that was compatible with convention rights. In particular, they contended

a Section 2 is set out at p 1018 *e* to *g*, post
b Section 5, so far as material, is set out at p 1018 *a* to *d*, post
c Section 28 is set out at p 1020 *a*, post
d Article 6, so far as material, is set out at p 1020 *h j*, post
e Section 3, so far as material, provides: '(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights ...'

that art 6 and s 3 required the courts to interpret the provisions in question as placing only an evidential burden on the defendant, so that the general burden remained on the prosecution. If that contention was correct, it was accepted that court would have to allow the appeals which were being decided as if the 1998 Act was in force. The Court of Appeal was therefore required to determine whether those provisions, as hitherto applied, were in conflict with art 6. That in turn led the court to consider the principles applicable in such cases.

Held – (1) In determining whether a statutory provision in criminal proceedings which placed the burden of proof on the defendant was compatible with art 6 of the convention, the court could legitimately take into account the problem that the legislation was designed to address, with a fair balance being struck between the demands of the general interest of the community and the protection of the fundamental rights of the individual. In carrying out that exercise, it was important to start with the structure of the offences. If the defendant was being required to prove an essential element of the offence, that would be more difficult to justify. If, however, the defendant was required to establish a special defence or exception, that would be less objectionable. The extent of the inroad on the general principle which placed the burden of proof on the prosecution was also important. In that respect, it was important to have in mind that art 6(2) was directed to the application of the presumption of innocence of the 'criminal offences' charged. It was also important to have in mind that legislation was passed by a democratically elected Parliament and that accordingly the courts under the convention were entitled and should, as a matter of constitutional principle, pay a degree of deference to the view of Parliament as to what was in the interest of the public generally when upholding the rights of the individual under the convention (see p 1022 *b* to *g*, post); dicta of Lord Hope in *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 847 applied.

(2) Applying those principles in the instant cases, it was self-evident that s 2 of the 1957 Act did not contravene art 6 of the convention. The alternative provided by s 2 was not an ingredient of the offence of murder, either in form or substance. If the defendant did not seek to rely on it, he would not be required to prove anything. As regards ss 5(4) and 28 of the 1971 Act, they did not impose additional ingredients which had to be proved to complete the offence but provided a way of avoiding liability for what would otherwise be an offence. The criticism being made was not so much on the fact that the burden of proof had been transferred, but on the standard of proof required, namely proof on the balance of probabilities. That standard was the normal one under English law in the case of statutory defences. It had been imposed by the legislature deliberately for policy reasons that it considered justified, there was objective justification for the method chosen and the choice was not disproportionate. Accordingly, the offences did not contravene art 6. It followed that the appeals would be dismissed (see p 1023 *j* and p 1024 *c* to *e j*, post).

Notes

For the right to a fair trial and the presumption of innocence, see 8 *Halsbury's Laws* (4th edn reissue) paras 137, 142, for unlawful possession of a controlled drug and for possession with intent to supply, see 11(1) *Halsbury's Laws* (4th edn reissue) paras 397–399, for diminished responsibility, see 11(1) *Halsbury's Laws* (4th edn reissue) para 440 and for the burden of proof on the accused generally, see 11(2) *Halsbury's Laws* (4th edn reissue) para 1064.

For the Homicide Act 1957, s 2, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 267.

For the Misuse of Drugs Act 1971, ss 5, 28, see 28 *Halsbury's Statutes* (4th edn) (1996 reissue) 693, 717.

For the Human Rights Act 1998, s 3, see 7 *Halsbury's Statutes* (4th edn) (1998 reissue) 502.

For the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 6 (as set out in Sch 1 to the Human Rights Act 1998), see 7 *Halsbury's Statutes* (4th edn) (1998 reissue) 523.

Cases referred to in judgment

A-G of Hong Kong v Lee Kwong-Kut [1993] 3 All ER 939, [1993] AC 951, [1993] 3 WLR 329, PC.

Bratty v A-G for Northern Ireland [1961] 3 All ER 523, [1963] AC 386, [1961] 3 WLR 965, HL.

H v United Kingdom App No 15023/89 (4 April 1990, unreported), E Com HR.

Minister of Home Affairs v Fisher [1979] 3 All ER 21, [1980] AC 319, [1979] 2 WLR 889, PC.

Murray v UK (1994) 19 EHRR 193, ECt HR.

R v Byrne [1960] 3 All ER 1, [1960] 2 QB 396, [1960] 3 WLR 440, CCA.

R v Chaulk [1989] 1 SCR 369, Can SC.

R v DPP, ex p Kebeline [1999] 4 All ER 801, [1999] 3 WLR 972, HL; *rvsg* [1999] 4 All ER 801, [1999] 3 WLR 175, DC.

R v McNamara (1988) 87 Cr App R 246, CA.

Robinson v United Kingdom App No 20858/92 (5 May 1993, unreported), E Com HR.

Salabiaku v France (1988) 13 EHRR 379, ECt HR.

Sunday Times v UK (1979) 2 EHRR 245, ECt HR.

Warner v Metropolitan Police Comr [1968] 2 All ER 356, [1969] 2 AC 256, [1968] 2 WLR 1303, HL.

Woolmington v DPP [1935] AC 462, [1935] All ER Rep 1, HL.

Cases also cited or referred to in skeleton arguments

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X v UK App No 5124/71 (19 July 1972, unreported), E Com HR.

Appeals against conviction

R v Lambert

The defendant, Steven Lambert, appealed against his conviction at Warrington Crown Court on 9 April 1999 after a trial before Judge Hale and a jury for possessing a class A drug with intent to supply contrary to s 5(3) of the Misuse of Drugs Act 1971. The facts, so far as material, are set out in the judgment of the court.

R v Ali

The defendant, Mudassar Mohammed Ali, appealed against his conviction for murder at Manchester Crown Court on 13 August 1999 after a trial before Judge Rhys Davies QC and a jury. The facts, so far as material, are set out in the judgment of the court.

R v Jordan

The defendant, Shirley Jordan, appealed with leave of the Court of Appeal granted on 27 July 2000 against her conviction for murder at Inner London Crown Court on 30 September 1999 after a trial before Judge Van der Werff and a jury. The facts, so far as material, are set out in the judgment of the court.

Tim Owen QC and *Rebecca Trowler* (assigned by the *Registrar of Criminal Appeals*) for the appellant Lambert.
Ian MacDonald QC and *Rajiv Menon* (assigned by the *Registrar of Criminal Appeals*) for the appellants Ali and Jordan.

John P Hedgecoe and *Simon M Mills* (instructed by the *Crown Prosecution Service*, Warrington) for the Crown in Lambert's appeal.

Alan Conrad QC and *Zoe Nield* (instructed by the *Crown Prosecution Service*, Oldham) for the Crown in Ali's appeal.

Michael Worsley QC and *David Perry* (instructed by the *Crown Prosecution Service*) for the Crown in Jordan's appeal.

LORD WOOLF CJ (giving the judgment of the court).

1. These three appeals have been heard together because they raise related issues involving the Human Rights Act 1998. The principal issue is as to the effect of the 1998 Act on statutory provisions that provide a benefit to a defendant, who is being tried for a criminal offence, but require him to prove certain facts which the statute specifies before he can obtain that benefit.

2. The facts of the individual cases cannot affect the outcome. If the appellants are correct in their respective contentions their appeals succeed. It is therefore only necessary to note that Steven Lambert was convicted at the Crown Court at Warrington of possessing a controlled drug of class A with intent to supply contrary to s 5(3) of the Misuse of Drugs Act 1971 on 9 April 1999, Shirley Jordan was found guilty of the murder of her son at Inner London Crown Court on 30 September 1999 and Mohammed Mudassir Ali was found guilty of the murder of his wife at Manchester Crown Court on 13 August 1999.

3. In the cases of Jordan and Ali the jury rejected the contention of the defence that they should be found not guilty of murder but guilty of manslaughter by reason of diminished responsibility under s 2(2) of the Homicide Act 1957. Section 2 of the 1957 Act provides:

> '(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.
>
> (4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.'

4. Since 1957 under s 2 it has been established that the defendant is required to prove that he is suffering from diminished responsibility in accordance with s 2(1) and that the standard of proof is the balance of probabilities. The issue has to be determined by the jury, which may disagree with the medical evidence, but the aetiology of the abnormality is a matter to be determined by the expert evidence (*R v Byrne* [1960] 3 All ER 1, [1960] 2 QB 396).

5. The statutory provisions relevant to an offence of being in possession of a controlled drug are ss 5 and 28 of the 1971 Act. Those provisions are in the following terms :

'5(1) Subject to any regulations under section 7 of this Act for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession.

(2) Subject to section 28 of this Act and to subsection (4) below, it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) above.

(3) Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 4(1) of this Act.

(4) In any proceedings for an offence under subsection (2) above in which it is proved that the accused had a controlled drug in his possession, it shall be a defence for him to prove—(a) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of preventing another from committing or continuing to commit an offence in connection with that drug and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to destroy the drug or to deliver it into the custody of a person lawfully entitled to take custody of it; or (b) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of delivering it into the custody of a person lawfully entitled to take custody of it and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to deliver it into the custody of such a person.

(5) ...

(6) Nothing in subsection (4) ... above shall prejudice any defence which it is open to a person charged with an offence under this section to raise apart from that subsection ... '

'28(1) This section applies to offences under any of the following provisions of this Act, that is to say section 4(2) and (3), section 5(2) and (3), section 6(2) and section 9.

(2) Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

(3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused—(a) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but (b) shall be acquitted thereof—(i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or (ii) if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies.

(4) Nothing in this section shall prejudice any defence which it is open to a person charged with an offence to which this section applies to raise apart from this section.'

6. The language of s 5 makes it clear that it creates two offences. One involves merely possession and the other, of which Mr Lambert was found guilty, involves the additional element of intent to supply. Both offences are subject to s 28 but only the offence under sub-s (2), which does not involve an intent to supply, has the additional 'defence' under s 5(4).

7. Unless the 1998 Act has altered the position it is clear that not only is the obligation on a defendant relying on s 5(4) or s 28 to prove the facts stated, but the standard of proof to which the facts are required to be proved is on a balance of probabilities. It is insufficient for a defendant to merely raise a doubt.

The attitude of the common law to the burden of proof being placed on a defendant

8. The common law is fiercely resistant to a burden of proof being placed on a defendant. This is the 'golden thread' of English law identified by Viscount Sankey LC in his classic statement in *Woolmington v DPP* [1935] AC 462 at 481, [1935] All ER Rep 1 at 8. There is, however, what has been regarded as a well-established exception in the case of insanity. It is an exception because of what is another equally glittering thread of English law. This is that the proof of the commission of any offence requires the existence of a guilty mind and the ability to prove this depends on courts being able to rely on the presumption of mental capacity in the absence of evidence to the contrary (see Viscount Kilmuir LC in *Bratty v A-G for Northern Ireland* [1961] 3 All ER 523 at 531, [1963] AC 386 at 407).

9. Parliament has created many exceptions to the general rules. When it does so it must use clear language if it is to successfully achieve its purpose. The sections involved in the present appeals are examples of it successfully achieving this objective. A statute can require a defendant to do no more than satisfy an evidential burden. (When this is so, the issue will be required to be left for the jury to determine. Then it will be determined in the defendant's favour unless the prosecution satisfy the jury to the contrary.) The other approach which a statute can adopt is that the defendant has to satisfy a persuasive burden. (That is to satisfy the jury on the balance of possibilities that he is entitled to succeed on the issue.) A variation of the first alternative, not only requiring the defendant to raise an issue but to raise a doubt, has not been adopted in legislation, as far as we are aware, although this could produce practical benefits.

The effect of the 1998 Act

10. The 1998 Act can have a significant effect on statutory provisions which purport to depart from the general rule that the onus should be on the prosecution. This is because of art 6 which the 1998 Act makes part of domestic law. Article 6(1) provides: 'In the determination of any criminal charge against him, everyone is entitled to a fair and public hearing ...' and art 6(2) provides: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'

11. Whether a statutory provision became law before or after the 1998 Act it must be 'read and given effect in a way which is compatible with Convention rights' (including art 6) and if this is not possible the court can make a declaration of incompatibility (ss 3 and 4).

12. The obligation under s 3 is relied on by the appellants. They contend that art 6 and s 3 now require the courts to depart from the interpretation adopted hitherto of s 2 of the 1957 Act and ss 5 and 28 of the 1971 Act. The sections instead of being interpreted as placing a persuasive burden on the appellants (to establish their case on the balance of probabilities) should be interpreted as placing an evidential burden only on the defendant so that the general burden remains on the prosecution. If that contention is correct, the appellants' appeals will have to be allowed.

13. There is, however, a prior question to be answered before it is necessary to consider s 3. That is whether s 2 of the 1957 Act and ss 5 and 28 of the 1971 Act as applied hitherto under English law are in conflict with art 6? In answering this question it is necessary to take into account the jurisprudence of the European Court of Human Rights as required by s 2 of the 1998 Act. In doing so it is necessary to have in mind the nature of the convention as an instrument for the protection of fundamental rights. This justifies the adoption of the approach vividly described by Lord Wilberforce in relation to the provisions of a written constitution in *Minister of Home Affairs v Fisher* [1979] 3 All ER 21 at 26, [1980] AC 319 at 329. It involves giving a broad and purposive approach, not a rigid approach, to the language of the convention, an approach which will make the convention a valuable protection of the fundamental rights of individual members of the public as well as society as a whole.

14. Mr Owen QC, on behalf of Mr Lambert, submits that there cannot be different standards of fairness. This we are prepared to accept as long as it is also appreciated that what fairness requires can differ depending on the circumstances of the case. Thus, taking an obvious situation, where the defendants are children. Here what would be fair in the case of adults may not be fair in the case of children. Again, take the requirement of a public hearing. As in the case of the common law, art 6 does not require a public hearing if a public hearing would defeat the interests of justice. The convention is not intended to be an instrument of injustice. Mr Owen also submits correctly that the convention is to be distinguished from the Canadian Charter and the South African Constitution in that it does not contain any general savings or limitations clause. However, in practice the distinctions will probably not be significant because, as the European Court of Human Rights jurisprudence makes clear, the court does not have to ignore the wider interests of the public in applying those provisions of the convention which have no express limitation (see *Murray v UK* (1994) 19 EHRR 193). The position is well illustrated by the judgment of the European Court of Human Rights in the case of *Salabiaku v France* (1988) 13 EHRR 379 at 388 (para 28), when the court said:

> 'Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider [para 64 of the report], paragraph 2 of Article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words "according to law" were construed exclusively with reference of domestic law. Such a situation

could not be reconciled with the object and purpose of Article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law [see, inter alia, *Sunday Times v UK* (1979) 2 EHRR 245 (para 55)]. Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.'

15. *Saliabaku*'s case was considered by Lord Hope of Craighead in *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 847, [1999] 3 WLR 972 at 997 where he pointed out that account may be legitimately taken, in striking the right balance, of the problem the legislation was designed to address. He added that:

'As a matter of general principle therefore a fair balance must be struck between the demands of the general interest of the community and the protection of the fundamental rights of the individual ...'

16. We agree. In doing this it is important to start with the structure of the offences. If the defendant is being required to prove an essential element of the offence this will be more difficult to justify. If, however, what the defendant is required to do is establish a special defence or exception this will be less objectionable. The extent of the inroad on the general principle is also important. Here it is important to have in mind that art 6(2) is specifically directed to the application of the presumption of innocence of the 'criminal offences' charged. It is also important to have in mind that legislation is passed by a democratically elected Parliament and therefore the courts under the convention are entitled to and should, as a matter of constitutional principle, pay a degree of deference to the view of Parliament as to what is in the interest of the public generally when upholding the rights of the individual under the convention. The courts are required to balance the competing interests involved.

Ali and Jordan

17. We turn to consider these cases first because we have found the answer self-evident. Mr Macdonald QC on behalf of the appellants bravely contended that in some way the alternative provided for by s 2 of the 1997 Act becomes an ingredient of the offence at common law of murder. Neither as a matter of form or substance is this correct. If the defendant does not seek to rely on the section he will not be required to prove anything. The count in the indictment does not refer to s 2.

18. There could be situations where there is an uncooperative defendant. Then it would be very difficult for the prosecution to satisfy a jury of the negative. A defendant is not required to submit to an examination by a doctor and it would not be desirable to change the law to require him to submit to an examination.

19. The change in the law brought about by s 2 was of benefit to defendants who were in a position to take advantage of it. It does not matter whether it is treated as creating a defence to a charge of murder or an exception or as dealing with the capacity to commit the offence of murder. Section 2 still does not contravene art 6. We find ample support for our view in the judgments of the Supreme Court of Canada in *R v Chaulk* [1989] 1 SCR 369 and in the decisions of the European Commission of Human Rights which decide that arguments of this nature are manifestly ill-founded (*H v United Kingdom* App No 15023/89 (4 April

1990, unreported) and *Robinson v United Kingdom* App No 20858/92 (5 May 1993, unreported). Mr Worsley QC on behalf of the Crown provided the court with most valuable detailed written submissions, but because of our clear conclusion as to the outcome, it is not necessary to do more than acknowledge our appreciation.

Lambert

20. The position is not as clear in the case of ss 5 and 28 of the 1971 Act. Mr Owen obtains support from the approach of Lord Bingham CJ and Laws LJ in the *Kebeline* case. However, the court was then dealing with a different statutory provision, namely s 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989, and it is critical to give consideration to the precise terms of the sections in issue. In addition, in the House of Lords, Lord Slynn of Hadley and Lord Steyn did not express any view on this aspect of the appeal. Lord Cooke of Thorndon thought it was doubtful that the section would be left unscathed, while Lord Hope and Lord Hobhouse of Woodborough were more optimistic as to the prospects. They considered the decision should be made after a trial. So even with regard to s 16A, the language of which is more difficult to justify than that of ss 5 and 28, the position is not clear.

21. So far as domestic law is concerned, it has already been authoritatively decided what the ingredients of the s 5(3) offence are in *R v McNamara* (1988) 87 Cr App R 246. The prosecution have to prove that the defendant was in fact in possession of the named controlled drug and that he had the intention to supply what was in fact a controlled drug. In order to have possession, it is necessary to have knowledge of the presence of the object of which it is said you are in possession. Accordingly, if the drugs are contained in a 'box', as was the case here, it has to be proved the defendant was aware that the box was not empty but contained contents. Otherwise, the defendant would not have possession of the contents as well as the 'box'. What it is not necessary to prove is that the defendant knew the nature of those contents, here controlled drugs. However, it is important that the prosecution are required to prove an identifiable actus reus and mens rea of the offence.

22. It would make the offence more grave if the defendant had to know either that he was in possession of controlled drugs or the precise controlled drug which was the subject of the offence. However, the language of ss 5(3) and 28 makes it clear that this is not required (without applying s 3 of the 1998 Act).

23. When applying the convention attention is to be paid to the substance as well as the form of the statutory language creating the offence (*A-G of Hong Kong v Lee Kwong-Kut* [1993] 3 All ER 939 at 952–953, [1993] AC 951 at 972–973). Prior to the 1971 Act the increasing international concern over the supply of drugs had been reflected in treaties to which this country was a party. When the statutory history of the sections is taken into account (as to which see the speeches in *Warner v Metropolitan Police Comr* [1968] 2 All ER 356, [1969] 2 AC 256) it is clear that Parliament had deliberately chosen to produce the result set out already. We regard the substance of the offence as being reflected in the language of the sections. Sections 5(4) and 28 do not impose additional ingredients which have to be proved to complete the offence but a way of avoiding liability for what would otherwise be an offence.

24. We can well understand why Parliament wanted to restrict the extent of the knowledge required for the commission of the offence and then established a special defence, on which a defendant could rely if he could establish that he had no suspicion as to the nature of the contents of the box. It is commonplace for a

defendant to seek to avoid his guilt by saying that he thought he had pornography or gold and not drugs in the box. Such a defence is difficult to rebut. What the offence does is to make the defendant responsible for ensuring that he does not take into his possession containers which in fact contain drugs.

25. The offence applies to the possession of all controlled drugs. It applies to cannabis as well as cocaine and heroin. The sentence, however, will vary on conviction, depending on the seriousness of the offence. But there is a clear social objective in discouraging trading both in hard drugs and the softer drugs. In addition the level of sentence will reflect the extent to which the defendant was responsible for the drugs being in his possession. He may not be able to prove the statutory defence because he had reason to suspect the contents were controlled drugs, but if he was duped into being in possession this is something which the court can take into account in determining the sentence.

26. As is stated baldly in Lester and Oliver *Constitutional Law and Human Rights* (1997) p 153, para 142: 'The burden of proof must fall upon the prosecutor, but it may be transferred to the accused when he is seeking to establish a defence.' The criticism, which is made here, is based not so much on the fact that the burden of proof has been transferred, but on the standard of proof which is required. That standard of proof is the normal standard of proof, namely on the balance of probabilities, in this situation under English law in the case of statutory defences. It has been imposed by the legislature deliberately for policy reasons it considered justified. Since 1971 that justification has increased. The method selected had been roundly criticised by Professor Glanville Williams (see for example *Proof of Guilt* (3rd edn, 1963)) but we do not consider that the chosen course of the legislator contravenes art 6. There is an objective justification in the case of drugs for the choice and it is not disproportionate. It is important in considering the validity of the offences that the defendant will only be punished for the offence he has been proved to have committed if he fails in his attempt to rely on the statutory defences. We do not consider the offences contravene art 6.

Retrospectivity

27. We heard these cases at the end of the week preceding the end of term and we give this judgment on the last day of the term prior to the 1998 Act coming into force. In doing so, we have assumed that the 1998 Act is in force. We are entitled to do so because if it had been necessary we could have deferred entering our judgment until after the 1998 Act came into force.

28. The judges summed up to the jury in these cases on the law as it was at that time. It has, however, been accepted by all parties that because of s 22(4) together with ss 7 and 8 of the 1998 Act we have to approach the safety of any conviction as if the 1998 Act had been in force when the judge summed up. This, of course was not the situation and we have reservations as to whether Parliament could have intended such a result. It does, however receive indirect support from Lord Steyn in *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 832, [1999] 3 WLR 972 at 981 and we accept it is correct so far as art 6 is concerned. It should not, however, be assumed that non-compliance with the convention before the 1998 Act came into force will be regarded as a ground for extending time for appealing.

29. These appeals are dismissed.

Appeals dismissed.

Lynne Townley Barrister.

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